

# **UNIVERSITY OF PRETORIA**

## **MASTER OF LAWS (LLM) IN INTERNATIONAL TRADE AND INVESTMENT LAW IN AFRICA**

### **PUBLIC PRIVATE PARTNERSHIP POLICY IN NIGERIA'S INFRASTRUCTURE DEVELOPMENT LANDSCAPE: A CRITICAL APPRAISAL OF THE INFRASTRUCTURE CONCESSION REGULATORY COMMISSION ACT**

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## DECLARATION

I Mutiat Abdulsalam, declare that this Mini-Dissertation is my original work. It is submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria. I further declare that this research work has not been previously for the award of a degree at this or any other institution of learning.

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Date

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## LIST OF ACRONYMS

PPP.....	Public Private Partnerships
ICRCA.....	Infrastructure Concession Regulatory Commission Act
ICRC.....	Infrastructure Concession Regulatory Commission
ADB.....	Asian Development Bank
PSP.....	Private Sector Participation
PFMA.....	Public Finance Management Act
FDI.....	Foreign Direct Investment
ENDC.....	Eastern Nigerian Development Corporation
NNOP.....	Nigerian National Oil Corporation
NNPC.....	Nigerian National Petroleum Corporation
USA.....	United States of America
GDP.....	Gross Domestic Product
BRICS.....	Brazil Russia India China South-Africa
ICAO.....	International Civil Aviation Organization
NCAA.....	National Civil Aviation Authority
NAMA.....	National Airspace Management Agency
NRC.....	Nigerian Railway Corporation
ECN.....	Electric Company of Nigeria
NDA.....	Niger Dam Authority

NEPA.....	National Electric Power Authority
EPSRB.....	Electric Power Sector Reform Bill
PHCN.....	Power Holding Company of Nigeria
NERC.....	National Electricity Regulatory Commission
PSI.....	Private Sector Involvement
PFI.....	Private Finance Initiative
SPV.....	Special Purpose Vehicle
O&M.....	Operation and Maintenance
OMM.....	Operation Maintenance and Management
ROT.....	Refurbish-Own-Transfer
D-B.....	Design-Build
DBO.....	Design-Build-Own
DBFO.....	Develop-Build-Finance-Operate
BTO.....	Build-Transfer-Operate
BOT.....	Build-Operate-Transfer
BOO.....	Build-Own-Operate
BROT.....	Build-Rent-Operate-Transfer
MDAs.....	Ministries Departments and Agencies
FEC.....	Federal Executive Council
ADR.....	Alternative Dispute Resolution
MFMA.....	Municipal Finance Management Act

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## **Abstract**

Nigeria's infrastructure assets are old and dilapidated and in response to this infrastructure deficit, all tiers of government in Nigeria are making urgent and deliberate efforts to renovate, maintain and properly manage existing infrastructure assets as well as fund the construction of new infrastructure projects. However, factors like contraction in fiscal space and the resultant budget deficit; lack of required specialized skills on the part of the public sector; huge capital demands for funding projects, the need to share project risk and obtain the best value for tax payers' money in the light of this appalling level of infrastructure deficit necessitated the paradigm shift from traditional method of financing infrastructure projects which involves sole-reliance on government funds and resources to engaging private sector resources and skills in bridging the infrastructure gaps in the country. In this wise, like many of the developed and developing countries across the globe, all the tiers of government in Nigeria have embraced Public Private Partnerships (PPP) in procurement, management, and financing public infrastructure assets in the country.

In pursuit of this policy shift, the Nigerian government enacted the Infrastructure Concession Regulatory Commission Act (ICRCA) in 2005 and the regulatory body, ICRC was established in 2008. Regrettably, despite the enactment of the ICRCA and establishment of the regulatory body, ICRC, most PPP projects in Nigeria have not been successful. Studies have however suggested that the poor legal and regulatory framework is one of the major factors inhibiting successful use of PPP for facilitating sustainable infrastructure development in Nigeria. This study forcefully argues that the ICRCA was poorly drafted and hence it lacks the appropriate provisions needed to deal with militating problems like corruption, lack of transparency, absence of proper procurement process and poor risk allocation which cumulatively erode the country of the benefits of PPP. So, the research agenda is to critically appraise the ICRCA, pointing-out the various gaps responsible for the poor performance of PPP in the country and making suggestions on how the Act can be amended in order to make a success of PPP as a tool for facilitating sustainable infrastructure development in the country.

## CHAPTER ONE

### General introduction

#### 1.1 Introduction

Nigeria upon gaining independence from Britain in 1960 inherited most of the infrastructure assets as part of the colonial heritage. Added to this inherited infrastructure is the culture of vesting management and control of public utilities entirely within the purview of the public sector administrators. Infrastructure assets in major cities like Lagos, Ibadan, Kano, Kaduna, Port-Harcourt and Calabar which were constructed by colonial administration and left in a functional state were managed by the public sector for several years after colonization.<sup>1</sup> Unfortunately, following independence, the country witnessed a turbulent political history involving twenty five years of military rule and civil war, with an interlude of democratic governance marred by ubiquitous bribery and corruption which spread to the public sector before the eventual return to democratic rule in 1999.<sup>2</sup> For a long time, government continually earned income from export of crude oil, the existing infrastructure assets were not maintained, modernized or expanded and new ones were not procured.

Today, most infrastructure assets in Nigeria are old and dilapidated. The major means of transportation, road and air transportation have become death traps because of high rate of fatal accidents. Electricity supply in the country is erratic; sewage disposal, access to portable water and housing are generally poor especially in congested urban centers, while telecommunications seem to be the only relatively functional sector in the country.<sup>3</sup>

Several factors are responsible for the current high level of infrastructural decadence in Nigeria and these include: corruption, lack of transparency and accountability across every cadre of the public sector, undue political interference in public administration, absence of maintenance culture, poor tariffs and over-subsidization. One of the implications of this is that human capital

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<sup>1</sup>O Oyedele 'Public Private Partnership(PPP) and Infrastructure Provision in Nigeria' (2012) online Conference paper. (accessed at [http:// www.researchgate.net/profile/Olufemi\\_oyedele/Publications](http://www.researchgate.net/profile/Olufemi_oyedele/Publications))

<sup>2</sup> <http://en.m.wikipedia.org/wiki/Nigeria>. (accessed 10 February 2014).

<sup>3</sup>A Akinwale 'The Menace of Inadequate Infrastructure In Nigeria' (2010) 2 *African Journal of Science, Technology, Innovation and Development* 207-288.

development in the country has been greatly hampered. Besides, the country's poor infrastructure has been identified as a major factor responsible for the slow rate of economic development.

In response to this infrastructure deficit, all tiers of government in Nigeria are making urgent and deliberate efforts to renovate, maintain and properly manage existing infrastructure assets as well as fund the construction of new infrastructure projects.<sup>4</sup> The need for Nigeria to invest hugely in infrastructure assets is underscored by the by the former Governor of Central Bank of Nigeria, Sanusi Lamido Sanusi, when he stated that: 'to check the deteriorating state of infrastructure in the country, Nigeria requires a yearly investment of \$10 billion over the next ten years'.<sup>5</sup>

Factors like contraction in fiscal space and the resultant budget deficit; lack of required specialized skills on the part of the public sector; huge capital demands for funding projects, the need to share project risk and obtain the best value for tax payers' money coupled with the appalling level of infrastructure deficit necessitated the paradigm shift from traditional method of financing infrastructure projects which involves sole-reliance on government funds and resources to engaging private sector resources and skills in bridging the infrastructure gaps in the country.<sup>6</sup>

In this wise, a model that has been embraced by both developed and developing nations all over the world in procurement, management and financing public infrastructure assets is Public Private Partnerships (PPP).

PPP basically refers to any form of arrangement or group of arrangements between public and private sectors for the purpose of making available facilities which were hitherto solely provided by the government. It enables government to fund huge concession contracts while simultaneously mitigating financial risks and employing private sector's expertise. For instance, the world's largest sports hub at an estimated cost of \$978 million is currently being constructed in Singapore under a PPP arrangement to be completed by 2014.<sup>7</sup>

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<sup>4</sup>[http://en.m.wikipedia.org/wiki/infrastructure-based\\_development](http://en.m.wikipedia.org/wiki/infrastructure-based_development), (accessed 15 November 2013).

<sup>5</sup> 'ICRC Act frustrates PPP project pipelines' *Businessday* 17 December 2012.

<sup>6</sup> 'Public Private Partnerships- the answer to Nigeria's infrastructure problems?' *Insight into Business in Africa* 12 December 2010.

<sup>7</sup> (*Insight into Business in Africa*, n 10 above).

## 1.2 Problem statement

In a bid to encourage the use of PPPs in solving the menace of the huge infrastructure deficit in the country, Infrastructure Concession Regulatory Commission Act<sup>8</sup>(ICRCA) was enacted in 2005 and the regulatory body, ICRC was established in 2008. The Act as an enabling statute authorizes government ministries, agencies and departments to partner with the private sector for the purpose of funding, constructing, maintaining or managing an infrastructural facility. Regrettably, despite the enactment of the ICRCA and establishment of the regulatory body, ICRC, most PPP projects in Nigeria have not been successful.<sup>9</sup> Studies have however suggested that the poor legal and regulatory framework is one of the major factors inhibiting successful use of PPP for facilitating sustainable infrastructure development in Nigeria. In order to make the most of PPP as a potential tool for facilitating infrastructure development, existence of a proper legal and regulatory framework is indispensable<sup>10</sup>. Unfortunately, the ICRCA is poorly drafted hence, it lacks the appropriate provisions needed to deal with militating problems like corruption, lack of transparency, absence of proper procurement process, and poor risk allocation which cumulatively erode the country of the benefits of PPP.

Flowing from the above, this study seeks to critically appraise the ICRCA, pointing-out the various gaps responsible for the poor performance of PPP in the country and making suggestions on how the Act can be amended in order to make a success of PPP as a tool for facilitating sustainable infrastructure development in the country.

## 1.3 Research questions

The overarching question which this study will seek to answer is: how can the ICRCA be amended to fulfill government's intended objective of providing sustainable infrastructure development in Nigeria? In order to properly address this question attempts will be made to answer the following sub-questions which flow directly from the main question:

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<sup>8</sup> Infrastructure Concession Regulatory Commission Act of 2005.

<sup>9</sup> (*Businessday* n 9 above).

<sup>10</sup> O Sotola & T Ayodele Initiative for Public Policy Analysis policy paper 'Absence of Appropriate Regulatory Framework may Undermine Public Private Partnership' 2011.

- i. What is the present state of infrastructure asset development in Nigeria?
- ii. What is PPP as a financing technique for large scale infrastructure development and to what extent has it been implemented in Nigeria?
- iii. What are the various gaps in the ICRCAs that have rendered it substantially ineffective in driving functional PPPs in Nigeria and what are the implementation challenges confronting the regulatory bodies as a result of the perceived loop holes in the Act?
- iv. How can the Act be amended to transform it into an effective instrument for attracting a functional and well regulated PPP environment in Nigeria?

#### **1.4 Thesis statement**

This study argues that there are various gaps in the ICRCAs that have rendered it substantially ineffective in driving functional PPPs in Nigeria and the failure of PPP as a technique in facilitating sustainable infrastructure development is as a result of these gaps in the Act.

#### **1.5 Justification**

The aim of this study is to call the attention of the Nigerian policy-makers to the urgent need to review and amend the ICRCAs as well as enact PPP subsidiary legislation. This will eliminate the obvious gaps in the Act and provide the detailed guide needed to drive successful PPP arrangements. Expectedly, if the recommended changes are made it will provide the requisite transparency needed to boost investors' confidence and attract foreign direct investment. This will also produce the residual effect of aiding technological transfer, increased productivity, job creation, poverty alleviation, improved living standards and attainment of sustainable development.

#### **1.6 Literature review**

As a result of the wide-spread acceptance of PPP globally as technique for facilitating development of infrastructure assets, there are generally numerous literature on the subject matter especially in the area of PPP critical success factors. Although several authors have also written on the practice of PPP in Nigeria, most of the literature criticize the poor performance of PPP in the country, pointing out factors responsible for the prevalent failure without paying much attention to the importance of a proper legal and regulatory framework to solving the existing problem. Finding a literature that contains a comparative analysis of the ICRC based on the performance of PPP in other climes seems impossible. However, several write-ups do exist which are useful for this study and some of them are reviewed below.

**Felsinger**<sup>11</sup> in a book written for the Asian Development Bank (ADB), opines that PPP is an important tool for ensuring accessibility of public services in developing countries because it facilitate provision of basic amenities and reform of various sectors. For the purpose of clarity, the author points out the differences between PPP and Private Sector Participation(PSP): whereas the former prioritizes accessibility of efficient basic amenities, the latter upholds the private investor's profit motive. As a general point of divergence, success of a PPP arrangement is seen in the book as dependent upon three major features namely: the basic elements, sector specific elements and contractual elements. Whereas, basic elements are favorable policy environment, proper legal and regulatory framework, detailed due diligence, well conducted feasibility study, and adequate consultation of all stakeholders; sector specific elements are proper technical consultations, and well-conducted due diligence. While project implementation, market survey, tariff design, tariff adjustment structure, nature and type of government support, performance assessment and pro-poor consideration are all contract specific.

Although in line with the view in this study, proper legal and regulatory framework is seen as crucial to PPP success, since it enhance contract enforceability and secure investors' confidence. However, a further divergent view is held to the effect that success of PPPs also depend largely on the nature of contract.

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<sup>11</sup> K Felsinger *Asian Development Bank (ADB) Public-Private Partnership Handbook* . e-copy(2008).

**Oyedele**<sup>12</sup> in his paper, centers his discourse around the importance of tackling the various challenges confronting transitional economies in financing infrastructure projects in order to facilitate socio-economic development. In convergence with the view of this research, the author identifies high demand for basic amenities and limited resources as major challenges which necessitate the search for alternative means of project financing including PPP. Similarly, the poor performance of PPP in Nigeria is also seen as being traceable to numerous problems to which corruption is central. Corruption which is endemic in the system, leads to poor project regulation and this in turn affects project timing, financing and quality.

However, in divergence, he states that PPP may not be the most appropriate technique for financing infrastructure assets considering the various challenges, especially the win-lose element depending on the parties negotiating strength. Partnering is suggested as a more suitable alternative to PPP considering the extreme flexibility involved which creates the possibility of a win-win agreement involving equal sharing of profit, loss and risk among parties.

**Babatunde et al**<sup>13</sup> in an article express the view that PPP can be successfully used as a financing technique for all forms of projects regardless of the sector involved. The article identifies factors that are crucial to successful PPP arrangements and makes a distinction based on the priority of the public and private sector in a PPP as well as factors that are jointly important to both parties. Usually, both parties regard competitive procurement process, favorable framework, proper risk sharing formulae and suitable economic and financial conditions as crucial. While the private sector sees as important factors like existence of a well-organised government institution to coordinate the project and well conducted feasibility study, on the other hand, the public sector prioritise transparency, realistic project assessment, existence of strong consortium and shared authority over project.

Although there are no clear points of convergence besides the importance of PPP in facilitating infrastructure development, in divergence, the article fails to address the performance of PPP in Nigeria which would have necessitate identifying the factors responsible for the inability to successfully use the infrastructure financing technique for achieving the desired level of development.

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<sup>12</sup> (Oyedele n 4 above) 1-14.

<sup>13</sup> S Babatunde et al 'Critical Success Factors in Public Private Partnership on Infrastructure Delivery in Nigeria' (2012) 10 *Emerald Journal of Facilities Management* 212-225.



**Soltola** and **Ayodele**,<sup>14</sup> in a jointly written paper examine PPP in Nigeria as a technique for financing large scale infrastructure projects. They pay attention to the performance of PPP in the country, effect of the regulatory framework on the outcome of PPP, the problems preventing PPP contracts from being successful and how the problems can be resolved. The paper concur with the view expressed in this study that there are gaps in the Nigerian PPP regulation which are responsible for other existing problems including lack of transparency, unequal partnership and lack of project continuity.

