

STAKEHOLDER PERCEPTION ON THE ADEQUACY OR OTHERWISE OF NIGERIA'S LEGAL FRAMEWORK ON PUBLIC PRIVATE PARTNERSHIP

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ABSTRACT

The paper is an empirical study that sought to gain insight into the opinions of key stakeholders on the adequacy of the existing legal framework on Public Private Partnership (PPP). In response to glaring infrastructure deficits and paucity of public funds, the Federal Government of Nigeria, through its various policies and National plans, had supported the implementation of PPP, which culminated in the development of so many PPP projects including the Nation's PPP flagships, the Murtala Muhammed Airport 2 concession, the Nigerian Ports terminal concessions and the Lekki Toll Road concession. In spite of the support, many projects have either failed, stalled or are in litigations, which could be attributable to either the failure of Critical Success Factors or a weakness in the extant legal framework. With no fewer than thirty-six legislation, three Executive Orders and eight National policies, it is appropriate to conduct an empirical study that could shed more light on whether or not the current legal framework is adequate. Thus, this paper, adopting a phenomenological design and qualitative method of research, analyzed a total of sixty-two questionnaire survey responses administered on eighty-two targeted participants from twenty-four regulatory, implementing, partnering and consulting organizations that were selected based on purposive and snowballing samplings. Using the framework analysis approach, it categorized data into three themes to arrive at the conclusion that the legal framework was not adequate; that it required amendments of specific legislation; and that Nigeria does not require any new or additional legislation or policy to make a success of its PPP policy. Consequently, the paper recommended that both the ICRC Act and the National Policy on PPP should be amended for a more robust and receptive PPP system.

Keywords: PPP Legal Framework; Critical Success Factors; Phenomenological Research Design; Sampling Technique, Data collection, analysis and interpretation.

INTRODUCTION

The fundamental issues that could arise in any appraisal of the legal regime of Public Private Partnership (PPP) in Nigeria would ordinarily include the adequacy of the existing legal framework and its capacity to successfully deliver public infrastructure assets and services. Nigeria has massive infrastructure deficits,ⁱ insufficient funds for its infrastructure requirements and has, through its various National plans, created a central role for the private sector to fund its public infrastructure. The policy directions of the Federal Government from 1986 to date underscored the role of the private sector in public infrastructure investment,ⁱⁱ the latest and most comprehensive cognate infrastructure policy document being the Nigeria Integrated Infrastructure Master Plan (NIIMP),ⁱⁱⁱ which was developed in 2014.

The sole objective of the 30-year integrated infrastructure master plan was to reduce the Country's infrastructure deficit from 20 – 25 percent of Gross Domestic Product (GDP) while increasing the stock to a minimum of 70 percent of GDP.^{iv} The private sector has the largest ratio of funding the master plan among the four identified financing stakeholders, i.e. the Federal, State, Local Government and the Private sector, with the latter expected to contribute 48 percent of the funding.^v However, in spite of Nigeria's efforts to achieve its PPP objectives, there seems to be doubts on the efficiency and effectiveness of the legal framework, whose role in determining the outcomes of national and sub-national aspirations for infrastructure provision cannot be overemphasized. This paper therefore adopts a phenomenological research design^{vi} to investigate, through qualitative research, the opinions of relevant PPP stakeholders on the adequacy or otherwise of the PPP legal framework.

For easier understanding, the paper is divided into four sections, namely, Introduction, literature review, the data presentation methodology and the conclusion. The data presentation methodology is divided into six sub-sections in line with standard practice for research reports.^{vii} The first and second sub-sections discuss the objectives for data collection and the

efforts made to select participants that could adequately respond to the objectives of the data collection, i.e. the sampling techniques. The strategy, collection of data and its analysis are in sub-sections three, four and five respectively, while the sixth sub-section is on interpretation of the data.

LITERATURE REVIEW

PPP, as a universal concept, has no common definition. In Nigeria however, it was defined, using the nomenclature of ‘concession’, as a contractual arrangement whereby the project proponent undertakes the construction of public infrastructure together with its operation, maintenance and supply of its equipment and machinery.^{viii} In order to understand fully the concept of PPP under the ICRC Act, reference must be done to section 7(2)(b),^{ix} which obligates maintenance and repairs as part of the scope of Nigeria’s PPP projects. Although there are different definitions and perspectives on the definition of PPP in many jurisdictions and by various Multilateral Development Banks (MDBs), the consensus is that PPPs are long-term contracts for private sector participation in public infrastructure and services based on shared risks, shared resources and shared rewards.