In divergence, the paper examines PPP in Nigeria generally and expresses the view that apart from the federal government and a few proactive states like Lagos where PPP laws have been enacted, most states of the Federation lack proper PPP regulation yet, they sign PPP contracts without a legal basis for enforcing and such contracts. In further divergence, the authors identify corruption as a major factor responsible for poor performance of PPP in Nigeria, and suggest that proper competition policies and adequate public awareness on the importance of private involvement in public infrastructure financing will be useful in solving the existing problems.

### **1.7 Research methodology**

This study will be desktop and library based. This will involve consultation of both primary and secondary sources of law as this will be very crucial to answering the research questions. The primary sources include statutes such as the ICRC, Constitution of The Federal Republic of Nigeria 1999 as amended<sup>15</sup> and other relevant laws applicable to PPP in Nigeria. It will also involve an examination of South Africa's Public Finance Management Act<sup>16</sup>(PFMA) and the various applicable modules of the National Treasury PPP manuals<sup>17</sup>. The secondary sources on the other hand will involve reading, analyzing and utilizing text books, journals, articles, newspapers and other relevant secondary sources of law.

However, as regards techniques, descriptive, narrative and critical techniques will be used in this study. The history of Nigeria's infrastructural development, use of PPP in the country and several instances of failed PPP projects will be illustrated by means of narrative and descriptive

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<sup>14</sup> (Sotola & Ayodele n 14 above).

<sup>15</sup> Constitution of The Federal Republic of Nigeria 1999 (as amended).

<sup>16</sup> Public Finance Management Act 1 of 1999 sec 76(4) (g) (as amended).

<sup>17</sup> National Treasury PPP Manual 2004 (modules 3,4,5,).

techniques, while the critical technique will be employed in examining the content of the ICRCA in order to ascertain the reasons why most PPP projects in Nigeria has been hugely unsuccessful.

### **1.8 Limitations of study**

The scope of this study will be limited in the following ways.

First, Nigeria being a federal state vests the responsibility to provide infrastructure assets in the three tiers of government; with each tier having the duty to provide certain public services such as portable water, good road and housing which are contained in the concurrent legislative list. However, this study is majorly concerned with federal infrastructure assets and public services which are solely the duty of the federal government.

Secondly, there are different kinds of infrastructure assets including: hard, soft, economic and social infrastructure. This study will simply address hard infrastructure particularly in relation to the transportation and power sectors.

Thirdly, there are several infrastructure related legislation in Nigeria, some of which are sector specific and these include Electric Power Sector Reforms Act<sup>18</sup>, Public Procurement Act<sup>19</sup> and Bureau of Public Enterprises Act<sup>20</sup>. This research will dwell solely on the ICRCA which is the infrastructure statute enacted for the purpose of regulating PPP arrangements to facilitate infrastructure development.

Lastly, a detailed examination of the ICRCA reveals that there are several loopholes in the provisions of the Act; all of which cannot be addressed in this research. Hence, attention will be focused on omissions relating to project inception, feasibility study and procurement process.

### **1.9 Overview of chapters**

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<sup>18</sup> Electric Power Sector Reform Act of 2005.

<sup>19</sup> Public Procurement Act of 14 2007.

<sup>20</sup> Bureau of Public Enterprises Act of 1999.

Chapter one introduces the research topic and delineates the scope of the research work to ensure that the argument is concise and easy to understand. The contents of the chapter include basic introduction, problem statement, thesis statement, justification, literature review, research methodology, limitations of study and overview of chapters.

Chapter two traces the history of infrastructure development in Nigeria from the post-colonial era till date. It looks into evolution of the state of the nations' infrastructure assets to explain how the present decadence came up. It also examines the reasons why traditional financing techniques may not be sufficient to bridge the existing gap.

In chapter three, the concept of PPP is examined as a modern technique for financing large scale infrastructure assets. It cast critical eyes on the pros and cons of PPP while emphasizing the use of PPP in Nigeria. General performance of PPP in the country will also be examined through case studies.

Chapter four appraises the ICRC Act to establish the inherent problems with the provisions of the Act.

In chapter five, a comparison is made of the ICRC Act, PFMA and modules 3,4,5 of the national treasury PPP manuals. This is to evince the perceived omissions in the ICRC Act which are part of the factors responsible for the prevalent failure of PPP in the country.

The last chapter presents a summary of the chapters, the conclusion and suggested recommendations.

## CHAPTER TWO

### The State of Infrastructure in Nigeria

#### 2.1 Introduction

This chapter gives a detailed description of the state of Nigeria's infrastructure by looking at the various kinds of infrastructure, with emphasis on hard infrastructure precisely in relation to the energy and transportation sectors. This is aimed at making a case for the necessity of adopting modern financing techniques as government cannot single handedly provide the finance and technical requirements needed for the country to be able to meet her infrastructure demands.

Moving around Nigeria today, the commonest sight is the overwhelming level of infrastructure decay which has stagnated national development and aggravated the rate of crime and poverty in the country<sup>21</sup>. Presently, most infrastructure facilities in the country are both dilapidated and archaic as evidenced by features like erratic electricity supply, lack of access to potable water, poor sewage disposal and drainage system, and overbearing inefficiency in the transportation sector, which is responsible for the frequency in occurrences of ghastly road accidents and plane crashes. Generally, existence of a thriving economy depends heavily on the availability of functional infrastructural assets. It is crucial to the survival of every societal unit starting from the family which is the smallest unit up to government as the central controlling unit. It aids mechanized agriculture, facilitates industrialization, commercialization and market expansion; it improves production and distribution of goods and services, leads to trade expansion, improves environmental condition, eases market access nationally and internationally and increases national income.<sup>22</sup> At the long-run, it leads to job creation, determines location and localization of industries, alleviates poverty and reduces rate of crime as well as social disturbances. It has

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<sup>21</sup> "Nigeria won't progress while corruption is 'just the way it is'" *The Guardian* 10 October 2011.

<sup>22</sup>B Srinivasu& P Srinivasa 'Infrastructural Development and Economic growth: Prospects and Perspectives' (2013) 2 *Journal of Business Management and Social Science Research* (JBM&SSR) 2319-5614.

been established that investment in infrastructure has a direct positive effect on socio-economic development, with more pronounced effect in rural areas as it directly affects the price

agricultural produce. Thus, it facilitates development through improved productivity, increased Foreign Direct Investment (FDI) earnings and increased per capita income.<sup>23</sup>

Considering the importance of infrastructure to national development, one cannot help asking the question: how did infrastructural assets in Nigeria deteriorate to the current level, especially since most of these structures were functional at independence? The current level of infrastructure decay in the country is caused majorly by the problem of bad governance which paved way for several other challenges including absence of proper regulation, poor management and maintenance culture, corruption and lack of transparency, policy inconsistency, poor taxation and over-subsidization.

Historically, infrastructure development in the country is traceable to the colonial era as public infrastructure assets were invested in to facilitate operation of the colonial economy. As far back as 1897, Lagos Race Course Management Board was established by the then colonial government to manage Lagos Island Race Course. Several other structures were put in place during this era, including the Nigerian Railway Corporation and necessary rail structures (1898), the Central Bank of Nigeria (1958), roads, ports, the Federal Civil Service and many others. After independence, it was necessary to put more structures in place in order to have a system that works. Thus, public corporations like Nigerian Television Authority, Nigerian Airways, Nigerian Defense Industries Corporation and several others were established.

Furthermore, to facilitate governance and proper management of resources, public enterprises were also established at the regional level. These include New Nigerian Development Company in the Northern region; Odua Investment Company in the Western region; and Eastern Nigeria Development Corporation (ENDC) in the eastern part of the country. Also, there were other enterprises established to aid proper management of the country's oil resources, among which are Nigerian National Oil Corporation (NNOC) which was later merged with Federal Ministry of Petroleum in 1978 to form Nigerian National Petroleum Corporation (NNPC). By 1975, Nigeria

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<sup>23</sup>S Uhunmwangho 'Analysis of Socio-Political Implication of Infrastructural Decay in Nigeria' (2012) 6(4) *African Research Review Journal* 43-43.

had up to 800 government owned commercial enterprises with branches all over the country including the steel companies in Ajaokuta, Osogbo, Katsina and Jos.<sup>24</sup>

However, as a result of management and regulatory challenges which are closely linked to the political instability in the country, between 1960 and 1999, most of these enterprises have ceased to exist. Immediately after independence, the country witnessed military intervention in politics which lasted for twenty five years with an interlude of civil war and interim democratic government. As the mantle of leadership changed hands, attention was gradually shifted from investment in infrastructure development to struggle for political power and embezzlement of public funds for personal uses. Furthermore, the situation was worsened by the global oil-glut of the 80s which contracted the fiscal space as well as population growth and rural-urban migration which continuously increased demand for infrastructure assets. Government frequently changed development policies without maintaining existing infrastructure assets or putting new structures in place. Also, since other productive sectors of the economy such as agriculture and mining were gradually abandoned upon discovery of crude oil, recovering from the glut became difficult as income from the abandoned sectors reduced drastically. Although government introduced Structural Adjustment Programme in 1986 which was followed by privatization and commercialization of public entities in order to recover from the existing infrastructure and development challenges, however, the situation was worsened as the quality of public services dropped drastically and other problems such as poor maintenance, corruption and lack of technical skills became prevalent. Most of the other policies introduced thereafter with the hope of improving the nation's infrastructure facilities failed at the implementation stage.<sup>25</sup>

The inability of Nigerian government to adequately tackle the problem of infrastructural deficit by rehabilitating existing facilities and adopting international best practices such as the clean energy initiative to put modern infrastructure in place has placed her national development behind that of countries like China, India, Brazil, South Africa, United States, United Kingdom, where constant efforts are being made to improve on infrastructure facilities. It has also made it

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<sup>24</sup> J Jakutyte 'Analysing Public-Private Partnership' unpublished Master's Thesis, Aarhus University, 2012.

<sup>25</sup> (Wikipedia n 6 above).

difficult to strike a balance between infrastructure development and population growth, hence the current high rate of poverty and unemployment.<sup>26</sup>

Moving to the substantive issue, the starting point is to ask the question: what is an infrastructure?

## **2.2 What is an infrastructure?**

The term 'infrastructure' has no universally acceptable definition. However, it is explained as facilities and assets required to provide social services including the services being provided. Furthermore, for the purpose of this study, the term '**infrastructure**' simply denotes a set of essential and integrated structures which must be in existence in order to make a community/country habitable for the populace. They are services and installations which are necessary for improving the general standard of living of the people and to aid the social-economic development of a nation.<sup>27</sup> The term '**infrastructural facilities**' is traceable to the United States of America (USA) where it was first used in 1927 for collective description of roads, rail lines, bridges, and other public works which must be in place to aid industrialization in any economy. It is also used precisely for describing permanent military installations used for defending a country. When put in place, such facilities aid provision of public services such as water, electricity, health care, etc<sup>28</sup>

Provision of public utilities is primarily the responsibility of government. These public utilities must be accessible to the populace at an affordable rate regardless of societal class. Such services are usually monopoly or monopolistic in nature, although private entities may be granted the authority to provide these services. Where such authority is so granted, fees chargeable for using the assets is usually regulated by government to avoid public exploitation.<sup>29</sup>

### **2.2.1 Kinds of Infrastructure**

Generally, infrastructure assets may be classified on the basis of two major yardsticks: either as regards the form in which they exist where they are classified as 'hard' and 'soft' infrastructure or

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<sup>26</sup> 'Public Private Partnership: The new way to infrastructural provision' *Vanguard* 17 December 2012.

<sup>27</sup> <http://en.wikipedia.org/wiki/infrastructure> (accessed 12 February 2014).

<sup>28</sup> <http://www.the-free-dictionary.com/infrastructure> (accessed 12 February 2014).

<sup>29</sup> <http://legal-dictionary.thefreedictionary.com/public-utilities> (accessed 12 February 2014).

in relation to the purpose they serve or what they are used for, in which instance they are categorized into 'economic' and 'social' infrastructure. Although economists have further identified three more kinds of infrastructure assets which are "institutional", 'personal/human capital' and 'material' infrastructure, it is however important to point out that these categories are interlinked.

### ***Hard infrastructure***

Hard infrastructure assets are tangible permanent facilities that can be physically perceived, seen or touched installed for the purpose of providing public services. Examples of hard infrastructure include roads, rail tracks, bridges, airports, seaports, telecommunication masts, satellites, wind mills, drainages, solid waste incinerators, water dams<sup>30</sup> etc.

### ***Soft infrastructure***

Soft infrastructure on the other hand comprises of intangible assets as well as institutions that set and maintain standards for the day to day running and management of hard infrastructures, including specialised public services. Examples of these soft infrastructure include military and paramilitary services, emergency services, law enforcement agencies, various laws and regulations, banking, insurance and other financial services, medical services etc.<sup>31</sup> Both the hard and soft infrastructural facilities are crucial for socio-economic as well as human-capital development of a nation.

### ***Economic infrastructure***

These are income earning infrastructure facilities. They support national finance by serving as a source of income for government through payments made by the public for using such facilities. Though, if not managed properly they may not yield the expected returns, but at the least, they are capable of realising the running cost. They promote economic activities by integrating different sectors of the economy. Examples of economic infrastructure include toll roads, airports and electricity<sup>32</sup>.

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<sup>30</sup> <http://www.treehugger.com/clean-technology/the-basics-of-infrastructure.html>(accessed 12 February 2014).

<sup>31</sup> <http://en.m.wikipedia.org/wiki/infrastructure>(accessed 12 February 2014).

<sup>32</sup> S Demurger '*Infrastructure: General*' (2012) University of Lyon; CNRS Gate Lyon Saint Etienne. Entry for Oxford Companion to the Economics of China.



### ***Social infrastructure***

As the name implies, social infrastructure are assets which facilitate the provision of social services. They are inclusive of both the institutions charged with the responsibility of making services available and the services being provided. These include health care system, educational system, recreational and culture facilities, energy and telecommunication facilities, as well as government ministries, agencies and departments responsible for running the various facilities.<sup>33</sup>

### ***Institutional infrastructure***

Institutional infrastructure refers to set of norms, rules and regulation including customary and unwritten laws which help to maintain sanctity in a society. They determine the framework for making and implementing various policies and create the avenue for implementing such policies and enforcing applicable laws. Thus, institutional infrastructure includes the legislature, judiciary, police and other law enforcement agencies.<sup>34</sup>

### ***Person/Human capital infrastructure***

Human capital infrastructure is the labor force inclusive of both skilled and un-skilled labor and their ability to facilitate economic integration through increased productivity. Proper development of human capital requires government to pay attention to various factors that might influence the quality and quantity of labor output including birth, death and migration rate, access to formal and informal skill acquisition and wage rate. Nature of national human capital is also influenced by the nature and availability of institutional and material infrastructure.<sup>35</sup>

### ***Material infrastructure***

Material infrastructure asset is identified as including capital assets to the general public, and various structures but not limited to physical structures. Examples are transportation, education and health facilities, sewage disposal system, and drainage system, electricity supply.<sup>36</sup>

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<sup>33</sup> <http://www.-treasury.gov.uk/pfi-strengthening-long-term-partnership.htm> (accessed 28 April 2014).

<sup>34</sup> Demurger (n 36 above).

<sup>35</sup> <http://www.uni-siegen.de/infrastructure-research/infrastructure//index.html.en?lang=en> (accessed 28 April 2014).

<sup>36</sup> (n 39 above).

## 2.2.2 Infrastructure as driver of economic development

A direct nexus has been established between a nation's economic development and the availability of basic infrastructure facilities.<sup>37</sup> It has been proven that availability of basic infrastructure facilities helps a nation to alleviate poverty and facilitate sustainable development.<sup>38</sup> Several economic theories have also been propounded in support of this proposition, prominent among which include "Theory of the Stages of Growth"<sup>39</sup> as propounded by W.W Rostow. According to the theory, availability of basic infrastructure facilities such as good roads, railways, civil aviation facilities, healthcare and stable power supply is a prerequisite for a rapid and sustainable economic development since it attracts foreign investors. Infrastructure assets also increase efficiency of production and distribution of goods and services; facilitates adequate interaction among the different economic sectors, increases per capita income, creates new jobs, reduces poverty, and improves the general living standards. Where on the other hand, non-availability of infrastructure assets increases production cost, repels investors, reduces government earnings and job availability<sup>40</sup>.