Since 1986 when the Government came up with the Structural Adjustment Programme (SAP),^x culminating in the promulgation of the Technical Committee for Privatization and Commercialization Act of 1988, encouraging the private sector to take over the commanding heights of the Nation’s economy as a State policy, the success rate of infrastructure development under PPP has been less than 10 percent,^{xi} and even where it succeeded, the operations and maintenance of the infrastructure had fallen below the aspirations of parties. Apart from the concession of the Nigerian Ports Authority (NPA) and the Murtala Muhammad Airport Terminal 2 (MMA2) concession, there has not been any outstandingly successful PPP project. Even the MMA2 concession, which achieved financial close in record time and was delivered in 2007 within three years, had been dogged by controversies, disputations and court cases until ICRC intervened to resolve the issues between the parties.^{xii}

Promising projects, which were flagged off with much fun and fanfare, like the Lagos State Lekki Road Concession project, the Lagos-Ibadan Expressway project and the Second Niger

Bridge PPP project, have failed as PPP projects even though financial close was effectively achieved. In fact, the Commercial Operation Date (COD) of Lekki Road Concession project was even attained, and the project was operated for two years before it failed as a PPP project.^{xiii} It is amazing that these projects failed in spite of multilateral approaches of support by both the government and its development partners. The tendency is to attribute the ugly situation to either a failure of PPP Critical Success Factors (CSFs)^{xiv} or a weakness in the larger gamut of the legal framework. Although there have been many empirical studies on the identification of those factors agreed as constituting CSFs,^{xv} there is consensus that they could successfully create and sustain peak performance cultures in an organization.^{xvi} These factors include economic viability of projects; capacity of the Special Purpose Vehicle; commitment of the government; the financing mechanism; and the enabling economic and political environment.^{xvii} These, within the general PPP legal framework, are the few key areas that dictate success.^{xviii}

It is auspicious at this stage to ask the question, what is a legal framework? Since framework has been defined^{xix} as a basic structure that provides support for something, it follows without argument that a PPP legal framework is a broad system of rules and regulations that supports, governs and regulates PPP decision making, and as such it is rooted in legal, regulatory, institutional and financial legislation and policy documents,^{xx} which are either developed or have been in place to ensure effective and efficient implementation of the scheme.^{xxi} In fact, legal framework includes not only the core component of the legislation itself, but also the administrative, political, social and economic conditions or arrangements, which make the legislation available, accessible, enforceable and therefore effective.^{xxii} The United Kingdom Department for International Development (DFID) captured it appropriately when it posited that a legal framework is composed of the international obligations, the legislation, the legislature, the judicial system, the regulators, the regulated, the beneficiaries (public), the social support mechanisms, the political commitment to implement the law and the resource to apply and enforce the law.^{xxiii}

The legal instruments and National plans underpinning Nigeria's PPP legal framework therefore included the Constitution of the Federal Republic of Nigeria;^{xxiv} the Infrastructure Concession Regulatory Commission Act;^{xxv} the Public Enterprises (Privatization and

Commercialization) Act;^{xxvi} and more than thirty-one other legislation, three Executive Orders and eight National policies. In spite of this robust legal framework, the success rate of Nigeria's PPP is still low, thereby raising appetite to seek stakeholder opinion on the three reasons for failure,^{xxvii} i.e. soundness of existing legal framework, strength of judicial system and knowledge of the framework by key stakeholders. It is within this context that this empirical research is conducted.

METHODOLOGY

In conducting an empirical examination of the adequacy of PPP legal framework in Nigeria, the work adopted a qualitative approach of research methodology that leverages on people's knowledge, understanding and experiences of the PPP process.^{xxviii} This approach is subjective, non-statistical and revolves around the perception of the respondents.^{xxix} However, this 'subjectivity' bias could not detract from the utility of the approach in providing a clue of the 'why' and 'how' of a phenomenon,^{xxx} which partly addresses an appraisal of the general PPP legal regime. The paper did not consider the quantitative data method in its data collection and analysis. This is because any outcome or expected data of quantitative approach in this type of study would neither be numerical nor subject to statistical analysis. In fact, the ultimate findings would not be measured in units, prices, percentages, rates, ratios and rankings. Furthermore, it is not the intention of this paper to rank elicited issues in terms of any priority. It was for the same reasons that the paper did not also adopt the mixed method, i.e. a mixture of qualitative and quantitative methods, either concurrently or sequentially.^{xxxi}

Objectives for Data Collection

Qualitative data method requires clarity on the objectives of data collection.^{xxxii} This allows for appropriate alignment to enable participants satisfactorily respond to semi-structured, unstructured or open-ended questions based on the aspiration and to the satisfaction of the researcher. It is against this background that the paper begins with the formulation of the objectives of the data collection, which are briefly articulated in the following basic queries:

- i. Is Nigeria's legal framework adequate? If not, what other legal instruments or policies could be introduced to strengthen it; and
- ii. Are the contractual structures in Nigeria's PPP agreement effective as to ensure the success of PPP projects?

For easier understanding, the above data collection objectives could be extrapolated into four research questions as follows:

- i. What are the relevant laws enabling and impacting on private sector participation in the provision of public infrastructure and services in Nigeria?
- ii. What are the contractual structures and key provisions critical to a successful PPP transaction?
- iii. Whether the extant PPP legal regime in Nigeria is adequate as to assure successful delivery of PPP projects in Nigeria?
- iv. Whether there is any other law(s), regulation(s), guideline(s) or practice(s) that can strengthen Nigeria's legal regime for the purposes of achieving a more effective and successful implementation of PPPs?

It is important to point out that the research questions above, which were on the adequacy of the extant legal regime and a suggestion of any additional legal instrument to strengthen it, *ipso facto*, formed the basis for the formulation of fourteen unstructured, open-ended questions of the questionnaire.