Contrary to the theory of stages of growth, R Nurkse propounded the theory of "Overhead Capital" which is to the effect that investment in infrastructure assets is usually capital intensive, may not yield returns at the short-run and there is no assurance on the level of profit that may be realised. Consequently, private firms are not encouraged to invest in such facilities in the event that government fails to make necessary provisions. However, government is not usually discouraged from embarking on such capital investments since it falls under overhead capital which can be financed through foreign borrowings and will eventually yield returns. Although the overhead capital theory proposes a seemingly convincing argument, to the effect that the mere provision of basic infrastructures without more may not generate huge economic returns, yet a more viable counter-argument exists to the effect that infrastructure facilities are public

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<sup>37</sup> P Sahoo & R Dash 'Infrastructural Development & Economic Growth in India' (2009) 14, 4 *Journal of Asian Pacific Economy*, *Rutledge* 351-365.

<sup>38</sup> B Srinivasu & P Srinivasa (n 26 above).

<sup>39</sup> WW Rostow *The Stages of Economic Growth: A Non-Communist Manifesto* (1960) 4-16.

<sup>40</sup> <http://go.worldbank.org/I3P7K0D7F0> (accessed 10 March 2014)

goods, consequently, when put in place, they produce positive externalities and economically beneficial domino effects.<sup>41</sup>

From an economist's perspective, investment in infrastructure can influence production returns and sustainable economic growth as well as facilitate recovery from depressions and economic meltdown.<sup>42</sup> This was also suggested to the government of USA during the 2008 global economic meltdown, when economists like Martins Feildsten<sup>43</sup> and Paul Krugman<sup>44</sup> argued in favor of direct fiscal stimulation as being capable of instigating demand for labor, while the labor market activities will have a multiplier effect on other markets within the economy. Although such a multiplier may have a corollary, proponents of the theory uphold that cumulative multiplier effect on huge infrastructure expenditure makes it an economically beneficial venture worth embarking on.

Finally, there are often arguments in relation to the duration of benefits derivable from investments in infrastructure facilities, whether it is short term or long term and the amount of revenue realizable from such investments. Arguments have been raised that income is only realizable at the long run and there are no assurances. However, proponents have posit that since recovery from economic recession is usually slow, viable contribution can still be made during the long incubation period.<sup>45</sup> For example, a World Bank study revealed that for every 1% increase in expenses on infrastructure which a country incurs, there will be a corresponding increase in the country's Gross Domestic Product (GDP) by 1%. Studies have also revealed that East Asian countries have witnessed more rapid economic growth compared to Latin American countries as a result of the huge investment in infrastructure. Among the BRICS countries, China is currently witnessing the fastest rate of economic growth as a result of its relentless effort at investing in infrastructure. This has facilitated its industrialization, urbanization, and increased income per capita<sup>46</sup>.

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<sup>41</sup> B Srinivasu & P Srinivisa (n 26 above) .

<sup>42</sup> *The Role of Public Works Infrastructure in Economic Recovery*: (2011) Congressional Research Service.

<sup>43</sup> 'The Stimulus Plan We Need Now: The President-Elect Won't Have to Wait Till January to Act'

*The Washington Post* 30 October 2008.

<sup>44</sup> 'Let's Get Fiscal' *The New York Times* 16 October 2008.

<sup>45</sup> *Infrastructure Development and Economic Growth in China* (2010) Institute of Developing Economics.

<sup>46</sup> 'Building BRICs of growth: Record spending on infrastructure will help to sustain rapid growth in emerging economies' *Economic Focus* 5 June 2008.

As a result of space constraint and in pursuant of the objectives of this research, sector specific assessment of hard infrastructure will be carried out in relation to transportation and power sectors in particular.

### **2.3 Performance of infrastructure in Nigeria's transportation and power sector**

Transportation and power sectors are crucial to socio-economic development of every nation. Access to efficient and effective modes of transportation is critical to facilitation of the requisite interaction among other sectors and ease trade and investment nationally and internationally. Similarly, the power sector practically drives the economy, access to stable and affordable power supply is essential to the survival of every economic sector. Like most other sectors in the country, the poor state of transportation and power infrastructure assets has continued to affect economic performance adversely.<sup>47</sup>

#### **2.3.1 Transportation sector**

The importance of an effective and efficient transportation system to a nation's economy cannot be over emphasized. In fact, availability of adequate transport facilities is a major yardstick for determining a country's level of development. There are four major modes of transportation in Nigeria namely: road, rail, air, and water. The existing challenges have reduced the amount of GDP realisable from this sector.

##### ***Air transportation***

The Nigerian aviation industry which commenced operation in 1903 witnessed major government investment from oil income in the 70s and as a result, the industry began to experience steady growth which became commendable in the 70s. Although the frequent plane crashes experienced especially from 2005 reduced passengers' confidence in the industry and took a down turn on income realisable, there is gradual recovery with the present increase in passenger and cargo traffic as regards both local and international flights.

The industry is well regulated under the control of four national regulatory bodies and the International Civil Aviation Organisation (ICAO). The Federal Airports Authority of Nigeria

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<sup>47</sup> C Ayedun et al 'Towards ensuring sustainable urban growth and development in Nigeria: Challenges and strategies' (2011) 1/2 *Business Management and Dynamics* 99-104.

(FAAN) is a statutory body established to take control of operation and maintenance of commercial airports; the National Civil Aviation Authority (NCAA) regulates market access and conduct of air transport operators and also advises the Ministry of Aviation, while National Airspace Management Agency (NAMA) is a body established in 1999 to ensure compliance with ICAO standards and other relevant international aviation standards.<sup>48</sup> Although with this level of regulation, it is expected that the industry will be highly functional and capable of rendering standard services. Unfortunately, this is not the situation on ground. In fact, the Nigerian aviation industry has the highest track record of air mishaps globally resulting in loss of several lives traceable to numerous factors. Among the factors affecting successful performance of the industry are poor governance, continuous increase in operation and management cost, excessive taxation, lack of local skilled workers, unfair competition from foreign air line operators, corruption and lack of transparency.

Generally speaking, several local flight operators have ceased to exist as a result of unbearable running cost. The price of aviation fuel in the country is exorbitant having increased in price by 88% between 2010 and 2011, placing it highly above the global price. Similarly, the operators battle with excessive taxation having to pay huge landing, parking and navigation charges. The problem is further compounded by lack of sufficient local skilled workers. Study has shown that out of about 700 pilots in the industry, up to 500 of them are foreigners while Nigerian pilots are only about 200 in number. The implication of this is that huge expenses are incurred for payment of the foreign employees who are paid heavily. The income of local airline operators is also cut down by the application of multiple destination scheme which permits international airlines to land in several airports thus creating a situation of unfair competition.

Another major challenge of the Nigerian aviation industry is corruption and lack of transparency which adversely affect policy formulation, implementation and adequate monitoring. There has been several allegation of failure to monitor airline fitness and ensure compliance with safety standards prior to take-offs, poor response to plane crashes and failure to adequately punish operators for negligence resulting in loss of lives which are linked to bribery of concerned officials.<sup>49</sup> In addition, maintenance cost of airlines is very high. For proper servicing, airlines

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<sup>48</sup> 'Nigeria To Lose More From Merging of Aviation Agencies' *Leadership* 20 April 2014.

<sup>49</sup> 'Corruption in Aviation Sector Responsible for Plane Crash-MURIC' *Daily Times NG* 4th October 2013.

are supposed to be taken through maintenance categories A to D. Only A and B services are available locally while C and D which comprise of complete overhauling can only be accessible abroad. Consequently, most local operators boycott the categories C and D which is very risky as poor servicing is a major cause of plane crash. In the same vein, most local operators can only afford to purchase few aircrafts which are over-stretched in order to maximise profits. This, coupled with poor servicing, has resulted in several crashes in the past.<sup>50</sup>

### ***Road transportation***

Road transportation is a vital mode for moving goods and services along the chain of distribution by virtue of its accessibility. The major roads in the country were relics from the colonial era which were later expanded and modified during the oil boom and as part of post-civil war rehabilitations. The roads are generally divided into three: 'trunk A' or federal roads, 'trunk B' or state roads and 'trunk C' or provincial roads, with maintenance vested in the three tiers of government respectively. The country has the largest road network in West Africa but they are generally in very crooked state as revealed by the Central Bank of Nigeria survey of 2002.<sup>51</sup> Nigerian roads are being subjected to heavy usage with 90% of both freight and passengers in the country including raw materials and refined crude oil and finished goods which ought to be rail-freighted, are moved around by road. This has been the main cause of potholes and patches on both federal and state roads with the resultant high occurrence of ghastly motor accidents on major high-ways. For instance, the Benin-Ore express road has been in a pitiable state for long and is thus renowned for the frequent accidents. Other effects of frequent heavy traffic include: congestion, parking challenges, environmental pollution, noise pollution, disruption of forward and backward linkages, impairment of regional trades, poverty, unemployment, and many others.<sup>52</sup>

In addition to the poor state of roads, road transport in Nigeria is also adversely affected by lack of access to sufficient mass transportation facilities. As a result of poverty, majority of urban dwellers rely solely on public transportation on a daily basis since they cannot afford to purchase

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<sup>50</sup>A Amwe& D Jonathan 'An Appraisal of the Nigerian Transport Sector: Evidence from the Railway and Aviation Sub-Sectors' (2013) 4 *Journal of Economics and Sustainable Development* 10.

<sup>51</sup>E Ogunbodede 'Urban Road Transportation in Nigeria from 1960 to 2006: Problems, Prospects and Challenges' (2008)1 *Ethiopian Journal of Environmental Studies and Management* 1.

<sup>52</sup>M Solanke 'Challenges of Urban Transportation in Nigeria' (2013) 2 *International Journal of Development and Sustainability* 891-901.

personal vehicles. However, failure of government to invest in mass transportation facilities makes free movement a major challenge. The profitability of transport business in Nigeria is indisputable evidenced by involvement of small scale investors in provision of transportation all over the country. This is however insufficient in solving the problem as a result of population growth and continuous increase in demand for basic transportation facilities. Although there are certain instances of government's active involvement in provision of mass transportation such as the Lagos Bus Rapid Transportation system, the huge demand is beyond government's capability in terms of financial and technical requirements, hence, the need for organised large scale private investment in that sector.

### ***Rail transportation***

Rail transportation in Nigeria began in 1898 and the system is made up of a wide rail network, about the largest in West Africa which connects the then four regions of the country. The existing tracks are part of relics of colonial era. As a result of drift in preferred mode of transportation from rail to road several years after independence and several years of neglect, the Nigerian Railway Corporation (NRC) had ceased to be a profit making venture. The drift from passenger commuting to freight transport further compounds its woes. Poor track equipment and poor management were the last straw that broke the camel's back of NRC as at today. Furthermore, similar to what is happening in other sectors, government's effort to improve transportation through various policies have proven abortive. For instance, 'Railway Bill' was passed by the National Assembly upon being sponsored by National Council on Privatization in the year 2000, and certain financial allocations were made for improvement of rail structures in 2009. Despite these effort, implementation curtailed the expected success.<sup>53</sup>

### ***Water transportation***

Water transportation is one of the most desirable modes of moving goods and services, compared to other modes of transportation. It is relatively less expensive, energy and environmental friendly, suitable for haulage of heavy goods and machineries. It covers movement through all forms of navigable water including rivers, lakes, canals, coastal creeks and lagoons. Nigeria is

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<sup>53</sup> AO Adesugba 'An Assessment of Infrastructure Development in Nigeria; A Strategy for improving the Investment Climate' unpublished Masters thesis, Edinburgh Napier University Business School, 2009.

highly blessed with navigable inland water ways which cuts across almost 20 states of federation including eastern deltaic states like Port Harcourt and Bayelsa, Rivers states; Niger state which is blessed with rivers Niger, Benue and the tributary, and Lagos State. Water transportation was well used during the colonial era, however, upon gaining independence, this mode of transport has been abandoned for several years by both public and private sector. Hence, the under-utilisation of water resources in the country.<sup>54</sup>

Furthermore, most of Nigerian ports operate below international standards as a result of lack of access to requisite funding necessary for expansion, operation, management and improvement. Government can realise high income from proper utilisation of port assets as it is capable of facilitating international trade. For instance, the Lagos port handles up to 5.75 million tons of cargo annually, though Nigerian ports are not being put to maximum use. Consequent upon failure of government to improve water transportation, inland water transport is obstructed by physical impediments, poor water channels, insufficient access to water motility assets like speed boats, safety and security challenges. This leads to loss of income which can be realised from economic activities such as fishery, forestry, private transport operation, and agriculture generally.<sup>55</sup>

Although in some rural parts of eastern deltaic states like Bayelsa, Rivers and Cross-River the water transportation is the only mode of transportation is by water, water transportation is the major source of the peoples' livelihood and economic activities. However, with deliberate, proper investment, management and necessary private involvement, water transport can generate huge income and reduce the problem of road congestion in most urban areas.

### **2.3.2 Power sector**

Although provision of stable and efficient power is highly demanding as regards huge financial and capacity requirements, yet it is a necessity for achieving national development. In case of Nigeria, demand for electricity constantly exceeds supply and government has continuously found it difficult to improve on the erratic power supply over the years as a result of contraction

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<sup>54</sup> B Obed 'A critical assessment of inland waterways operations & management of the Nigerian maritime industry' (2013) 2 *Greener Journal of Environmental Management & Public Safety* 17-99.

<sup>55</sup> C Obeta 'The Characteristics of Inland Water Transportation in Nigeria' (2014) 19 *Journal of Humanities and Social Sciences* 119-126.



in fiscal space which led to financial challenges as well as ever-increasing demand for electricity as a result of continuous population growth.

Historically, Nigeria commenced generation of electricity in 1898 when the first power plant was built to serve the Lagos colony. However, government officially took control of electricity generation and supply in 1951 with the establishment of Electric Company of Nigeria (ECN). By 1960, the Niger Dam Authority (NDA) was constituted as a body in charge of managing the dams in the country which generated more than 50 megawatt of electricity as at then. Government amalgamated ECN and NDA in 1972 as National Electric Power Authority (NEPA) and vested it with additional power to transmit, distribute and sell electricity to all parts of the country.<sup>56</sup>

However, a constant element of the power sector over the years is inability to generate and distribute sufficient amount of electricity for the country as a result of funding challenges, poor operational and financial performance. Although in order to rescue the situation, several reforms have been initiated by government including amendment of Electricity Act and NEPA Act in 1998 to accommodate private involvement in the sector. Failure of the amendment to yield desired outcome prompted Federal Government to adopt National Electric Power Policy (NEPP) in 2001 and pass the Electric Power Sector Reform Bill (EPSRB) into law in 2005. Also, in line with the content of the law, generation and distribution of electricity were transferred to 18 successor companies which took over assets and liabilities of NEPA rebranded as Power Holding Company of Nigeria (PHCN), while Government continued to be in charge of transmission. National Electricity Regulatory Commission (NERC) was also established as an independent regulatory body to prepare the ground for transferring the power sector into private hands by facilitating development of necessary regulations and performing other necessary oversight functions which include ensuring accessibility, affordability and quality of electricity supply. Government successfully unbundled PHCN in September 2013.<sup>57</sup>

With the unbundling which was completed at the end of last year, Nigerians have high expectations for stable electricity which has a commensurate value for their money. However,

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<sup>56</sup> [http://en.m.wikipedia.org/wiki/Power\\_Holding\\_Company\\_of\\_Nigeria](http://en.m.wikipedia.org/wiki/Power_Holding_Company_of_Nigeria) (accessed 18 February 2014).

<sup>57</sup> S Amadi 'The structure of the Nigerian electricity industry, major on-going projects; opportunities & challenges' (2014)3 *International Journal of Scientific Research* 4.

commendable changes are yet to take place. It is important to point out that to improve on the performance of the power sector, it is crucial to have a detailed examination of various challenges being faced in the sector such as poor taxation, operational and management challenges, low level of electricity generation and distribution, and have a proper plan on how to solve the problems.