Sampling Techniques

The participants were generally selected through purposive sampling,^{xxxiii} and with respect to two organizations through snowballing.^{xxxiv} It should be noted that in purposive sampling, the researcher deliberately identifies participants to share information according to their knowledge, observations and experiences. In snowballing sampling however, participants are selected based on recommendations. Middle and senior cadre management officials that were involved in one aspect of the PPP process or the other in public, private and consultancy

organizations were targeted as prime respondents. They were purposely selected to participate^{xxxv} on account of first, their first-hand experiences in specific PPP projects in which their organizations were involved, and secondly, in view of the study's data collection objectives.

Consequently, data were collected from twenty-four Federal ministries, governmental agencies and private entities that comprised of seven regulatory agencies, five implementing government departments, six private sector participants and six consultancy firms. The study selected between three and four senior and middle cadre management staff from each of the identified organizations. All the selected officers were, one way or the other, responsible for conceptualization, procurement and/ or implementation of PPP projects. It should be noted that of the twenty-four identified organizations, two organizations were included based on the recommendation of one of the respondents, a typical case of snowballing sampling. It is to be further noted that each categories of stakeholders had more than one representation in order to get opportunity of different experiences.

The targeted agencies and firms were ICRC, BPE, Bureau of Public Procurement (BPP), Nigerian Investment Promotion Council (NIPC), Federal Ministry of Justice (FMOJ), Federal Ministry of Finance (FMOF), AIIC, Federal Ministry of Works & Housing (FMWH), Nigerian Ports Authority (NPA), Nigerian National Petroleum Corporation (NNPC), Federal Airport Authority of Nigeria (FAAN), FCDA, the Infrastructure Bank Plc., First Bank of Nigeria Plc. (FBN), the Dangote Group, BGD (Nigeria) Limited, Ports & Terminals Multi-services Limited (PTML), Bi-Courtney Limited, Yolas Consultants, Adamu Kassim & Associates, Murty International Limited, Brickstone Limited, B. O. Omale & Co., and K. T. Turaki SAN & Co.

To ensure that participants meet the study's criteria of respondents without compromising their privacies and ensuring that they have the requisite knowledge as well as profoundly share their experiences, four questions were included in the questionnaire for the data collection. These were:

1. Which category of organization do you work with?
2. What cadre of Management Staff are you?

3. Your experience in PPP projects.
4. Give details of one PPP project, i.e. Name of project, your specific role and for how long were you involved in the project?

Although the organizations and participants were few and represent a fraction of those involved in PPP processes, they yet represent a broader category of all necessary and critical stakeholders in a PPP environment, and hence their opinions could be representative of general opinions. It is important to mention that for the purposes of the study and as pointed in **Table 1** hereof, these organizations were divided into four categories, namely regulatory or facilitating agencies, implementing public authorities, private sector partners and consultancy firms. ICRC, BPE, BPP, NIPC, FMOJ and FMOF were categorized as regulatory agencies. The implementing public authorities were listed as the FMWH, AIIC, NPA, NNPC, FAAN and FCDA. The private sector partners were considered as the Dangote Group, BGD Limited, PTML and Bi-Courtney Limited. Although they are lenders, the Infrastructure Bank Plc and First Bank of Nigeria were put in same category as private sector partners. The last category is consultancy firms, which had Yolas & Consultants and Adamu Kasim & Co. as project designers, Murty International Limited and Brickstone Limited as transaction advisers, and B. O. Omale & Co. and K. T. Turaki SAN & Co. as legal practitioners/ consultants. These organizations represented a variety of respondents in a PPP environment, which type of representation was described as a good practice for triangulation purposes.^{xxxvi}

Table 1: Table Showing the Targeted Participants and their Categorizations

S/N	Organization of Participants	Type of Organization
1	Infrastructure Concession regulatory Commission (ICRC)	Regulator/ Facilitator
2	Bureau of Public Procurement (BPP)	Regulator/ Facilitator
3	Bureau of Public Enterprise (BPE)	Regulator/ Facilitator
4	Federal Ministry of Finance (FMOF)	Regulator/ Facilitator

5	Abuja Infrastructure Investment Centre (AIIC)	Regulator/ Facilitator
6	Nigerian Investment Promotion Council (NIPC)	Public Authorities
7	Federal Ministry of Justice (FMOJ)	Public Authorities
8	Federal Ministry of Works & Housing (FMWH)	Public Authorities
9	Nigerian Ports Authority (NPA)	Public Authorities
10	Nigerian National Petroleum Corporation (NNPC)	Public Authorities
11	Federal Airport Authority of Nigeria (FAAN)	Public Authorities
12	Federal Capital Development Authority (FCDA)	Public Authorities
13	Dangote Group	Concessionaires
14	Bi-Courtney Limited	Concessionaires
15	BGD Limited	Concessionaires
16	Ports & Terminals Multi-services Limited (PTML)	Concessionaires
17	Infrastructure Bank Plc	Lenders
18	First Bank of Nigeria Plc	Lenders
19	Yolas & Consultants	Project designers
20	Adamu Kasim & Co.	Project designers
21	Murty International Limited	Transaction Advisers
22	Brickstone Limited	Transaction Advisers
23	B. O. Omale & Co.	Legal Practitioners
24	K. T. Turaki SAN & Co.	Legal Practitioners

The Data Collection Strategy

There are five strategies through which qualitative data could be collected, namely, Individual Interview, Questionnaire Survey, Observation,^{xxxvii} Focus Group Discussions, Photo-voice and Picture Story.^{xxxviii} Initially, the research work wanted to adopt the Individual Interview method for data collection as it gives better understanding of the contextual factors that informed individual opinions as well as get participants to talk freely and openly.^{xxxix} However, in view of the Federal Government's restrictions on official engagements, meetings and conferences due to Covid19 pandemic,^{xl} the research work resorted to the use of Questionnaire Survey method, which could equally achieve the stated objectives of this data collection. A Questionnaire Survey is a research instrument consisting of series of questions given to respondents for the purposes of gathering information.^{xli} The nature of the questions was open-ended as to give respondents the opportunity to formulate their own answers. Questionnaires were circulated to relevant officers using the paper and pencil mode of questionnaire administration and, thereafter, completed copies were retrieved for analysis.

In a qualitative research, questionnaire questions could be semi-structured or unstructured, but either way they should be formulated in such a way as to fully elicit the personal experiences of respondents in order to adequately address the objectives of the data collection.^{xlii} Such questions should be focused, clear, well-articulated and a good fit with the research objectives. In preparing the questionnaire, due consideration was given to these attributes as well as the objectives of the data collection as captured in paragraph 3.1 of this paper.

Collection of Data

In line with the adopted methodology for data collection and sampling techniques as stated above, data was collected from the twenty-four identified Federal Ministries, governmental agencies and private entities. A total of eighty-two questionnaires were distributed to selected middle and senior cadre management officers of the twenty-four identified organizations within four days, from 15th to 18th June 2021, both days inclusive. Specifically, the distribution of the questionnaires was such that four copies each were given to the seven regulatory agencies and the five implementing MDAs; three copies each were given to the six private entities and four

out of the consultancy firms; while two copies each were given to the remaining two consultancy firms.

Feedback was received from only sixty-two respondents, representing 75.60 percent of total respondents. The first response was on the 15th of June 2021, while the last feedback was obtained on 25th June 2021. Of these sixty-two respondents, twenty-six were senior cadre management staff while thirty-six were middle cadre management staff. The twenty-six senior cadre management officials, representing 41.93 percent of feedback, comprised of five officials from regulatory agencies, seven officers from implementing MDAs, five directors from private entities and nine senior partners from consultancy firms. In the same vein, the thirty-seven middle cadre management officials, representing 58.07 percent of feedback, comprised of twelve officials from regulatory agencies, nine officers from implementing MDAs, nine officers from private entities and six officers from consultancy firms. All of them were involved in conceptualization, procurement or implementation of PPP projects.

Although from the analysis of participants in **Table 1** above, the total responses was from only 75.61 percent of targeted participants (sixty-two out of the eighty-two participants), the organizational feedback had however recorded 100 percent success rate, as there was response from all the twenty-four identified organizations. It is equally important to point out that from the analyses of questions 3 and 4 of the questionnaire as could be seen in **Table 2** below, a total of forty-four respondents were involved in the conceptualization of PPP projects, thirty-one respondents in the procurement process while forty-six respondents were involved in the implementation process. In the same vein, a total of sixty respondents gave details of one project each in which they were involved and the role they played in the particular projects. It must be cautioned that the sixty respondents did not translate to sixty projects, as some projects were mentioned more than once. It is auspicious to also mention that some of the respondents played multiple roles, as they were involved in more than one PPP process. To a large extent, the feedback was satisfactory and represented all categories of PPP stakeholders and every stage of the PPP process.

Table 2: Table Showing the Number of targeted participants, the number of participants that responded, and the number of respondents involved in each of the three processes

Cadre & Type of Organization	Participants		Respondents		PPP Processes		
	No.	Total	No.	%	Conceptual-ization	Procure-ment	Implement-ation
Regulatory Agencies (Senior Cadre)	14	28	5	60.71	44	31	46
Regulatory Agencies (Middle Cadre)	14		12				
Implementing Agencies (Senior Cadre)	10	20	7	80.00			
Implementing Agencies (Middle Cadre)	10		9				
Private Entities (Senior Cadre)	9	18	5	77.78			
Private Entities (Middle Cadre)	9		9				
Consulting Firms	10	16	9	93.75			

(Senior Cadre)							
Consulting Firms	6		6				
(Middle Cadre)							
Total	82	82	62	75.61	44	31	46

Analysis of Data

There are two ways of analyzing qualitative data. The first is the framework analysis, which examines findings based on a pre-determined framework that reflects the aim and objectives of a research work. The second approach is the thematic network analysis, which takes a more exploratory perspective that may take interpretation of findings to different and unexpected directions.^{xliii} While the first is simple, the latter is more complex and could involve multiple findings. The relevant fundamental question of this paper is on whether or not the existing legal framework is adequate. Since any conclusion would only take us to a one direction, 'yes' or 'no', the best approach for data analysis is the framework analysis approach. Consequently, the research adopted this approach, and focused on only answers that related to the formulated research questions, thereby abandoning any extraneous answer or issue in the responses.