## **2.4 Conclusion**

Access to basic infrastructure assets has been established as a major driver of the economy, however, from the above examination of performance of various sectors based on access to functional infrastructure assets, it is obvious that the country still suffers from high level of decadence which will require cooperation of both public and private sectors as well as high level of government commitment if commendable improvements will be made.

In summary, government must source for alternative techniques of financing infrastructure investment and take necessary steps to ensure proper monitoring is carried out through increased commitment in order to bridge the existing infrastructure deficit. It is also crucial for government to work on policy implementation and consistency, corruption and issues related to lack of transparency, to increase investor confidence in the system.

## CHAPTER THREE

### The Concept of PPP as a Technique for Financing Infrastructure

#### 3.1 Introduction

In the previous chapter, the present state of infrastructure in Nigeria was examined. The observation made was that there exist a wide infrastructure gap which is responsible for the nation's poor economic performance and inability to achieve sustainable development. It was concluded, that to recover from the state of infrastructural deficit government cannot solely provide the requisite financial and technical expertise needed. Hence, it becomes necessary to adopt modern infrastructure financing methods.

Historically, the use of PPP in funding public projects is traceable to the economic meltdown of the 80s, which necessitated reduction of government debt. Thus, private investment in infrastructure started to be encouraged, and PPP then became prominent for infrastructure financing in the 90s and a preferred funding method since it allows for risk allocation, increased efficiency and accountability in service delivery. The importance of PPP in facilitating infrastructure development is inestimable. In fact, in the last twenty years, well over 1400 PPP contracts were assigned in the European Union. Although study has shown that government debt is cheaper than PPP, it is crucial to weigh merits of PPP against its demerits before reaching possible conclusions. To mitigate the possible demerits of PPP, a new concept "Public Private Community Partnership" has been developed. Here, the private sector de-emphasizes profit motive and cooperate with the public sector to facilitate provision of basic amenities. Although a PPP project can either record success or failure, statistics has shown that more successful PPP projects have been executed globally since inception of the concept.<sup>58</sup> It seems apposite to finally ask the question: what is PPP?

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<sup>58</sup> [http://en.m.wikipedia.org/wiki/public%e2%80%93private\\_partnership](http://en.m.wikipedia.org/wiki/public%e2%80%93private_partnership) (accessed 20 February 2014).

### 3.2 Definition of PPP

There is no universally acceptable definition of PPP. This has made it difficult to have a definition that encompasses all forms of PPP arrangements. However, it may be described as 'any long term arrangement between public and private sectors targeted at managing, financing, constructing, renovating, maintaining, operating infrastructural facilities for the purpose of providing public services'. Although PPP became a renowned infrastructure financing method in the last two decades, elements of PPP have been in existence for over a century. The possible variants of PPP may include: Private Sector Involvement (PSI), Private Finance Initiative(PFI)<sup>59</sup>, PSP, Privatization<sup>60</sup> etc. The term 'PPP' may also be described as an arrangement involving public and private entities for the purpose of jointly funding, constructing and managing infrastructure assets while striking a balance between private sector's profit motive and public sector's duty to provide basic amenities without directly incurring debt. It can be used in financing projects in every sector of the economy. The use of PPP enables government to utilize the dexterity and efficiency of the private sector while simultaneously excluding the public sector from incurring huge project costs. If properly utilized, PPP can deliver value for money, but can also be difficult to execute financially.

A typical PPP arrangement may either be in form of a contractual or institutional agreement. Whereas developing countries often opt for contractual PPPs, institutional PPPs are more rampant in developed countries where the requisite framework and experience is in existence. By its nature, PPP involves risk allocation to the most competent party and thus, the contract must clearly specify the risk sharing formula. It is usually a complex arrangement involving numerous parties and several sub-contracts necessary for the successful completion of the original contract. It is performance-based and helps to obtain the best value for tax payers' money.

Furthermore, in a PPP contract, compensation may be through a number of ways and these include: user charges such as tolls, access fees; state facility availability agreement with the relevant government authority such as power purchase agreement, water purchase agreement etc cash payment either in form of once-off lump-sum or installmental payment, or a combination of

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<sup>59</sup>O Teye & M Dada 'Appraisal of Private Sector Involvement in Infrastructure Development in Lagos State, Nigeria' (2012) 3(2)*Mediterranean Journal of Social Sciences* 2039-2117.

<sup>60</sup>'Public Private Partnership and the Poor, Private Sector Participation and the Poor' (2002) Halcrow Management Sciences, Loughborough University, UK.

any of these methods. Generally, it is crucial that government exhibits willingness and ability to financially support the project in a manner that will not adversely affect efficient risk management. This is done by provision of subsidy or acting as debt guarantor to a creditor. For a successful PPP arrangement to exist, transparency and accountability of the regulatory bodies cannot be dispensed with.<sup>61</sup>

PPP became a globally employed means of funding infrastructure investment as a result governments' budget constraints which necessitated private involvement in funding and managing capital projects to increase efficiency and the inability of developing countries to meet up with the huge demand for infrastructure facilities as a result of urbanization and population growth. For instance, countries like Korea, South Africa, Germany, France, and Spain have high record of PPP utilization.<sup>62</sup>

### **3.3 Parties to a PPP arrangement**

Where a project is to be completed via PPP arrangement, the public sector in charge advertises the project; interested investors submit their bids and the concessionaire is chosen competitively. After ascertaining the concessionaire, the other parties who will be actively involved in the work can then be ascertained. These parties are as follows:<sup>63</sup>

#### **a) Project Company**

A limited liability company (project consortia) established as the owner of the concession for purposes of delivering the project otherwise known as 'Special Purpose Vehicle' (SPV), facilitates fund-raising through the public for the purpose of executing the contract and protect the investor from risk of insolvency if the project fails. The project company will execute a contractual agreement with the public agency stipulating the terms and conditions for delivering the project.

#### **b) The Sponsors**

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<sup>61</sup> A Idris et al 'Public Private Partnership in Nigeria and Improvement in Service Delivery : An Appraisal' (2013) 10 Journal of Humanities and Social Science 63-71.

<sup>62</sup> V Tan.Allen & Overy 'Public Private Partnership (PPP)' (2012 ) Advocates for International Development, Legal Guide.

<sup>63</sup> (Allan & Overy n 63 above) 4-6

Usually, an established parent company that sets up the SPV as its subsidiary, manages its activities through the equity management section in order to deliver the project successfully. The arrangement between the two companies is usually documented in the shareholders' agreement.

#### c) Sub-Contractors

There will be certain sub-contracts which will be detailed in the concession contract. Basically, there will be a 'Facility Management Contract' entered into with a company charged with the duty to provide facility management required for the project. Also, there will be a 'Construction Contract' with an entity that will provide construction works, and any other necessary contracts such as a power purchase agreement.

#### d) Project Financiers

The SPV is responsible for funding the contract, usually by a mixture of equity and debt financing from the sponsors and outside lenders respectively. The SPV enters a financing and security agreement with the lenders involving provision of funds by the lenders using the project as collateral. There will also be a 'Direct Agreement' as a further security to prevent the public sector from terminating the concession before the debt is fully paid, while giving an opportunity to the lender to settle possible conflict between public sector and concessionaire. Members of the general public who hold shares in the SPV are also financiers. Lenders may include commercial banks, export credit agencies, multilateral agencies (e.g. ADB), and development finance institutions.

### 3.4 Merits and demerits of PPP

#### 3.4.1 Merits of PPP<sup>64</sup>

- It facilitates sustainable development since decisions are based on long term considerations rather than short term benefits.
- Investment risk is better managed since it is transferred to the most competent party who is capable of preventing *ex-ante* risk and managing *ex-post* risk if any when they occur.

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<sup>64</sup> (Idris et al, n 62 above) 68-69.

- Competitive pricing of projects helps ensure use of market value as yardstick for financial assessment of such projects.
- It allows for a more accurate projection and valuation and thus helps to obtain the best value for money.
- It encourages innovation and efficiency through the combination of public and private sectors' dexterity, commitment and efficiency.
- The concessionaire performs its very best in order to protect its name and build a lasting relationship with government .
- The risk allocation involved in a PPP helps to secure the best value for money.
- Since PPPs are off budget, it enables government to finance projects beyond existing income.
- It enables government to spread project payment over a reasonably long period of time and thus the budget is not adversely affected.
- Use of PPP makes it possible for government to finance project even in times of economic crises.
- Use of PPP helps to achieve sustainable development at affordable cost by emphasizing efficiency and accountability.

### 3.4.2 Demerits of PPP<sup>65</sup>

- Multiplicity of parties and long term duration of projects often lead to complex negotiations, and attracts high transaction and legal costs.
- Completion of PPP projects are often interrupted by financial challenges which can cause public mistrust for the government agency that issued the contract.
- Government borrowing is often cheaper than private borrowing.
- Expensive bidding process as a result of *ex-ante* planning of service delivery, operations, reimbursement and vesting the responsibilities in a single party.
- PPP is generally more expensive since at the long run, both parties end up hiring technical, financial and legal experts to determine project viability and ensure that value for money is earned.

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<sup>65</sup> (Idris et al n 62 above)70.

- The huge cost of tendering bids is lost by competing investors who lose the contract award to a better bidder.
- There are usually discrepancies between public and private sector's idea of *modus operandi*, management, execution and accountability, which might lead to project termination.<sup>66</sup>
- Complexity of PPP arrangements necessitates employment of professionals to ascertain value for money by detailed comparison of the *ex-ante* determined cost to proposed cost if project were executed traditionally.
- Government incurs contingent liability upon acting as project guarantor.<sup>67</sup>

### 3.5 Varieties of PPP

The item 'Public Private Partnership' comprises of three important words the meaning of which must be clearly understood.

The word 'public' in PPP simply refers to a decision making authority in any society, community or among a group of people responsible for making and implementing policies which affect the general public. They have the social responsibility to provide basic amenities, employment, security, and maintenance of socio-economic stability. They include government at all levels, government ministries, agencies, departments, commissions and enterprises acting through public officials. They are the major decision-makers in a PPP arrangement. Webster dictionary describes it as 'anything connected to government, public service or people generally'<sup>68</sup>.

The term 'private' on the other hand describes all institutions, individuals and enterprises that possess autonomy from government in terms of ownership, management and control of day to day running and conduct of business, usually established for the sole purpose of making profit. Webster English dictionary describes it as restricted to individual person, company or interest.

Lastly, 'partnership' means 'an agreement between two or more parties coming together to achieve a particular purpose, either profit making or getting a particular project executed, within a specified period of time and upon clear specification of important terms like profit and loss

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<sup>66</sup> (Allan & Overy n 63 above)

<sup>67</sup> M Alshawi 'Concept and Background to Public Private Partnership (PPP)/(PFI) UK Experience (2009) Iraq Institute for Economic Reforms

<sup>68</sup> <http://i.word.com/dictionary/public> (accessed 10 March 2014).



sharing formula, termination, liability etc'<sup>69</sup>. Webster dictionary describes it as a contractual relationship between two or more persons who jointly own a particular business.<sup>70</sup>

There are six major types of PPP arrangements that interested parties can reach, with each possessing different characteristics, merits, demerits, risk sharing formula, parties' responsibility and suitability for particular project, sector and circumstances. The available types are as follows:<sup>71</sup>

### **3.5.1 Service contracts**

In a service contract, government engages a private investor in executing a specific portion of a contract within a given duration of time. Government is responsible for executing a substantial part of the contract and only unbundles a portion to the private investor. The investor who is chosen via competitive bidding is expected to execute the contract in strict compliance with cost and performance specifications indicated in the agreement, hence more profit can be realized by cutting cost.

A variant of service contract allows parties to agree on cost, fee and provides possibility of allowing the private investor to participate in profit sharing. Generally in a service contract, government bears the cost of executing the contract and the investor does not relate with the consumers directly. A service contract is advantageous because it clearly spells out the private investor's task and allows for close monitoring. Investor's risk is relatively low hence efficiency is mostly achieved. It also aides transfer of technology, skill and can be completed within a short duration. On the other, it may not be desirable to public authorities because it is not suitable for foreign direct investment; government bears all the financial expenses and determines user charges which makes it susceptible to political influence and corruption.

### **3.5.2 Management Contracts**

Here, government awards a contract involving expansion, and operation of a part of or the whole of a facility to a private investor, vests the day to day running and control of the facility in that investor for an agreed duration of time and the investor raises working capital while the

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<sup>69</sup> <http://m.businessdictionary.com/definition/partnership.html>.

<sup>70</sup>, Merriam -Webster Dictionary ' online at <http://i.word/> (accessed 5 March 2014)

<sup>71</sup> (Felsing n 15 above) 24-43.

remaining fund is provided by government. Operating cost is ascertained *ex-ante*, but the private investor may earn extra income as a reward for meeting set targets or may be permitted to share from profit made.

The contract clearly states extent of investor's duty and the investor is permitted to relate with consumers but government still determines user charges. It is a desirable method of project financing as it enables government to utilize private funds and skills. However, it has a number of flaws. For example, distinction between duty to manage and duty to control may be difficult because parties' duties are closely linked, autonomy and privacy of function is often lost. Also, where payment is made in advance, it may lead to dereliction of duty by the investor.<sup>72</sup> Examples of service contracts are Operation and Maintenance (O&M), Operations-Maintenance-Management (OMM)

### **3.5.3 Affermage or Lease Contract**

Here, private investor is employed to maintain the facility usually for a considerable period of time between 10 to 20 years during which decision as to the standard and quality of maintenance is made by the investor. During the pendency of the contract, private investor bears cost of operation, maintenance, services and setting off of consumer debts and answering consumer claims. Government construct the facility and leases it to the private sector but the legal title rests with the government throughout the contractual term. Affermage is slightly different from lease because after payment of affermage fee, investor keeps the remaining profit. Investor's profit is contingent on amount realizable from user charges, and may reduce the quality of maintenance provided by investor over time in order to increase profit. A disadvantage is the fact that determination of user charges becomes crucial, sensitive and may involve making of complex arrangements. Examples include Lease-Develop-Operate(LDO), Lease-Back (LB), tax-exempt lease etc

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<sup>72</sup> P L Ninh 'Why should Transportation Companies Join Public Private Partnership (PPP) Proposed by Public Sector to support the implementation process of Freight Electric Vehicles (FEVs) in Copenhagen municipality' unpublished masters thesis, Denmark Aalborg University, 2013 25-35.

### 3.5.4 Concessions contract

In a concession contract, the concessionaire has an obligation to provide services stipulated in the contract. These may include: operations, maintenance, management, construction, rehabilitation and control of the facility in question. However, the legal title rests with the government which sets performance standards, ensures compliance and regulate user charges. The contract regulates price and quality of services to be provided, tariff rate and periodic adjustment of such tariff where agreed on. Private investor provides the initial working capital and later recoup it from user charges. Concession contracts are often for reasonably long duration, usually between 25 -30 years. Hence, concessionaire would have realised both capital and profit, and in certain instances, government provide subsidy or permit concessionaire to share from the profit.

Investors find concession contracts attractive since there will be sufficient time to recoup all their investment and also make profit. It also helps to ensure that investors are committed since they will do everything possible to avoid loss of investment. Although it is complex in nature, requirement of strong legal and regulatory framework, possibility of complications, high cost and skill required and possibility of creating a monopoly makes it undesirable. Examples include Refurbish-Own-Transfer (ROT), Design-Build (DB), Design-Build-Operate (DBO).

#### ***Build-Operate-Transfer (BOT) and Similar Arrangements***

A BOT is a specialized concession based on an arrangement whereby a consortium funds construction of a facility, and manages it within the agreed duration during which the consortium is vested with legal title to the project, but government agrees to purchase a particular level of services during the operation stage. Parties may include in the arrangement a mechanism to reduce demand risk by having separate payment for capacity and distribution charges. At the expiration of the contract, legal title reverts back to the government. Other variations which exist are named depending on assignment of responsibilities toward construction of the structure, transfer of risk, ownership, management, and operation of the infrastructure in question. These variations include Develop-Build-Financed-Operate (DBFO), Build-Transfer-Operate (BTO),

Build-Operate-Transfer(BOT), Build-Own-Operate(BOO), Buy-Build-Operate(BBO), Build-Rent-Operate-Transfer(BROT) etc

It is characterised by major elements of a concession contract including financing by the private sector, transfer of project risk, a long duration of operation by the private investor during which capital invested and profit can be realised. Governments find it attractive as it enables the authority to embark on capital projects by sharing risk and cost of investment while giving out the concession to the most competent party chosen through competitive bidding.