From the analysis of collected data, three key themes were identified, which hopefully could provide insight into the adequacy of the legal framework in the success or failure of PPP projects in Nigeria. The themes, which are discussed in details and analyzed for ease of interpretation hereunder, are as follows:

- i. The adequacy of the PPP legal framework;
- ii. The effectiveness of the PPP contractual terms; and
- iii. Laws, policies and contractual terms to enhance the success of PPP projects

Theme 1 – Adequacy of PPP Legal Framework

The theme was generated from questions 6, 7, 12 and 13 of the questionnaire. The questions were:

6. List the Laws and Policies that you have come across in the regulation, facilitation and implementation of PPP projects in Nigeria;
7. State the organizations that you have come across as critical in the conceptualization and implementation of PPP projects in Nigeria?
12. Do you consider Nigeria's PPP Legal Framework adequate?
13. Do you consider Nigeria's PPP Legal Framework effective?

The above questions elicited answers from all the sixty-two respondents. There was widespread awareness among respondents that, in response to Question 6, the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005 plays a major role in PPP processes. In fact, 82.25 percent of respondents said that they had come across the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005 in the regulations, facilitation and implementation of PPP projects in Nigeria. Two legislations that also enjoyed widespread awareness among respondents were the Public Procurement Act, 2007 with 40.32 percent awareness and the Public Enterprises (Privatization and Commercialization) Act, 1999 with 30.64 percent. Of particular interest were the Road Infrastructure Development and Refurbishment Investment Tax Credit Order, 2019 and FCT Land Swap Executive Order, 2014, which enjoyed 53.23 percent and 50 percent widespread awareness respectively. The respondents identified a total of fourteen legislation, three Executive Orders and seven policies in contrast to the twenty-four Federal legislations, three Executive Orders and four National policies discussed in section one of this paper. **Table 3** contains instruments in response to question 6 of the questionnaire:

Table 3: Laws and Policies that Respondents (Middle Management (M) and Senior Management (S) Staff) Came Across in Regulating, Facilitating and Implementing PPP Projects in Nigeria

S/N	Laws and Policies	Respondents		
		M	S	Total
1.	Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005	34	17	51
2.	Public Enterprises (Privatization and Commercialization) Act, 1999	14	5	19
3.	Public Procurement Act, 2007	14	11	25
4.	Fiscal Responsibility Act, 2007	5	1	6
5.	Debt Management Office Establishment (Etc.) Act, 2003	3	1	4
6.	Federal Capital Territory Act, 1976	8	11	19
7.	Land Use Act, 1978	4	3	7
8.	Federal Highways Act, 1956	1	1	2
9.	Nigerian Investment Promotion Commission Act, 1995	2	0	2
10.	Nigerian Ports Authority Act, 1964	4	2	6
11.	NNPC	2	0	2
12.	Deep Offshore and Inland Basin Production Sharing Contract Act, 1999	2	0	2
13.	The Power Sector Reform Act, 2005	8	11	19

14.	Federal Airports Authority of Nigeria Act, 1996	5	2	7
15.	Road Infrastructure Development and Refurbishment Investment Tax Credit Order, 2019	21	12	33
16.	FCT Land Swap Executive Order, 2014	15	16	31
17.	Executive Order on the Promotion of Transparency and Efficiency in the Business Environment, 2017	2	3	5
18.	National Policy on Public Private Partnership	24	12	36
19.	Nigeria's Integrated Infrastructure Plan 2014	14	12	26
20.	National Implementation Plan II, Vision 2020	11	1	12
21.	The National Industrial Revolution Plan, 2014	1	3	4
22.	Oil and Gas	2	0	2
23.	Economic Recovery and Growth Plan 2017	8	5	13
24.	The Abuja Master plan	1	5	6

From **Table 3** above, it is clear that out of more than thirty-one legislation and eight policies identified in section one of this paper as constituting the legal framework of PPP in Nigeria, the respondents mentioned twenty-four legislation and policies including the PPP National Policy, the Oil and Gas Policy and the Abuja Master plan.

Corollary to question 6 was question 7, which sought to find out the agencies that respondents interfaced in their PPP project processes. The respondents listed only nine agencies that they came across in their PPP implementation, with ICRC and BPP garnering 58.06 percent and 29.03 percent of awareness respectively. Surprisingly, the Federal Capital Territory Administration had 33.87 percent awareness, which plausibly could be due to the vestment of all lands within the Federal Capital Territory by the Land Use Act in the Hon. Minister of the

Federal Capital Territory.^{xliv} All other agencies had less than 16 percent awareness. **Table 4** is the list of organizations in response to question 7 of the questionnaire:

Table 4: Organizations that Respondents (Middle Management (M) and Senior Management (S) Staff) Came Across as Critical in Conceptualizing and Implementing PPP Projects in Nigeria

S/N	Organizations	Respondents		
		Middle	Senior	Total
1.	Infrastructure Concession Regulatory Commission	20	16	36
2.	Bureau of Public Enterprises	6	3	9
3.	Bureau for Public Procurement	9	9	18
4.	Nigerian Ports Authority	4	2	6
5.	Nigerian National Petroleum Corporation	2	0	2
6.	Federal Airports Authority of Nigeria	4	2	6
7.	Federal Inland Revenue Service (FIRS)	3	2	5
8.	Federal Capital Territory Administration	11	10	21
9.	Other Ministries, Departments & Agencies (MDAs)	6	3	9

Apart from other Federal Government's Ministries, Departments and Agencies (MDAs), which are lumped as one entity, the researcher had identified seventeen organizations as playing one role or the other in the implementation of PPPs in Nigeria. The respondents only identified nine organizations with Infrastructure Concession Regulatory Commission, the Federal Capital Territory Administration and the Bureau for Public Procurement enjoying widest recognitions.

Questions 12 and 13 envisaged a ‘yes’ or ‘no’ answer without demanding for any further explanation. All the sixty-two respondents answered both questions in the negative. In other words, there was unanimity of respondents in their respective opinions that the Nigeria’s PPP legal framework was neither adequate nor effective.

Theme 2 – Effectiveness of PPP Contractual Terms

The theme is generated from questions 5, 9, 10 and 11 of the questionnaire. These questions were:

- “5. Did the project record any major issue that required a renegotiation or reconsideration?
9. What contractual provisions do you consider as necessary in a standard PPP Agreement?
10. Were those necessary contractual provisions provided in the PPP Agreement you were involved in?
11. From your experience, at what period after the executions of PPP Agreements do parties start complaining on all or any aspect of the PPP Agreement and which provisions do they usually and mostly complained of?”

The above questions elicited answers from the sixty-two respondents. For a comprehensive appreciation of responses to questions under this theme, it is important to revisit question 4, which gauges the competence, knowledge and experience of targeted participants. The sixty-two respondents from the twenty-four identified organizations mentioned that they had experiences in a total of seventeen PPP projects. This could seem insignificant compared to the number of PPP projects being supervised by the ICRC, which as at 31st April 2021, were one hundred and fifty-five projects under development or procurement,^{xlv} seventy-three projects under implementation,^{xlvi} and fifty-one projects in the 2021 first quarter (Q1) Project Pipelines.^{xlvii} The BPE also has similar huge project list of completed, on-going and future transactions.^{xlviii} However, the responses cut across different sectors and many stages to give credibility and reliability on the issues and challenges of PPP development, procurement and

implementation. **Table 5** below is the list of the total projects mentioned in response to question 4:

Table 5: List of PPP Projects Mentioned by Respondents

S/N	Projects
1.	The Concession of Abuja National Stadium by the Bureau of Public Enterprise
2.	The Concession of Aminu Kano International Airport, Kano by the Federal Min. of Aviation
3.	The Aerotropolis Project of the Federal Ministry of Aviation
4.	The Construction of 4-Star Hotel at Murtala Muhammed Airport, Ikeja by Bi-Courtney Limited
5.	The Development of COREN Head Office, Abuja by Federal Ministry of Works & Housing
6.	The Federal Ministry of Justice Project on Criminal Justice Management Information System
7.	The Development of Engineering Infrastructure in Katampe District, Abuja by the FCDA
8.	The Development of Engineering Infrastructure in Mabushi District, Abuja by the FCDA
9.	Development of Mechanic Village Project by the Federal Ministry of Trade and Industry
10.	Garki Hospital Concession by the Federal Capital Territory Administration

11.	Shippers' Council Inland Container Depot (ICD) in Lokoja by Delta Atlantic Nig. Limited
12.	Concession of the NPA's Kirikiri Port Lighter Terminal I & II Project
13.	The Land Swap Programme of the FCT Administration
14.	The Murtala Muhammed Airport 2 Terminal Concession
15.	The Sea Terminal Concessions of the Nigerian Ports Authority
16.	The Production Sharing Contracts between the NNPC and the International Oil Majors
17.	The Road reconstruction projects under the Road Infrastructure Tax Credit Scheme

Question 5 was a follow-up question to Question 4. Out of the seventeen projects mentioned by respondents in **Table 4** above, four projects were at Development stage, five were at Procurement stage and eight were at Implementation stage, and the projects cut across the Transportation, Aviation, Roads, ICT, Health and Urban Infrastructure sectors. It is important, at this stage, to appreciate that on a statistical analysis of the responses, the twenty-four participating organizations had two Regulators, three Facilitators, seven Public authorities, two Lenders, four Concessionaires, two Project designers, two Transaction advisers and two Legal practitioners. This therefore provided the fulcrum for the answers to question 5.

Fifty-eight respondents from twenty-two organizations submitted a total of thirty-eight issues in response to question 5, which on a cursory analysis could be grouped into five categories, namely: Timing of PPP Processes, Strict Adherence to PPP Regulations, Policy Inconsistencies, Public Sector Bureaucracy and Periodic Review of Agreements. The thirty-seven issues raised in the feedbacks are listed in **Table 6** hereof.

Table 6: List of Major Issues that Require Renegotiation or Reconsideration as Raised by Respondents (Middle and Senior Management Staff)

S/N	Issues
a. Timing of PPP Processes	
Issue One	There is need to regulate the period for procurements as from the date that an Outline Business Case (OBC) certificate is issued
Issue Two	There is need for procurement planning to ensure timely development of projects
Issue Three	Procurement planning should always be done by MDAs and in accordance with National plans
Issue Four	There is need for procurement planning so that project design and procurement costs are funded within specific budget circles.
Issue Five	The Outline Business Case should be comprehensive enough to ensure that the time and adequacy of cost recovery are covered
Issue Six	Key milestones in service provision and targeted incomes are not met, citing economic issues and requiring extension of concession period
b. Strict Adherence to PPP Regulations	