### **3.5.5 Joint Venture**

This is an alternative to privatization involving joint ownership of a project by both private investor and government. Parties can register a company afresh or assume ownership of an existing company and have it transformed into a joint venture. The company jointly-owned may be publicly quoted and must be autonomous from any forms of government control . Its operation and management is usually handled by the private partners while parties cooperate to successfully operate the company.

Before the project in question commences, parties must agree on terms of execution, risk of business is shared and both parties must be willing to invest in the project. Because a real partnership relationship exists between the parties, they are committed to the success of the project, although government's dual role may lead to corruption.

### **3.5.6 Hybrid Arrangement**

Besides the major types of PPP contracts, parties may combine different contract types suitable for achieving the particular purpose intended. The types to be combined depend on several factors such as project requirements, sector of economy involved, duration of contract, and several other specific circumstances. Parties may also vary specific terms such as risk sharing formula, payment options, unbundling of sub-contracts etc. Examples of possible hybrids are: Developer-Finance, Lease-Purchase, Turnkey etc.

### **3.6 Public Private Partnership in Nigeria**

The use of PPP as a viable tool for investment in infrastructure is not entirely new to Nigeria. For instance, Dolphin Estate in Lagos was constructed via a PPP arrangement. However, majority of the PPP contracts in recent times have failed woefully. The use of PPP in Nigeria has recorded immense failure, with most of the concession contracts canceled, reassigned or abandoned by the parties. Contracts like Lagos-Ibadan Expressway, Kuto-Bagana Bridge, Lekki-Epe road project and Maervis contract for management of Muritala Muhammed International Airport Lagos are a few of such failed projects. Over the years, the country has not been adopting a particular PPP pattern; the several failed PPP projects have their peculiar challenges and unique reasons for failing thus learning from previous mistakes has been difficult.

For example, the Muritala Muhammed Airport concession contract awarded to Messrs Maevis to be remunerated partly from user-charges failed primarily as a result of corruption. The concessionaire bribed its way through contract assignment and had to find a way of recouping the un-recorded expenses. In the same vein, the Victoria Island-Epe Express way concession contract also failed as a result of the concessionaire's failure to work hand in hand with other stake holders. It was reported that the concessionaire attempted to erect three toll gates within a five kilometer distance, this led to development of alternative routes thus residents were not obliged use the road.<sup>73</sup>

#### **Case Study : Lagos/ Ibadan Express Road Concession Contract**

It is important to emphasize that a PPP arrangement is usually very complex. Every step of it requires detailed planning, calculation, monitoring and assessment by the relevant authorities through qualified experts. Where adequate preparation is not made prior to commencement of a PPP arrangement, and the contractual agreement is not meticulously drafted, the likelihood of project failure becomes relatively high. Like many failed PPP concessions in the country, the Lagos/Ibadan Express Road contract appeared to be heading towards failure right from the beginning for numerous reasons to be outlined in later.

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<sup>73</sup> (Oyedele.n 4 above).

The Contract involved a DBOT arrangement assigned to Bi-Courtney Highways Nigeria Limited in 2009. It required the concessionaire to solely fund the rehabilitation and expansion of the road at the cost of 89.6 Billion naira, within four year duration. At the completion of the contract, the Concessionaire is to manage the facility for the duration of 25 years during which cost of rehabilitation and profit is to be realized from user charges, while simultaneously paying the government annual consortium fee of 100 million Naira and 5% of all accrued profit. The contractual arrangement was highly faulty and should not have been signed as advised by the ICRC in its 2010 annual report<sup>74</sup>. Principal among the noticeable flaws in the contract include:

First, since the road to be reconstructed is a federal road being funded jointly by the governments of Lagos, Ogun, and Oyo states, it becomes necessary to resolve easement issues with the Federal government. It will also be necessary to obtain necessary permits and approvals in order to obtain right of way which is crucial to the contract execution. However, this was left unattended to.<sup>75</sup>

Second, before a PPP contract can be awarded, it ought to go through a competitive bidding process. This helps the authorities to select the most competent bidder and guarantees proper performance. In this instance, the bidding process lacked credibility and transparency. In the words of the Minister of Works, there were numerous bidders but a contrary information was made available to the public to the effect that Bi-Courtney was the only bidder hence the contract was assigned to the existing bidder.<sup>76</sup>

Furthermore, the Ministry of Works lacks the technical skills required to consummate such a complex contract and failed to employ the services of qualified experts to make requisite detailed assessment needed to draft a good PPP agreement. Rather, Government relied on the concessionaire's expert who drafted the contract in his client's favour. It is necessary to determine project bankability because if a contract is not bankable, sourcing for funds will be a huge challenge. Here, the concession contract was not really bankable as the survey of estimated usage did not clearly show how returns will realised. This adversely affected availability of fund

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<sup>74</sup> 'Infrastructure Concession Regulatory Commission Annual Report' (2011).

<sup>75</sup> 'Lagos-Ibadan Expressway: ICRC Vindicates Bi-Courtney' *This Day Live* 10 December 2012.

<sup>76</sup> 'Why Bi-Courtney Failed on Lagos-Ibadan Expressway-Onolememem' *The Citizen online* 3rd March 2014.

and speed of construction. Even three years after being assigned the contract construction it was still very slow and the visible changes were merely patches here and there.<sup>77</sup>

Also, the contract was signed based on an inaccurate financial model. Parties could not agree on a precise estimated project cost. The income realizable through user-charges was exaggerated as it was not based on a detailed survey of traffic forecast and a study of willingness and ability of road users to pay toll fees. Besides, a social and environmental impact study was not carried out to ascertain with precision the extent of rehabilitation and expansion of the road, and there was also no clear risk allocation structure. Hence, the contract was terminated by the Federal government and reassigned in 2012 to two different companies, unbundled into two road axis.<sup>78</sup>

### 3.7 Conclusion

Access to basic amenities in Nigeria is very poor, the situation is worsened by government's budget constraint, poor maintenance culture and huge infrastructure demands as a resultant effect of urbanization and continuous population growth. It is therefore crucial for the nation to find lasting solutions to the current infrastructural challenges. As a result of the huge investment and expertise required to recover from the present infrastructure deficit which government cannot single-handedly provide, and upon realisation of the successful use of PPP as a tool for infrastructure reform globally, the Nigerian government adopted PPP by the enacting the ICRC Act in 2005. However, since 2005, the country has not witnessed any commendable success in the PPP sector. Most concession contracts are either abandoned or terminated abruptly.

Although to improve the state of national infrastructure government is proposing a vision 2020 development agenda targeted at tremendous national development through massive investment in infrastructure. The agenda proposes projects like light rail system and Kuje Water Works in Abuja, Shagamu-Benin-Asaba high way project, Abuja-Kaduna-Kano road project, Kirikiri Lighter Terminals 1&2, among others.<sup>79</sup> However, considering the manner of termination of

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<sup>77</sup> 'Termination of Lagos-Ibadan Expressway Concession' *The Sun* 27 November 2012 .

<sup>78</sup> 'Another Failed Marriage: The Lagos-Ibadan Story, by S.Y Ibrahim' *Premium Times* 29 November 2012.

<sup>79</sup> <http://en.m.wikipedia.org/wiki/Nigeria-vision-2020>. (accessed 20 February 2014).

most previous PPP projects in the country, private investors are reluctant to contract with the government to execute the new projects.

Hence, it is incumbent on scholars and government in particular to identify the problems precluding the country from making a success of its PPP sector and suggest practicable and lasting solutions in order to materialise future national development plans.



## CHAPTER FOUR

### **An Appraisal of the Infrastructure Concession Regulatory Commission Act**

#### **4.1 Introduction**

In chapter three, PPP as a technique for financing infrastructure projects was examined in details. The chapter considered the various elements of the concept including the origin, parties to a typical PPP arrangement, varieties of PPP contracts as well as possible pros and cons derivable from the use of PPP. In particular, performance of PPP in Nigeria was reviewed, with the conclusion that the infrastructure financing technique has not been very successful in the country, having being marred by several irregularities.

It is also important to mention at the outset that there are numerous infrastructure related legislation in Nigeria which include Electric Power Reforms Act<sup>80</sup> and Public Procurement Act<sup>81</sup>. Also, as regards PPP some states such as Lagos State which have been proactive by taking steps to enact PPP laws within their jurisdiction<sup>82</sup>. However, the ICRC is regarded as the infrastructure legislation at the federal level, it officially recognizes the use of PPP to facilitate infrastructure development. Since the emphasis of this study is to ascertain why financing of federal government-sponsored infrastructure projects via PPP mechanisms has failed, an examination of the ICRC becomes necessary.

Therefore, the agenda in this chapter is to make a detailed appraisal of the ICRC by paying attention to PPP legal and regulatory framework as provided in the Act. This will be achieved through particular references to various provisions of the Act, pointing out the lapses in them, effects of such lapses on projects and practicable solutions will be suggested.

#### **4.2 PPP regulation in Nigeria**

In Nigeria, PPP is regulated through the duality of legal and institutional frameworks, both encapsulated in the substantive contents of the ICRC. The legal framework refers to the substantive law providing the various legal requirements and guide on every step of a PPP

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<sup>80</sup> Act of 2005 (n 18 above).

<sup>81</sup> Act 14 of 2007(n 19 above).

<sup>82</sup> Lagos State Public Private Partnership Law of 2011.

contract, while the regulatory framework which is a subset of the legal framework comprises of the institution established under the law for the purpose of enforcing and implementing the ICRC. The Act was passed into law by the National Assembly in 2005 as the enabling statute for regulating private sector involvement in financing, constructing, developing, maintaining, and managing federal infrastructural projects in the country. It established the ICRC as the institution responsible for implementing the provisions of the Act by cooperating with relevant sectors of the economy in identifying viable PPP contracts and carrying out oversight functions in relation to the chosen project from inception to financial closure<sup>83</sup>.

#### **4.2.1 Assessment of PPP legal framework in Nigeria**

As regards project inception, the ICRC authorises MDAs to identify viable projects, obtain recommendation from the sector involved and approval of the Federal Executive Council (FEC) before taking any step toward execution of such project<sup>84</sup>. Upon obtaining the necessary approvals, the Act provides that such proposed project must be advertised in at least three national news-papers in order to attract interested investors<sup>85</sup>. Such private investors who may either be a single company or a consortium of companies will be subjected to a public competitive bidding process through which the investor who presents the best bid in terms of technical and financial proposition and have met the pre-qualification requirements is selected and awarded the contract<sup>86</sup>.

The above project inception process as prescribed by the Act is obviously ambiguous and lack the necessary clarity needed to achieve effectiveness, by presenting the following unanswered questions: how would a proposed project be assessed to determine its viability?, what are the conditions to be met before an investor can partake in a bidding process?, how would the technical and financial details of submitted bids be assessed? what are those pre-qualification requirements which serve as the basis of being awarded a contract? How would unsuccessful bidders be notified about the outcome of a bidding process? and how could an unsatisfied failed bidder seek redress especially where there are allegations of bias and lack of transparency?

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<sup>83</sup> Act of 2005 (sec 14)

<sup>84</sup> Act of 2005 [sec 1&2(1&2)]

<sup>85</sup> Act of 2005 [(sec 2(4)]

<sup>86</sup> Act of 2005 (sec 4)

First, prior to application for approval, project viability must be determined by the MDA in conjunction with the sector involved. The project must be assessed through a detailed procedure to be provided by the Act including an initial need analysis to determine whether the proposed project is actually needed; initial feasibility study to ascertain whether PPP or traditional project financing is the best method for embarking on the project under consideration, value assessment, risk assessment and transferability; estimated technical and financial requirement; proposed funding methods; possibility of obtaining returns; detailed legal, financial and technical due diligence as well as other necessary considerations. In addition, technical details are also very important to ascertain project viability. The public sector must ensure that all potential technical challenges including engineering, architectural and planning uncertainties are fully resolved to avoid surprises in future. The ICRC requires that MDAs must ensure that the contractor has the wherewithal, knowledge and skill required to execute the contract, but does not prescribe the standards to be met for a contractor to be considered as qualified in this regard. This includes whether the company must hold a particular technical certification; have specified minimum amount or high credit rating, or have a record of executing similar contracts .

In awarding PPP contracts, government should ensure that the private consortium is financially buoyant or will have unhindered access to sufficient fund required to execute the contract. The contractor's competence must not be compromised, and the general minimum qualification requirements must be stated in the enabling Act. Where the contract involves a huge amount of money, it is preferable to assign it to an investor who is experienced in dealing with such contracts. Such investor must be a major entrepreneur with sound technical knowledge of the subject matter; must have a strong and competent team of workers; must be able to devise cost effective technical solutions, prioritise public safety and carry-out favorable environmental assessment. Where several bidders cooperate to form a consortium in order to utilise their pool of strength, skill and finances to execute a project, existence of a good relationship among them is crucial to avoid unnecessary disagreements on matters like risk and profit sharing.<sup>87</sup>

In addition, the questions relating to pre-qualification requirements, pre-condition for participating in a bidding process, notification of failed bidders and seeking redress on

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<sup>87</sup>C Hardcastle et al 'Critical Success Factors for PPP/PFI Projects in the UK Construction Industry: A Factor Analysis Approach'(2005) 23 Construction Management and Economics 459-471.

allegations of corruption affect existence of effective procurement process. Effective procurement process is the bedrock upon which the success of a PPP contract rest. It is so important to the contract that it accounts for well over 22.5% of the likelihood of successful project completion. First, for a bidding process to be effective there must be specified conditions to be met by interested investors as a way of reducing the large number of applicants and ensuring that only competent and serious bidders participate in the bidding process. An effective procurement process can be said to exist when contracts are awarded through a transparent bidding procedure which is open, public, competitive and participatory. Thus, the most competent bidder is selected.<sup>88</sup>.

Transparency in procurement process also requires that the yardstick for evaluating bids and making final decision be publicly disclosed prior to the final selection. Choice of contractor must not be influenced by elements of bias or favoritism and all bidders must have access to the same amount of information. All information relating to procurement process must also be disclosed, except where there is need to conceal trade secret or protect intellectual property rights. For instance, in Canada, government usually employ a third party independent expert to oversee the procurement process and ensure that the process is fair, transparent and equitable.<sup>89</sup>

Furthermore, government must create an avenue for a failed bidder who suspects lack of transparency in the selection process to seek redress before an unbiased tribunal within a specified period. The tribunal must be empowered to make binding orders such as, stay of execution of contract during the pendency of trial, order of a re-selection process where lack of transparency is established and imposition of sanctions on persons found guilty of corruption. The EU, for example, handles procurement process very seriously by making detailed provision for open and competitive procurement process in several directives. It also empowers the European Union to sanction the responsible party where lack of transparency is established.<sup>90</sup> A manipulated bidding process usually leads to selection of an incompetent contractor. This will

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<sup>88</sup> A. Chan et al 'Critical Success Factors for PPPs in Infrastructure Developments: Chinese Perspective' (2010) 484 *Journal of Construction Engineering and Management*.

<sup>89</sup> United Nations Economic Commission for Europe's 'Guidebook on Promoting Good Governance in Public Private Partnerships' 2008, United Nations 47-47.

<sup>90</sup>(UN guidebook n 90 anove).).

have a replica effect on every other necessary step which ought to be taken in order to make a success of the project.

Also, the ICRCIA prohibits the MDAs from providing any forms of guarantee in relation to an on-going project unless the FEC approve of such government support. The Act also requires that a concessionaire must insure, maintain and repair a structure during the pendency of such contract. At the implementation stage, the contractor is obligated to make payments to the federal government from contract proceeds based on agreed terms<sup>91</sup>.