Issue Seven	Due diligence on the capacity of the private company to undertake a PPP project should be conducted before any preferred bidder is declared.
Issue Eight	There should be effective supervision and monitoring of PPP projects to ensure efficient delivery
Issue Nine	Amendment of Public Enterprises (Privatization and Commercialization) Act to specifically accommodate Concession as part of BPE's mandate.
Issue Ten	Public authorities should ensure adherence to procurement regulations at every stage of the PPP process
Issue Eleven	PPP agreements should be vetted by the Federal Ministry of Justice before they are finalized and executed
Issue Twelve	The bill of quantities, engineering and measurement for road infrastructure projects under the Road infrastructure tax credit scheme should always be prepared by the Federal Ministry of Works and Housing
Issue Thirteen	The FIRS should put a system in place to ensure that big taxpayers participate in the Road Infrastructure Tax Credit scheme
Issue Fourteen	Potential risks and capacity of a company with an earlier should be taken into consideration in granting subsequent concessions
Issue Fifteen	The role of supervising Ministry should not include unilateral amendment of agreements

Issue Sixteen	The Ministry should participate in the utilization of funds sourced from lenders in the implementation of PPP project
Issue Seventeen	PPP projects should be conceptualized within the contract scope of ICRC Act
c. Policy Inconsistencies	
Issue Eighteen	Land allocation to government agencies for official usages should be prioritized
Issue Nineteen	There is too much policy inconsistency by the government that affects not only the credibility of government but also the delivery of projects
Issue Twenty	There is a need for statutory insulation of PPP projects from Politics
Issue Twenty-one	Too much interference in contract relationships
Issue Twenty-two	Policy inconsistencies that result in loss of money and project delays
Issue Twenty-three	Lack of political will on the part of government
Issue Twenty-four	Public authorities should have respect for Court Orders
Issue Twenty-five	Government should uphold the sanctity of agreements
Issue Twenty-six	Too much politicization of legal commitments in PPP transactions
d. Public Sector Bureaucracy	
Issue Twenty-seven	The processes of ICRC are too bureaucratic
Issue Twenty-eight	The ICRC is too bureaucratic in its PPP implementation

Issue Twenty-nine	The ICRC should institute thresholds to enable MDAs handle smaller public projects and services.
Issue Thirty	Land Allocation to agencies of government should ease up
Issue Thirty-one	There is need for PPP thresholds so as to improve the PPP capacity of MDAs
Issue Thirty-two	Clarity of the appointing authority in respect of project consultants for purposes of liability and fee payments from escrow account
e. Periodic Review of Agreements	
Issue Thirty-three	Periodic review of signed agreements to ensure that parties are not shortchanged
Issue Thirty-four	There should be central coordination as a way of encouraging investments in rural roads under the Road Infrastructure Refurbishment Tax Credit scheme
Issue Thirty-five	There is need for timely review of concessions to ensure that changing dynamics are dealt with as at and when they come up
Issue Thirty-six	The termination provision in PPP agreements should be dynamic
Issue Thirty-seven	Alternative Dispute Resolution should go beyond arbitration
Issue Thirty-eight	Strengthening of Anti-trust laws on actions that may lessen competition

On the first category of responses, i.e. Timing of PPP Processes, some respondents observed that there is the need to stipulate periods for commencing procurement immediately the ICRC

issues an OBC certificate, while other respondents raised the issue of procurement planning in order to ensure timely development of PPP projects and in accordance with National plans.

The issues that got more responses were on the second category of responses, Adherence to PPP Processes. The due diligence of private entities, project cost and design, compliance with extant regulations by officials and the role of public authorities were issues that were raised in the feedback. Interestingly, the amendment of the Public Enterprises (Privatization and Commercialization) Act to expressly accommodate concession was also raised as an issue. So also was the issue of ensuring that PPPs are designed within the scope of the ICRC Act. It appears the call for adherence to regulations was not restricted to public officials but extended to private entities in their obligations to deliver PPP projects. Hence, the issue that called for joint participation in the utilization of the private funds sourced for a project.

Policy Inconsistency was the third category of issues raised by respondents. The inconsistency involves interference with contract obligations, disrespect to court orders, non-recognition of the sanctity of agreements and politicization of legal commitments. A respondent also raised the issue of difficulty in accessing land for the purposes of public projects. Another category is in unnecessary bureaucracy of public authorities including the ICRC. It was observed that there is the need for ICRC to provide for procurement thresholds so that smaller projects and services could be undertaken by MDAs without recourse to ICRC. The last category of issues raised by respondents was periodic review of agreements to ensure that changing dynamics are dealt with as at and when they come up during the pendency of agreements. In this respect, issues relating to termination of contracts, alternative dispute resolution and the strengthening of anti-trust laws were raised.

In reference to question 9 of the questionnaire, respondents listed six contractual provisions that they considered necessary in a standard PPP agreement. These were provisions on conditions precedent, alternative dispute resolution, Step-in Rights, automatic termination of contracts for failure to satisfy conditions precedent, personal liabilities of government officials, and Indemnity against change of policy.

However, in response to question 10, some respondents observed that alternative dispute resolution and Step-in Rights were not provided in the agreement of the PPP projects they mentioned, while all respondents reported that personal liabilities of government officials and automatic cancellation of the agreement for failure to fulfill conditions precedent were absent in the respective agreements. Similarly, all respondents reported that their agreements contained provisions on conditions precedent and Indemnity against change of policy.