In the same vein, the above provisions pose the following questions: what are the circumstances under which the FEC will approve of government guarantee in relation to a project? ; what is the yardstick for determining the type of insurance applicable to a project and who gets the premium in the event of occurrence of the insured event?

Considering the importance of government is guarantee to a successful PPP arrangement, it is important that the legal framework specifies clearly all terms and conditions relating to granting such support. Adequate government support is central to the success of a PPP arrangement. This is because it shows government's commitment to the successful completion of the project and facilitates gaining of investors' confidence and reassurance about security of business interest and profit motive. Furthermore, it is important that government shows ability to bear financial responsibility in relation to the contract by providing subsidy, grants, acting as debt guarantor or entering into supply sub-contracts such as power purchase agreements, water purchase agreement among others.<sup>92</sup>.

Although, government support must be carefully structured to prevent the private sector from taking undue advantage of it to avoid risk, yet the public sector must be conscious of the fact that most PPP contracts cannot be successfully completed without some measure of government guarantee. A PPP regulation must therefore make provision for government guarantee which might be in form of sovereign guarantee performance guarantee, protection from adverse acts of government, currency and economic stability. Furthermore, adequate government guarantee also covers protection of the contractor from undue competition during the pendency of the contract

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<sup>91</sup> Act of 2005 (sec 3&7)

<sup>92</sup> BIAC Task Force on Africa's 'Towards as Set of 'OECD Guidelines on the Regulatory Framework for Public-Private Partnerships in developing countries, with an Emphasis on Infrastructure and Public Service Provision' 2004

to facilitate realisation of returns, thus the applicable competition law must be favorable. At the planning stage, government must determine the type and level of guarantee to be provided. For instance, the government of Hungary made provision for a sub-ordinate loan facility for the first six and half years of the M5 toll motorway project, under the condition that other creditors will take priority over the government in order for repayment of loans by the private investor.<sup>93</sup>

Similarly, there is need for further clarity on the nature of insurance policy to be obtained on a project, depending on the value of such project and importance of the service to be generated through it. For instance, while a third party can be obtained for a suburb road project, a multi million naira express road contract should be protected through a comprehensive insurance. It is worthy of note that where a project which is properly insured fails, especially as a result of an act of God or force *majeure*, the parties will not suffer compete loss as they will be indemnified by the insurance company. Thus, project insurance should be treated with the necessary level of seriousness and properly covered in a PPP regulation.

In addition, the ICRC Act prohibits any form of alteration or cancellation of a contract in any manner except so provided<sup>94</sup>. The Act also grants a contractor requisite right of easement in relation to surrounding land or property for the purpose of successful contract execution<sup>95</sup>. A careful look at these provisions show that the Act does not put into consideration unexpected situations that may necessitate contract operation. Usually, unplanned events such as acts of God which include earthquake, flood and hurricane or *force majeure* including war, chaos and strike may occur and necessitate contract alteration or termination<sup>96</sup>. Furthermore, besides right of easement other important matters including property right of investors and access to unbiased dispute settlement system ought to be adequately covered in a PPP regulation.

In order to facilitate implementation of any contract, a proper legal structure must be in place. Institutional investors are attracted to a system where the investment laws are clear, simple, predictable and futuristic enough to provide for most foreseeable situations. Since PPP investments are usually limited-recourse in nature, protection of investors is dependent on existence of a system of clear and predictable laws covering all aspects of investment including

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<sup>93</sup> (n 21 above) 40-43.

<sup>94</sup> Act of 2005 (sec 11).

<sup>95</sup> Act of 2005 (sec 13).

<sup>96</sup> [http://en.m.wikipedia.org/wiki/Force\\_majeure](http://en.m.wikipedia.org/wiki/Force_majeure) (accessed 5 May 2014).

contract, corporate, security, tax, torts and dispute settlement regulations. Investors are usually concerned about protection of their profit motive; they are therefore interested in a system which permits them to own assets and transfer such assets upon determination of the contract, repatriate profits, protect them from expropriation or provide adequate and sufficient compensation where expropriation is unavoidable<sup>97</sup>.

Similarly, the ICRC does not make provision for settlement of dispute. A PPP arrangement is usually complex in nature. It may involve numerous sub-contracts including local companies and transnational corporations. Often times, parties have to settle one dispute or the other; either minor misunderstanding or major disagreements in order to successfully complete the contract. It is therefore crucial for a PPP law to make detailed provisions for settlement of disputes. The Act should provide alternative dispute resolution (ADR) mechanisms, as the first point of call and litigation as the last resort as arbitration is often preferred because it saves time and it is enforceable. Thus, most PPP contracts usually contain arbitration clauses. It is crucial to have a legal provision for dispute settlement and enforcement of judgments. This will boost investors' confidence in the system. In the event that parties might have recourse to litigation, the country's judicial system must be fair, transparent affordable and unbiased against foreigners. Most countries adopt international commercial arbitration laws closely related to the UNCITRAL model and submit disputes to institutional arbitration tribunals. However, investors must be assured that such arbitral awards will be enforced at the national level.<sup>98</sup>

#### **4.2.2 Assessment of PPP institutional framework in Nigeria**

The ICRC established the ICRC as a legal entity responsible for implementing and enforcing the provisions of the Act<sup>99</sup>. It is also provided that policy implementation shall be carried out by the Director General of the Commission, who is also the Chief Executive, accounting officer and Secretary of the Commission<sup>100</sup>. The Director-General may however be removed from office by the President single-handedly on grounds of misconduct, corruption or inability to discharge

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<sup>97</sup> EBRD's 'Core Principles for a Modern Concession Law' 2012 '

<http://www.ebrd.com/pages/sector/legal/concessions/core-principles.shtml> (access 6 April 2014)

<sup>98</sup> The World Bank's PPP In Infrastructure Resource Center 'Dispute Resolution Systems Available'

<http://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-environment/dispute-resolution>, (accessed 4 April 2014).

<sup>99</sup> Act of 2005 (sec 14).

<sup>100</sup> Act of 2005 (sec 21).

official duties<sup>101</sup>. The Act also established for the Commission a governing board, responsible for making and adjusting Commission's policies as well as carrying out all other functions necessary for the full implementation of the Act<sup>102</sup>. Appointment of the Board members, except ex-officio members, is vested in the president subject to senate approval<sup>103</sup>. The Act also empowers the President to solely remove any board member from office if he opines that such removal will be in public interest<sup>104</sup>. And to give general directives which must be obeyed to the Commission in relation to execution of policies or functions.<sup>105</sup>

The analysis of the above provisions shows that constitution of the ICRC lacks requisite checks and balances; this deny the Commission of authority and the amount of independence necessary for effectiveness in carrying out her official duties. It also encourages corruption and lack of transparency. For instance, the Office of Commission's Director General, Chief Accounting Officer and Secretary ought to be separated. By vesting the duties in one person and empowering the president to be able to remove the person from office, the office holder is placed at the mercy of the president and will simply follow presidential orders in a gullible manner. Similarly, the Act empowers the President to solely remove a board member from office on grounds of misconduct or corruption, without stating what amount to corruption, misconduct or inability to discharge duties. This vest too much power in the President; such power may be abused easily and may adversely affect the Commissions' efficiency.

Furthermore, the above provisions of the Act condone and encourage undue political interference. This greatly hampers the Commission and her governing board from being independent and transparent in decision making and thus encourage corruption. Hence, to achieve effectiveness and efficiency, there is need to amend the Act in a manner that provides separation of the powers of Commission Director General and place proper checks and balances on the powers vested in the president. This will go a long way to solve the problem of corruption, lack of transparency and undue political interference that is responsible for the monumental failure of several previous PPP contracts in the country.

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<sup>101</sup> Act of 2005 [sec 21(3)(b)].

<sup>102</sup> Act of 2005 [sec 15(1) & 19].

<sup>103</sup> Act of 2005 [sec 15(3)].

<sup>104</sup> Act of 2005 [sec 17(1)(f)].

<sup>105</sup> Act of 2005(sec 33)



For instance, selection of Bi-Courtney as the concessionaire to handle the failed Lagos-Ibadan express road contract was not by a competitive bidding process. Sources recorded that the company got the contract as a result of the close relationship between the company's chief executive officer and the late president Umaru Musa Yar'adua. Also, despite the advice from ICRC that certain adjustments must be made before the contract could be signed, such as detailed cost estimate, detailed survey of estimated returns, determination of project bankability, proper environmental impact assessment among others, the contract was signed without effecting the suggested amendments, hence, the attendant failure.<sup>106</sup> Transparency in the process of awarding a PPP contract is very crucial to PPP performance. It encourages competition among investors and facilitates socio-economic reforms.

In relation to finance, the ICRC specified the sources of funds, permissible usages and require that the budget estimate of a preceding year be submitted to the president on or before 30st of September annually<sup>107</sup>. The Commission's account is to be audited within six months from the end of the year and the audit report as well as details of the Commission's activities are also to be submitted to the president latest by June 30th of a preceding year<sup>108</sup>. The Act also provides that a property of the Commission cannot be attached for the purpose of executing judgment without notifying the Commission within a duration that is not less than three months<sup>109</sup>.

It is crucial to point out that, in order for the ICRC to execute her statutory functions effectively, it must be granted requisite autonomy needed to view and determine issues objectively. This include financial independence, without which it will blindly follow instructions to avoid denial of fund; this will also affect the institutions' transparency. Besides, submitting the annual report and budget to the president, it is important to have a neutral third party expert to assess the budget and provide a form of checks and balances. Lastly, provision of the Act that places condition on ability to enforce a court judgment which attaches the Commissions' property as a

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<sup>106</sup>A Failed Romance: Why Public Private Partnerships do not Work in Nigeria' International Center for Investigative Report 1st February 2012.

<sup>107</sup> Act of 2005 (sec 24-26).

<sup>108</sup> Act of 2005 (sec 27).

<sup>109</sup> Act of 2005(sec 31).

judgment debt ought to be amended. This is because it has the tendency of discouraging investors by creating the impression of likelihood of denial of justice.<sup>110</sup>

### 4.3 Conclusion

The above analysis of the ICRC A reveals that the Act was poorly drafted with the omission of some crucial provisions and inclusion of certain provisions which have made it difficult for the Commission to carry-out its primary functions. This has adversely affected the overall performance of PPP in the country. Consequently, Nigeria is still saddled with the problem of infrastructure deficit, and the various attendant problems like poor human capital development, poor socio-economic development, abject poverty, and unemployment.

The review particularly shows that by the manner in which the Act is drafted, the investment climate in the country has become less-favourable. Usually, investment climate covers sound economic policies, political support, social support, and proper legal and regulatory framework. Another major challenge of PPP in Nigeria is the absence of a coherent PPP policy. To make a success of PPP as a tool for socio-economic development, government must set out a coherent policy or harmonise the various existing policies to reflect the aims and objectives it intends to achieve. Realistic targets must be set for achieving those objectives, and regulatory institutions must be put in place to follow up and monitor various steps taken to achieve those targets. For example, in 2011, Ogun State government terminated Ikenne Rubber Factory concession, and set up a Commission to look into the various on-going contracts of the immediate past administration. As a result of policy inconsistency and lack of continuity, change in government makes project completion difficult, as contracts may be reviewed, altered or altogether terminated.<sup>111</sup>

A properly drafted PPP regulation must reflect the core principles and policies prioritized by the public sector including increase in quality and quantity of public services, transparency and accountability, accessibility of public services and sustainability of development. It is also

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<sup>110</sup> n 24 aboe

<sup>111</sup> Initiative for Public Policy Analysis 'Absence of Appropriate Regulatory Framework may Undermine Public Private Partnership' 2011 Policy Paper.

important to adopt a flexible PPP policy to accommodate policy modification usually necessitated by socio-economic and political changes. For instance, at the inception of the use of PPP in the UK, the government erred on several occasions but usually corrected the mistakes and improved on PPP performance over the years.<sup>112</sup> A properly drafted PPP regulation must reflect the core principles and policies prioritized by the public sector including increase in quality and quantity of public services, transparency and accountability, accessibility of public services and sustainability of development. It is also important to adopt a flexible PPP policy to accommodate policy modification usually necessitated by socio-economic and political changes., joint investment funding, or supplemental periodic service payment so that the investor can finance project and realise profit.<sup>113</sup> Alternative income sources like development arrangements may also be considered. Also, government must consciously ensure that the country is politically and socially stable. Where there is any form of social unrest, it must ensure speedy settlement of such disturbance so that it does not disrupt project completion. Government needs to also adequately compensate private investor for any loss incurred as a result of such unrest.<sup>114</sup>

In conclusion, it is suggested that the ICRC should be amended to incorporate necessary changes in order to achieve desired infrastructure development. Also, the various PPP policies, recommendations and directives should be passed into law as subsidiary legislation in order to create the necessary legal basis for them.

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<sup>112</sup> (n 12 above)

<sup>113</sup> S Babatunde & AOpawole 'Critical Success Factors in PPP on Infrastructure Delivery in Nigeria' (2012) 10 *Journal of Facilities and Management* 3.

<sup>114</sup> M Y Alhashemi 'Critical Success & Failure Factors for Public-Private Partnership Projects in the UAE' unpublished MSC thesis, British University Dubai, 2008 011.

## CHAPTER FIVE

### Comparison of Certain Provisions of the ICRC and Public Finance Management Act and Relevant Subsidiary Legislation

#### 5.1 Introduction

In chapter four, the provision of the ICRC was appraised with particular emphasis on the legal and institutional frameworks, it was found that the Act was poorly drafted as it contains numerous gaps including failure to provide for dispute resolution and granting of excessive power to the president. The chapter was concluded by suggesting an amendment of the act to incorporate omitted provisions and enactment of subsidiary legislation in order to facilitate sustainable infrastructure development.

The Republic of South Africa (RSA) has the highest record of successful PPP projects in Africa and one of the best records in the world. The country has entered into more than fifty contracts at the national level and up to three hundred contracts at the municipal level from 1994 till date, with some projects such as the Gautrain Rapid Speed Rail, renowned for being very successful, facilitating development, creating jobs and improving the general standard of living of the people. The success recorded in the use of PPP in RSA is traceable to the existence of a standardised legal and regulatory framework and strong political commitment<sup>115</sup>. Structurally, PPP regulation in RSA is segmented in line with the parliamentary system of government being practiced in the country. Thus, at the national and provincial levels, PPP is governed by the Public Finance Management Act (PFMA) which regulates and manages financial activities and transactions of government at that level. Other subsidiary legislation, include the Treasury Regulation 16<sup>116</sup> issued in terms of the PFMA and Municipal Finance Management Act<sup>117</sup> (MFMA) and Municipal Systems Act<sup>118</sup> which govern the municipal arrangements.

Regulation of PPP at the national and provincial level is well governed by a system of robust legal and institutional framework which comprises of PFMA as the principal legislation enacted to ensure effective and efficient management of national finance with the objective of ensuring

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<sup>115</sup> M. Hossain 'Municipal PPP Projects in South Africa: Obstacles and Opportunities' 2006.

<sup>116</sup> The Treasury Regulation 16 of 2004.

<sup>117</sup> Act of 2003

<sup>118</sup> Act of 2000

that transparency, accountability and openness as a standard for managing government funds<sup>119</sup>. It applies to government departments, agencies, entities, constitutional institutions and other public bodies listed in schedule 3 of the Act and their subsidiaries<sup>120</sup>. The Act established the National Treasury as the government institution in charge of giving effects to the provisions of the Act<sup>121</sup> and empowered it to issue regulations and instructions necessary to aid it in the exercise of its statutory functions<sup>122</sup>. In exercising the statutory power granted it and taking necessary steps to give full effect to the provisions of the Act, the National Treasury issued several subsidiary legislation including nine modules of PPP manuals issued as PPP practice notes depicting a typical project cycle and the stages of a PPP project from the legal perspective<sup>123</sup>, and Treasury Regulation 16 all issued in terms of the PFMA. The various subsidiary legislations issued by the National Treasury provides a step by step guide for investors and the public sector involved in a PPP arrangement from inception, obtaining necessary approvals to financial closure and project management. In RSA, both the PFMA and Treasury Regulation 16 identify two major types of PPP contracts the State may enter into. In both contracts, the private sector is required to perform a function traditionally meant for the public sector. They allow the private sector to acquire and commercialise a public facility, or a hybrid. In any case, payment may be either through user charges or direct payment from government. In the case of ICRC, the Act does not specifically identify the types of PPP contracts that are permissible and modes of remunerating the private sector.

Similarly, Nigeria operates a federal system of government which comprises of three tiers federal, state and local governments with each unit having autonomy to regulate and coordinate its own affairs.<sup>124</sup> Thus, the ICRC is a national legislation governing federal MDAs in collaborating with the private sector for the purpose of constructing and maintaining federal public infrastructure and aiding provision of public services at the federal level. In the same vein, it established the ICRC as the regulatory institution responsible for implementing the provisions of the Act. Although the use of PPP has not been officially recognised in every state of the federation, some proactive states such as Lagos have developed their own PPP regulations and

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<sup>119</sup> Act no 1 of 1999 (n 16 above) Chapter 1 (sec 2)

<sup>120</sup> Act 1 of 1999 sec 3.

<sup>121</sup> Act 1 of 1999 Chapter 2 (sec 5)

<sup>122</sup> Act 1 of 1999, sec 76(4)g

<sup>123</sup> National Treasury PPP Manual, Module 1-9 (2004)

<sup>124</sup> The 1999 Constitution (n 15 above).

executed one or more contracts.<sup>125</sup> However, the ICRC does not specifically recognise any type of contract. In order to establish how failure of the ICRC to provide a detailed guide to a PPP contract, which is a major factor responsible for the failure recorded in the use of PPP in the country, and which the PFMA and other subsidiary legislation provide for in details, which explains why PPP has been very successful in RSA, this chapter examines the provisions for PPP inception, feasibility studies and procurement process as contained in Modules 3,4,5 of the National Treasury Manual issued in terms of PFMA and Treasury Regulation 16. It then suggests viable recommendations on how the ICRC can be amended to provide the necessary details required to enable it serve as a means to the end of achieving improved socio-economic infrastructure critical to development job creation and poverty alleviation in Nigeria.

## **5.2 Comparison between RSA regulation of PPP transactions and Nigeria's Regulation of PPP transactions**

### **5.2.1 Project inception in RSA**

Module three of the National Treasury PPP Manual makes provision for preparatory steps to be taken by government institutions intending to employ the use of PPP for executing a project right from the point of identifying the need for a particular structure or public service, to the decision on the best method of project implementation and selection of a competent project team to facilitate the choice of the most competent concessionaire essential for achieving success. Once a public authority identifies the need for a particular project or service, it notifies the relevant treasury authority which is responsible for taking steps to ascertain the best method of executing such project. If PPP is agreed upon as the most appropriate mode, a project officer and a transactional advisor are appointed and vested with the relevant authority to follow up project, obtaining the necessary political support, government approvals and other important implementation steps.<sup>126</sup>

#### ***Project need analysis and project registration***

The first step to be taken by an institution proposing to implement a project is to ascertain whether or not there is actual need for such project. This is done via an initial need analysis

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<sup>125</sup> Lagos State Public Private Partnership Law 2011(n 82 above)

<sup>126</sup> (n 2 above) sec 16.3

aimed at assessing project necessity based on the importance of such project as well as aims and objectives intended to be achieved. However, the need analysis at this stage is peripheral and intended to help in deciding whether or not to kick-start the project, while a further analysis is to be carried out at the feasibility stage. Once project need is ascertained, the proposed project is registered with the relevant treasury where proposed details are entered into the institution's data base and the project is assigned a number with which project progress can be followed.<sup>127</sup> The government institution proposing the project then appoints a project officer vested with the responsibility of ensuring that all necessary steps are taken from inception through completion and operation to achieve desired success and starts up by officially informing the treasury of proposed expertise required for the project.

### ***Appointment of Project Officer, Transactional Advisor and assessing proposed budget***

A project Officer has been defined in the PPP treasury regulation 16 as follows

A person identifies by the accounting officer or accounting authority of an institution, who is capable and appropriately qualified to manage a PPP to which that institution is party from its inception to its expiration or termination.<sup>128</sup>

The project officer has a mandate to ensure that the project is executed as scheduled within the specified time, estimated budget and in compliance with the agreed quality. This duty is carried out by proper planning and delegation of authority as necessary right from inception, throughout lifespan of the project including the first few years of operation. The regulation provides a competence model to be followed in other to ensure that the person appointed has requisite competence and capability to perform the role without which the project may not succeed. Such a person or institution must possess certain good qualities including diligence, honesty, truthfulness, hard- working nature and specified professional qualifications. The project officer who must be formally recruited based on standard terms of employment acts on behalf of the institution and thus must have the full cooperation of other professional staff in different departments including legal, accounting, and management departments as and when needed in other to achieve success.<sup>129</sup>

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<sup>127</sup> National Treasury PPP Manual Module 3, part 1& 2

<sup>128</sup> (n 2 above) sec 16.1

<sup>129</sup> (n 13 above) Part 3, Stage 1

The Project Officer also prepares the proposed project budget and appoints the Transactional advisor who helps to decide the most appropriate type of funding for the work about to be commenced. The Transactional Officer who is usually a group of consultant professionals or one or more firms of professionals working collectively as a team provides all technical details in every field to ensure that the project meets specified quality, it is well implemented and cost is cut down to the barest minimum. In RSA, they facilitate collection of the four Treasury approvals, submit period progress reports and may carry-out initial management functions for few years.. The Project Officer also appoints and heads a team of competent project crew responsible for carrying out various functions important among who is the Secretary who must be competent, efficient, and hard-working enough to carry out the necessary administrative functions including compilation of annual reports and provision of accurate information on project progress whenever requested.<sup>130</sup>

### ***Receiving and evaluation of bids***

A bid evaluation panel must be constituted by the Project Officer prior to evaluation date to enable them get familiarised with the bid evaluation process and have a clear understanding of their duties and bid assessment criteria which must be documented ahead of time. The 'Term of Reference' is also determined to enable the project officer have a clear clue of the institution's expectations as regards the project. Although the content of 'Term of Reference' differs from project to project it must be meticulously drafted in order to attract competent bidders and it must at the least contain PPP Mandate, project purpose, background documentation, budget, feasibility studies and procurement derivable, bidding requirements and evaluation, terms of employment and skills of transaction advisor. It is advisable to make installmental payments rather than once off-payment to the transaction advisor to ensure continued commitment throughout contract duration<sup>131</sup>.

It is however important to point out that proper evaluation of bids and well regulated bidding process are critical to the selection of competent bidders without which the project may not succeed. Thus, this module provides clear bidding rules and also require that all further instructions must be in line with the laid down rules and any further detail, capable of affecting

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<sup>130</sup> (n 13 above) Part 4&5 stage 1

<sup>131</sup> (n 13 above) stage 3



any tendering stage be resolved with the regulatory institution. It specifies the minimum bid evaluation standards and necessary steps which must be taken such as 'compulsory briefing' session during which all instructions relating to bidding will be provided and also requires preparation and endorsement of a detailed bid package by the regulatory institution. A well drafted bid package must contain detailed information as regards bid advertisement, letter of invitation, terms of reference, supporting documents, and must be properly endorsed by the necessary authorities. Upon receiving the bids they should be properly assessed to ensure compliance with stipulated technical details and once confirmed, they should be registered. Thereafter an interview should be scheduled for bidders, conducted and final decision made by the panel, with a detailed record of the process being taken. In case of clog in decision making in relation to two bids, the institution may call for the bidders to submit " Best and Final Offers " (BAFO) and re-bidding may be ordered if deemed necessary as provided in the National Treasury Manual.<sup>132</sup>

### ***Bidding conclusion and signing of contract***

While bids are still valid, project officer and transactional advisor reach conclusive decision on terms of contract and required documents where they are unable to reach an agreement with the successful bidder on contract terms, the next ranked bidder should be summoned for negotiations and once agreement is reached and contract signed, all unsuccessful bidders must be promptly notified. The payment made to transactional advisor may be raised via Project Development Facility (PDF) put in place by government as a tool for assisting institutions with project cost. The PDF is a PPP fund established by government in line with the provisions of the PFMA; however, amount obtained from the fund is later refunded upon being recovered from the successful bidder. The fund is used to finance all projects regardless of size or sector involved. It must be noted that financial assistance is only rendered in relation to registered and approved projects.

### **5.2.2 Project inception under the ICRC A**

The ICRC A does not make detailed provision for steps to be taken and requirements to be met before a proposed project can be approved by the Federal Executive Council. The Act simply

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<sup>132</sup> (n 13 above) Part 5, stage 3.

requires the submission of a project proposal to the Federal Executive Council upon recommendation of the relevant sector.<sup>133</sup> The Act did not provide for appointment of an officer to be in charge of each project and also failed to recognise the need to register projects in order to facilitate proper monitoring. The need to have a competent team comprising of transactional advisor, secretary and other staff assigned to a particular project, making specific provision for their qualification, employment terms and remuneration is not provided for in the Act especially the transaction advisor who are usually a team of experts necessary to achieve success in a PPP transaction. The Act also failed to provide for initial survey including need analysis, solution option analysis, proposed project budget and technical expertise required and other initial analysis for necessary to determine whether the project is a necessity, the best method of executing the project, institutional capacity to undertake such a project, risk allocation, value for money, funding and proposed cash inflow. All these considerations which are omitted in the Act are critical to making a success of any PPP arrangement.

In relation to bidding, the Act simply provides that there must be advertisements in three national dailies calling for bidders to be involved in a competitive public bidding session, and contract shall to be awarded to the best bidder who has met pre-qualification requirement. No further specification is made on how to conduct the bidding process, how to address allegation of lack of transparency by a failed bidder, what amounts to pre-qualification requirements and need to notify failed bidders of the outcome of the bidding process among other obvious loopholes. Whereas the ICRC did not specify the process of bid evaluation, the persons responsible for conducting such evaluation, in RSA, a panel is to be constituted for the purpose of evaluating bids, the criteria for evaluation is provided and the evaluation will be followed by an interview of the successful bidder. Where contract terms could not be agreed upon between the institution and the successful bidder the next bidder will be interviewed and if it agree on terms of the contract, contract will be signed. Furthermore, in RSA, approval is obtained in stages to prevent any attempt to side-step proper assessment and ensure that only qualified and competent bidders are awarded contracts.

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<sup>133</sup> Act of 2005 sec 2(2).

### 5.2.3 PPP feasibility study in RSA

The importance of feasibility study to the success of PPP cannot be over emphasised. It helps to ascertain the institution's ability to carry-out a procurement exercise revealing risk sharing formula, how to obtain the best value for money, and the appropriateness of PPP in the circumstance. Thus before a project is commenced, the public institution proposing such project through the Project Officer must carry out a detailed feasibility study. In the case of RSA the requisite approvals will not be granted unless feasibility study has been conducted, and if after obtaining the first approval but before the third, there is a substantial variation in the data or assumptions that formed the basis of granting the approval, the details of such variations must be made available to the National Treasury. Module four of the National Treasury PPP Manual provides a detailed guide on how to carryout feasibility study in relation to a project and will be examined below.<sup>134</sup>

#### *Need Analysis and solution option analysis tests*

The need analysis test helps to determine whether a proposed project is in line with government's development policies, meets public demands for social services and whether the institution will be able to provide such a project considering the required human, capital and technical resources and the proposed project duration. It is important to analyse available budget and show that the institution is able to handle project demands, identifying possible areas of lack of competency and making proper provision for them. Also, a plan must be prepared on how to consult with major stake holders especially the National Treasury to enable them express their views and to have such views incorporated into the existing plans. The need analysis test must involve specification of proposed project output and existing plans on how to achieve the specified outputs and whether the output meets public need and institution's needs, service provision responsibilities as well as aims and objectives.<sup>135</sup>

On the other hand, the solution option analysis test helps the institution to ascertain the best way of executing a project after a careful consideration of all options or combination of options based on the estimate of resources that will be required to complete the project. Thereafter, the

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<sup>134</sup> (n 2 above) sec 16.4.

<sup>135</sup> National Treasury PPP Manual, Module 4. (stage 1)

institution determines whether PPP is the most appropriate procurement method based on a properly conducted due diligence putting into consideration merits, demerits, risks and benefits of both PPP and traditional procurement methods and other crucial considerations such as financial impacts, affordability and funding, service delivery arrangements, trans-national management issues, applicable laws, risk transfer, value for money, future estimated cash flow from projects and any other important factors. At the completion of the test, the best procurement method will be chosen based on the test result. If PPP is chosen further tests will be conducted but if not, feasibility study may be repeated.<sup>136</sup>

### ***Project due diligence***

A project due diligence is conducted to properly examine the possible solution options based on proper consideration of a range of issues that will have great impact on project success right from inception to the operation stage. First, a detailed legal due diligence must be conducted putting into consideration all possible applicable laws and the possibility of any regulatory challenges. This will reduce bidding cost and duration of postponing such issues to a later date. Since PPP usually cuts across numerous fields, a wide range of laws will be considered including contract law, labour law, tax law, competition law, environmental law, foreign exchange laws, financial instruments, and other legislation. Also, government must resolve all potential issues relating to project sites especially where land is allocated for the project, matters relating to land ownership and control during the duration of contract, land claims, possible land impediments, environmental impacts and geo-technical issues, right of easement and right of entry, town planning and zoning, ownership and transfer of property acquired for the purpose of project execution. Furthermore, a value assessment test must be conducted to determine whether application of PPP will help obtain the best value for money and possibility of transferring risk to the private sector. Value assessment is carried out based on comparable models, usually a model of comparison between traditional procurement method and PPP is developed putting into consideration the above stated variables.

Central to the considerations is risk, affordability and value for money based on similar previously executed project where such exists, while affordability is determined by comparing

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<sup>136</sup> (n 20 above) stage 2.

project cost estimate, the institution's budget and survey of proposed income flow from project implementation. Other variables such as financing sources including project finance, equity and debt financing, inflation, currency depreciation and exchange rate depreciation must be considered meticulously. While project risk is considered via a risk adjustment model considering possible risk, possibility of such risks occurring, possible impacts of such risks if they occur including cost effect, risk mitigation, proper risk allocation and other possible variations relating to project risk. Risk can be properly allocated via a comprehensive risk matrix. The transaction Advisor must put in place a well-constructed risk matrix and a PPP reference model based on the result of the various analysis putting into consideration all possible variations. This will help the parties to achieve proper risk allocation<sup>137</sup>.

### ***Value Assessment, procurement plan and economic valuation***

A properly conducted PPP feasibility study must also include payment mechanisms, cost consolidations and a risk adjustment model to help cater for unforeseen variation that might hinder project construction based on proposed plan. This is effected via a sensitivity analysis which considers major variables and the possible impacts which they may have on project affordability, value for money and risk. A major sensitivity factor is a variation in production cost as a result of increase in the cost of one or more factors of production as a result of which the production cost exceeds the prepared estimate. This may hinder the concessionaire from completing project within the agreed duration or may affect the quality of projects where the concessionaire improvise inputs in other to avoid alteration of expected profit. It is also important to conduct an initial value for money test at this stage based on application of key assumptions to the various models. Thus, factors such as equity and debt ratio, debt servicing, liquidity ratio, inflation, service demand, total operational cost, project duration and taxation must be duly considered and included in the hypothetical calculation.