Question 11 also elicited interesting responses. Majority of respondents reported that public officers start complaining immediately after the execution of agreement and mostly on failure to effectively mobilize to site and commence work in accordance with the agreement. The private partners, on the other hand, were observed to be complaining of interference and non-cooperation of the contracting MDA during project execution stage.

Theme 3 – Laws, Policies and Contractual Terms to Enhance Success of PPP Projects

The theme is generated from questions 8 and 14 of the questionnaire. These questions were:

- “8. State critical and/ or contentious contractual issues usually raised by parties during pre-transaction negotiations?
- 14. List any additional Laws, Regulations or Policies that could make Nigeria’s PPP Legal Framework more adequate and effective?”

In response to question 8, the contentious contractual issues that usually cropped up in the pre-contract negotiation stage and which the respondents mentioned in their feedbacks could be categorized into three. These were:

- a. The sharing formula, investment recovery, guarantees, subsidies and viability gap funding;
- b. Sanctity of contractual agreements and sustainability of the transaction; and
- c. Site handing over, work mobilization and continued implementation of the project in line with agreed standard of work.

Although none of the respondents listed any new legislation or policy that should be added to the existing legal framework, there was common opinion in the call for the amendment of the ICRC Act as a response to question 14. Two respondents suggested the amendment of the Public Enterprises (Privatization and Commercialization) Act and one other suggested the strengthening of the anti-trust laws. Interestingly, there was a respondent that believed that there is over-regulation as there are too many laws, regulations and institutions on PPP in Nigeria.

Interpretation of Data

In interpreting qualitative data, there are five considerations that are critical, namely, response to the questions, harmony with the research objectives, multiple approaches of data analysis to enhance credibility, limitation of the study and comprehensiveness of the outcome.^{xlix} To a larger extent, the outcome of this data collection has satisfied these five considerations.

From the analysis of the data collected above, both the data collection methodology and the data actually collected have responded adequately to the fourteen questions in the questionnaire to be able to partly address the objectives of the data collection. The dominant or common opinion on Theme One was that the legal framework is neither adequate nor effective. The dominant or common opinion on Theme Two was that contractual terms are effective. The dominant or common opinion on Theme Three was that the existing legal framework, though requiring amendment of specific legislation and practices, does not require any new law or policy to ensure successful delivery of PPP projects in Nigeria.

The different findings have explained each other, are in sync and without any contradictions with the assumed hypothesis on PPP project failures in Nigeria. For instance, the outline Business Case (OBC) certificate of Inland Container Terminal project at Lolo, a project mentioned by one of the respondents, was issued on 8th November 2017, and that up till now in 2021 its present status was still that due diligence and negotiation with the preferred concessionaire, Delta Atlantic Nigeria Limited, was yet to take place. It is clearly a failure of the legal framework that allowed due diligence of the private party after its declaration as the preferred concessionaire or discussing about negotiation four years after the OBC certificate was issued. The suggested amendment of the Public Enterprises (Privatization and

Commercialization) Act, 1999 to accommodate concession when privatization and commercialization on one hand and concession on the other hand were stipulated in separate legislation is a pointer to institutional weakness in the existing legal framework.

Without doubt, the scope of the data collection method was limited, which was due to Covid19 pandemic. The outcomes have, nonetheless, represented a broader and credible perception on the adequacy of Nigeria's PPP legal framework. The suggestions on development and procurement of projects within reasonable timeframes, the call for consistency in governmental policies, the opinion on respect for contractual obligations, and the unanimity for the amendment of the ICRC Act are issues that ordinarily would be expected in any live interview on PPP legal framework, but which were indeed raised under the questionnaire survey strategy. More so, the responses were adequate and comprehensive enough to assure reliable and consistent outcomes of the research questions. To a large extent, it could be argued that nothing was lost in using questionnaire survey instead of the individual interview strategy that was initially preferred.

The respondents had mentioned twenty-four legislation and policies, which against the context of those discussed earlier, represented 77.41 percent of legislation and policies. This is commendable as it shows reasonable awareness of PPP processes among critical PPP development stakeholders. Although, some of the legislation that were not mentioned by respondents are very necessary in the development and implementation of PPPs and, hence ought to be mentioned, it is obvious that majority of respondents were ignorant of such legislation due to the fact that only 8.06 percent of respondents were in the legal departments. There is a need for further inquiry among new relevant key stakeholders to identify if there could be any law, policy and practice that could enhance the effectiveness to the existing legal framework.

CONCLUSION

The data collection in this paper leveraged on the knowledge, expertise, observations and experiences of middle and senior Management officers of selected key public and private sector

organizations to appreciate the adequacy of the existing PPP legal framework in the conceptualization, procurement and implementation of PPP projects in Nigeria. The data analysis mapped out the entire collected data, which shed lights as well as perception insights of players on PPP legal instruments, contractual terms and possible amendments, resulted in the grouping of the data into three themes.

The Interpretation method adopted in this paper utilized standard considerations to enhance the credibility of the research conclusion, i.e. that the legal framework was not adequate; that the contractual terms were adequate; and that the existing legal framework even though does not require any new legislation to be effective, needed to be amended. Except for the recommendation of a further study to identify new laws and policies that could be added to the present legal framework, the research conclusion has enriched the literature on the adequacy or otherwise of Nigeria's PPP Legal framework.

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