Furthermore, affordability must be ascertained once again. This time by full consideration to ensure that the proposed project is affordable This is done by determining the exact amount the institution is willing to spend on the project and comparing it with the risk adjusted hypothetical model already prepared. If the project is affordable, yields the best value for money under a well

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<sup>137</sup> (n 20 above) stage 3.

drafted risk sharing formula, all information are verified by a confirming statement from the Transactional Advisor in relation to accuracy of information and assumptions that form the bases of decision to proceed with the PPP. Where the type of project is being proposed for the first time and involves huge capital investments or requires high level of externality which must also be assessed, an economic valuation report must be prepared showing opportunity cost of the project and various project inputs. A procurement plan is prepared showing that the institution has the wherewithal and technical competency to proceed with the project . The feasibility report is then revisited and signed by the Transaction Advisor to confirm technical details and also signed by the institution, selected bidder and other relevant parties.<sup>138</sup>

#### **5.2.4 PPP Feasibility Study in Nigeria**

Unlike the ideal PPP provision based on international best practices which has been adopted in RSA, the ICRCRA draftsman did not deem it necessary for an institution proposing a project to take preliminary steps towards ascertaining project appropriateness, the best way of executing such project, the procedure for permits and approvals and minimum standards to be met by both the institution and the investor. Even where similar provisions can be found in one part of the Act or the other they lack the necessary details and thus have failed to yield desired results. In relation to feasibility of projects, the ICRCRA provides that the federal agency shall ensure that project proponent has the skill, experience and means to embark on the project without specifying the minimum standards for assessing institutions ability.<sup>139</sup> In the same vein, provisions for important procedures such as project due diligence, legal compliance, various permits and approvals, value assessment, procurement plan, and economic valuation are clearly left out in the Act, hence the attendant lack of commitment of both private and public sectors and the resultant failure.

#### **5.3 Case studies**

Successful use of PPP requires both private and public sectors to be proactive; government must be highly committed to achieving success by taking necessary steps to put in place proper

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<sup>138</sup> (n 20 above) stage 4,5,6.

<sup>139</sup> Act of 2005, sec 2(3).

regulatory framework, ensure that projects are properly planned, effectively monitored right from inception, and adequately regulated via properly drafted laws and result driven institutions.

#### **N4 toll road between South Africa and Mozambique**

In 1996, the governments of RSA and Mozambique jointly signed a 30 year BOT for road construction between Witbank in South Africa and Maputo in Mozambique to Trans-African Concessions (TRAC) The contract which was worth 30 billion Rands as at then was financed via 20:80% equity-debt ratio. The debt was raised through several investors including RSA Infrastructure Fund, Merchant Bank Asset Management, ABSA, Standard Bank, Nedcar Bank, Development Bank of South Africa, First National Bank, Mine employees, and Official Pension Funds. Because PPP was considerably new, government support was indispensable and consequently, guarantee was provided by the two governments jointly and severally on the debt, Also conditional guarantee was provided on the equity also. Based on the arrangement, concessionaire's ability to recoup his money was subject to traffic flows on the road, and was adversely affected by the low level of trade between the two countries before the traffic improved between 2003 and 2004. Also, as a result of the poverty level in Mozambique and the existence of an alternative free road, the people were neither willing nor able to pay toll fees, thus, cross-subsidy was provided and the high returns from the South African end was augmented with the low cash flow level from Maputo end.<sup>140</sup>

Considering the number of parties involved and novelty of PPP at that time which led to uncertainty, success could only be achieved by proper planning, well conducted feasibility study and project due diligence and the existence of strong regulation and government commitment. The parties were able to foresee possible risk including the one relating to low returns, and agreed on a fair risk sharing formula. In addition, the governments realised the importance of providing guarantee to encourage investors without which the two huge capital required for the project may be difficult to raise.

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<sup>140</sup> The South African Institute of International Affairs and NEPAD'S '*Assessing Public Private Partnerships in Africa*' 2005.

## **RSA Prison Contract**

As a result of poor structures and insufficiency of prison facilities, the South African government, in the year 2000, signed a 25-year DBFOT contract for the construction of two maximum security prisons based on the UK private prison model. The Department of Public Works' Asset Procurement and Operating Partnership Systems (APOPS) which was in charge had intended to construct 11 prison structures but discovered at the planning stage that government cannot finance more than two of such structures. In not less than two years, the two structures became fully operational with a capacity that accommodated up to 3000 inmates each. A 2002 survey conducted by government on the prison conditions and services shows that the prisons provide quality services while incurring the same cost as the public prisons. The survey also shows that the feasibility study was not properly conducted hence the expected standards of living planned for each inmate is such that will be beyond governments' proposed budget, and the returns on equity push up long term risk to government.<sup>141</sup> Thereafter, government introduced meticulous PPP regulation by vesting authority on the National Treasury to follow up projects from commencement to completion. This shows the importance of a properly conducted feasibility study to help establish an accurate project cost estimate and ability of government to afford the cost. It also shows ability of private sector to provide qualitative services at affordable prices.

## **Muritala Muhammed Airport Terminal Two Concession Contract**

In 2003, the Federal Government of Nigeria awarded a concession contract to Bi-Courtney Aviation Services involving construction and management of Terminal Two of the airport and building of a hotel within the airport vicinity. Initially, it was agreed to be for a period of 18 months, later extended to 33 months and then 36 months. The airport construction was concluded and commissioned in 2007. The contract which was worth about N65 billion was financed by the concessionaire via bank borrowings to be recouped via user charges from airline operators however, recouping of investment and profits has been difficult as a result of failure of the Federal Airports Authority of Nigeria (FAAN) to fully cooperate with the concessionaire. First, the usage survey was highly over estimated, thus, contrary to the expected passenger flows of

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<sup>141</sup> A Merrifield et al 'The Asset Procurement and Operating Partnership system (APOPS) for prisons in South Africa' (2002) 20 *International Journal of Project Management* 575-582.



about 4 million, the terminal barely manages to get up to 1 million passengers. Also, in breach of the terms of contract, the airports authority permits some local flight operators to operate from the general terminal thus short-changing the concessionaire. However, despite the fact that a court judgment has been obtained against such unfair practices, it has not been stopped; rather, there are allegations of debt made against each other by both the concessionaire and FAAN. Consequently, the concessionaire has not been able to finance construction of the hotel facility as agreed upon.<sup>142</sup>

This is one of the PPP contracts that may be regarded as successful in Nigeria, but a careful look at it shows that the various loopholes which exists results from absence to a proper planning right from inception. A well conducted PPP feasibility, due diligence and a properly drafted procurement plan which takes into consideration all possible variations would have averted the existing problems. First, the continuous extension of contracts duration shows absence of a well-planned contract and besides, over-estimation of cash flow at the operation phase and failure to foresee and provide for some occurrences instances such as boycotts by the flight operators and the poor regulatory frame work.

## **5.4 Conclusion**

A detailed assessment of PPP regulation in RSA in comparison to what is obtainable in Nigeria shows that the various regulations contain a detailed guide on every step of a project. In RSA, as against the provision in Nigeria, the PFMA is the principal legislation which contains basic instructions while the details of how to go about projects is contained in the various National Treasury Manual which are subsidiary legislation enacted by the relevant authority. Considering the complexity of a typical PPP arrangement, it is obvious that such a transaction is better regulated via a series of laws which can provide the necessary guide in a detailed manner. Thus lessons can be learnt from PPP regulation in RSA on how to amend the ICRC and enact requisite subsidiary legislation in other to make a success of PPP arrangements in Nigeria.

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<sup>142</sup> 'A Failed Romance: Why Public Private Partnerships Do Not Work in Nigeria' International Centre for Investigative Reporting 1 February 2012.

## CHAPTER SIX

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1 Summary of findings

This study argues that there are various gaps in the ICRCA which rendered it substantially ineffective in driving functional PPPs in Nigeria and the failure of PPP as a technique for facilitating sustainable infrastructure development is as a result of these gaps in the Act. Hence, there is a urgent need to amend the ICRCA in order to bridge the huge infrastructure gap through the use PPP. This will aid poverty reduction, job creation, maximum national productivity and sustainable development.

Chapter two examined the present state of infrastructure in Nigeria, explaining the importance of functional infrastructure to national development. The discussion centered on transportation and power sectors. It was found that as a result of bad governance which led to several other problems, the country reeds under huge infrastructure deficit, and that modern infrastructure financing technique will be needed to bridge the gap, since government cannot solely provide the finance and technical expartise required.

In chapter three, PPP was explored as a globally prevalent infrastructure financing technique which involves public-private contractual relationship based on shared risks, responsibilities and returns realisable from investing in a particular project. The chapter then focused on PPP in Nigeria and a conclusion was drawn to the effect that PPP has been largely unsuccessful in the country, hence it is important to examine the regulatory framework governing it in order to ascertain the causes of the failure and come up with practicable solutions to it.

Chapter four appraised the ICRCA as an instrument that provides the legal basis for PPP in Nigeria. It identified various omissions and provisions in the Act which gave room for the poor performance of PPP in the country. These include failure to make provision for transparency, separation of powers, checks and balances as well as adequate and effective dispute resolution mechanisms. The chapter was concluded by a recommendation for proper amendment of the Act for successful PPPs and attainment of sustainable development.

Chapter five made a detailed comparison of the first three steps of a PPP arrangement as contained in the ICRCAs, and in the South African PFMA and first three modules of the National Treasury Manuals. It was found that the ICRCAs lack the necessary details needed to drive an effective PPP arrangement. For instance, no provision is made for the process of assessing project viability prior to applying for approval. It was concluded that the ICRCAs should be amended and various existing policy documents and directives should be compiled into PPP regulations as subsidiary legislation to provide detailed guide needed to make a success of a typical PPP arrangement.

## **6.2 Conclusions**

The central argument of this study is the need to provide a functional and virile PPP legal and regulatory framework in order to facilitate sustainable development in Nigeria. Access to basic infrastructure facilities was established as a major driver of the economy. However, since government have neglected provision and maintenance of infrastructure assets for several years, it became necessary to adopt modern infrastructure financing techniques as traditional financing cannot meet national infrastructure need.

Consequently, the ICRCAs were enacted in 2005 as the infrastructure legislation meant to facilitate private involvement in infrastructure development through PPP arrangements. Unfortunately, performance of PPP in the country has been very poor as a result of numerous factors which centers on legal and regulatory deficit. Hence, the urgent need for appraisal of the PPP governing law and policy framework in order to figure-out where the problem lies and suggest practicable lasting solutions. A detailed appraisal of the ICRCAs was carried out with emphasis on the legal and institutional provisions, pointing out the lapses in it, effects of such lapses on projects and practicable solutions were suggested. In addition, considering the better performance of PPP in South Africa, a country with a transitional economy similar to that of Nigeria, a comparison of ICRCAs and PFMA was made with particular emphasis on project inception, feasibility study and procurement process. It was discovered that the ICRCAs failed to provide the necessary details as regards these major steps which must be taken in a project.

An amendment of the ICRCA was suggested in order to reflect core principles and policies prioritized by the public sector including increase in quality, quantity and accessibility of public services, transparency, accountability and sustainable development. The PPP policy must be consistent, well implemented and flexible enough to accommodate modifications usually necessitated by socio-economic and political changes. Also, the various PPP policies, recommendations and directives should be passed into law as subsidiary legislation in order to create the necessary legal basis for them. The public sector must monitor projects properly and be highly committed to achieving success.

### **6.3 Recommendations**

In view of the detailed appraisal of the ICRCA, juxtaposition of the Act with the PFMA and other subsidiary legislation, and examination of cases of successful use of PPP in other climes, the following recommendations are made:

Provisions of the ICRCA needs to be amended in two regards firstly, it will be necessary to clarify the numerous unclear provisions of the Act in order to make it easier for each contracting party to identify their roles and duties and important provisions such as dispute settlement clearly left-out in the Act must be incorporated. Secondly, it will be necessary to curtail the unfettered powers granted to the president under the Act. This will help to drastically reduce instances of corruption, lack of transparency and undue political influence.

On unclear provisions of the Act, the procedure for ascertaining project viability prior to application for approval, the bidding pre-qualification requirement and assessment, and process of assessing applications prior to approval by the FEC must be clarified. Also, the yardstick for assessing a project proponents' financial and technical competence before signing a contract must be clearly stated. It is also important to specify how the grievances of failed bidders who alleged lack of transparency in bidding process will be addressed and the condition precedent for granting or basis of refusal of government guarantee as well as the types of government support that may be provided.

Furthermore, on the issue of insurance policy, the various insurance policies which can be applied to projects, the yardstick for determining the most suitable policy for a particular project, sanction for failure to insure a project as well as indemnity details in case of occurrence of the

insured event must be clearly stated. Similarly, circumstances that may warrant termination of contract such as acts of God and *force majeure* as well as the rights and liabilities of parties in the event of such premature termination must be clearly provided. In addition, a concessionaire's property right and issues relating to profit repatriation, protection from expropriation and manner of compensation in the event of expropriation must be provided in details. Lastly, membership of the Commission's governing board must be adjusted to exclude some political office holders, specify their qualification and include more qualified experts. The offices of the ICRC's Director-General(DG), Chief Accounting officer and Secretary must be also separated and the duties must be vested in different persons

As to the need to curtail the powers of the president, it is important to divest certain authorities from the hands of the president and vest them in experts who should be neutral third parties or subject exercise of such powers by the president to adequate checks to prevent abuse and undue influence. The instances referred to in the Act are as follows:

First, the President's authority to single handedly remove a Commission or board member from office must be subjected to checks. The grounds for such removal, for instance, what amounts to misconduct, and public interest, as well as how to address unfair dismissal must be provided for in details. Also, examples of binding presidential directives which can be addressed to the Commission must be clearly stated and assessment of Commission's budget must be shared between the president and expert third parties to provide the requisite transparency needed.

With respect to enactment of subsidiary legislation, the appraisal of the ICRC conducted shows that the Act provides basic but not detailed guide lines on the necessary steps to be taken by the relevant institutions in monitoring a project but also empower the ICRC and the board to issue guidelines when necessary<sup>143</sup>. It is important to point out that because PPP contracts are usually complex, approval should be granted in stages rather than the once-off approval provided under the ICRC. In view of the above, it is recommended that regulations be issued in relation to three major stages of PPP contract namely Project inception, Feasibility study and PPP Procurement.

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<sup>143</sup> Act of 2005 (sec 34)

First, procedure for establishing project viability prior to applying for approval must be provided in details. These are steps to be taken by a MDA proposing a project, including establishment of project need to avoid unnecessary duplication, ensuring the project is being proposed by the proper party who is responsible for putting such a structure or service in place and ascertaining the best mode of executing the contract whether higher value for money will be obtained by traditional procurement method or by use of PPP. In case of adopting PPP, the Act must provide for the constitution, qualification, responsibilities and terms of employment of the project team, including the project officer and transactional advisor. The content of application for approval and procedure for initial project registration must also be contained in the subsidiary law.

Second, on project feasibility study, the PPP regulation should provide necessary guide-line on how a project feasibility study will be conducted considering the importance of such study to the success of a project. The provision must specify the details of analysis needed, as regards the best possible combination of legal, technical, financial options for the project with the primary objective of obtaining the best value for money and substantial transfer of risk to the most competent party. It should also provide direction on how to conduct due diligence, including comprehensive legal due diligence, site related issues like land ownership and acquisition, environmental matters, town planning and zoning issues, and contractor's property right. Furthermore, the regulation should provide all necessary guide on value assessment, affordability, risk transfer and risk variances including possibility of risk occurring, effect of such risk if it occurs, mitigating of such effect; and economic viability test. Lastly, the regulation must stipulate that a detailed report should be submitted to the appropriate authority at the conclusion of the feasibility study, this will be considered to decide on granting or refusal of the requisite approval.

Finally, there must be a regulation dealing solely with the PPP procurement process. It must contain all relevant information in relation to selection of the successful bidder, including advertisement of bids, pre-qualification requirements and process, bid submission, bid evaluation, evaluation criteria, bid bond, notification of unsuccessful bidders and other relevant information. It is important to provide at least two stages of pre-qualification process to reduce the number of bidders to the barest minimum and ensure that only competent bidders are involved eventually. Payment of bid bond must also be required to secure bidders' commitment.

The regulation should contain all further details including eligibility of parties, maximum number of bidders to be selected, avoidance of conflicts of interest, content of bid application, quality management system, environmental impact assessment, basic minimum requirements, specification of service, expected standard, details of evaluation process, choice of successful bidder, notification, submission of procurement report in other to obtain approval. Also provision must be made for the negotiation process, sorting out of ties and signing of the contract.

It is believed that these recommendations will be useful for facilitating sustainable infrastructure assets development in Nigeria.

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