

LEGAL CHALLENGES AND PROSPECTS IN THE IMPLEMENTATION OF PUBLIC PRIVATE PARTNERSHIP (PPP) POLICY IN NIGERIA

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ABSTRACT

Public Private Partnership (PPP) as a procurement option in Nigeria's quest for the reduction of deficit in its public infrastructure stock has not been wholly successful. In this respect, the paper looks at the challenges of PPP implementation as well as the prospects that in spite of these challenges, the PPP model remains a realistic solution to public infrastructure provision in Nigeria. Using the doctrinal research methodology to leverage on information from journals, conference papers, newspaper articles and internet searches, the paper was able to identify weaknesses in Nigeria's PPP legal framework, the inadequacy of the PPP policy and processes, institutional conflicts in PPP regulatory environment, and the lack of PPP capacity and experience of both public and private sector officials as the major challenges militating against PPP success in Nigeria. However, in spite of these challenges, the paper was able to show that the PPP option still holds an ace of card in view of National aspirations for adequate infrastructure provision; insufficient budgetary provision for public infrastructure; increased enthusiasm of public sector officials to leverage on private sector finance and expertise; efforts by stakeholders to amend the dominant PPP legislation; the foray into the sector by the Central Bank of Nigeria and the Federal Ministry of Finance with the potential of reforming the PPP financing aspect; as well as the conduct of the judiciary, which has left no one in doubt of its resolve to be fair and just between and among contracting parties. The paper therefore recommended an amendment of the Infrastructure Concession Regulatory Commission Act so as to expand the definition of PPP; recognize other types and tendencies of PPP; provide for 'savings' and 'exclusion' sections in order to mitigate institutional conflicts; and adopt a more

all-encompassing and investment-friendly name as the words ‘concession regulatory’ in the short title of the Act is anything but user-friendly.

Keywords: PPP, Challenges, Prospects, ICRC, Public, Infrastructure

INTRODUCTION

The historical evolution of Public Private Partnership (PPP) with its challenges and prospects provided many countries, including Nigeria, with the impetus to leverage on the private sector in the implementation of public infrastructure and services. In Nigeria, for instance, the Technical Committee on Privatization and Commercialization (TCPC) was established in 1988, and during its existence between 1988 and 1999, the Committee laid the foundation that enabled Nigeria not only to pursue a private sector-led National economic system but for the emergence of Bureau of Public Enterprises (BPE). The fundamental policies and practices of both TCPC and BPE were hinged on Structural Adjustment Programme (SAP) and Vision 2010, which were influenced by the New Public Management (NPM) approachⁱ in the 1980s and also urged by the International Monetary Fund (IMF).ⁱⁱ

The TCPC, upon its inauguration in 1988, concentrated majorly on the commercialization of Federal Government-owned enterprises. Hence, the Nigerian Railways Corporation, the National Electric Power Authority (NEPA), the Nigerian Telecommunication (NITEL), the Postal Services and the Nigerian Ports Authority were restructured to run as proper commercial concerns.ⁱⁱⁱ The BPE after taking over from TCPC in 1999 however, vigorously pursued the privatization of public enterprises that included hotels, vehicles assembling plants, the national carrier, the national shipping line, fertilizer companies, petroleum retail companies, steel rolling mills, sugar companies, newspaper companies and cement companies. The perception and support of the exercises by the general public as well as their outcomes was a mixed bag.^{iv}

The BPE had a turning point between 2002 and 2004 when it embarked upon the concession model of private sector participation, which it used in respect of the Murtala Muhammed Airport II (MMA2) terminal and the twenty-five terminals of the Nigerian Ports Authority

(NPA).^v In addition, it superintended, guided, supervised and advised on many funding and management arrangements of Ministries, Departments and Agencies (MDAs) of the Federal Government of Nigeria. The citizenry found the concession and the other funding models less controversial since they did not involve complete divestiture. The successful execution of the agreements and the observed weaknesses in the enabling legislations of MDAs culminated in the establishment of proper legal frameworks in Nigeria, thereby giving birth to both the Infrastructure Concession Regulatory Commission (ICRC) in 2005, which was inaugurated in 2009, and subsequently, the National Policy on PPP. These policies, practices and projects gave considerable clue to the challenges and prospects of PPP implementation in Nigeria.

To discuss these challenges and prospects appropriately, the paper is divided into 5 sections. The first section is the introduction, which gives a background on the implementation of PPP in Nigeria. The second section briefly contextualizes the implementation of PPP in historical perspectives, starting with its debut in the Roman era down to its evolution in Nigeria. It also arrived at a workable definition for the purposes of understanding the PPP concept. The third section discusses the challenges of PPP implementation while the fourth section considers its prospects. The conclusion is section five, which makes a total of four recommendations.

PPP IN HISTORICAL CONTEXT

The implementation of public infrastructure on the basis of public private partnership is as old as the Roman Empire when the statehood of Rome began to engage private ship owners, on long-term partnerships based on shared risks, for the transportation of grains for its inhabitants.^{vi} These structural engagements expanded into the Middle Ages, especially between 800 AD up to the 15th Century, when during the reign of King Louis VI of France, Parisians were given concession rights for the transportation of goods^{vii} as well as the building of bridges and roads that allowed investors to collect tolls in exchange for political support. The period between 16th Century and up to the end of 19th Century featured active cooperation between the public and private sectors on transportation infrastructure.

From a single service sector of grain transportation during the Roman Era, the private sector spread its tentacles into many economic sectors especially in the 17th and 18th Century when it

took the lead in the development of turnpikes, canals, bridges, railways and other transportation infrastructure. For instance, the French canals and bridges were privately financed in the 17th century^{viii} while the United States roads and bridges were privately owned and, with government charters,^{ix} their tolling commenced between 1789 and 1900.^x As a result, over 2,000 private companies operated turnpikes in Ohio, New York, Michigan and Albany.^{xi} The Private sector also forayed into water and electricity distribution infrastructure in the 18th Century and up to latter part of 19th Century. For instance, concession for water capture was given in France in 1777 while the construction and operation of the Suez Canal was granted in 1854^{xii} until it was nationalized in the 1950s.^{xiii}

However, the PPP concept, which underpinned infrastructure delivery and services on three elements of deregulation, privatization and marketization, began with the approach of the New Public Management (NPM) in late 70s and onto 1980s.^{xiv} It was based on the NPM approach that the UK privatized its commercial concerns in the early 80s^{xv} and developed infrastructure funding through PFI in 1992, while the US facilitated independent power projects in 1980, and China radically pursued its policy of private enterprise during the leadership of Deng Xiaoping in late 1978.^{xvi}

It should be appreciated that partnerships with the private sector from the Roman era up to the middle of the 19th Century, was essentially on transport logistics supported by rivers, roads, canals, postal systems and Alexander Hamilton's financial system.^{xvii} However, the second period between the middle of the 19th Century to the middle of the 20th Century, partnerships dug deeper into telecommunication, energy and municipal infrastructures, which were characterized by railroads, telegraph, telephone, electricity, natural gas, local banks, and national and international stock exchanges. In the third period, i.e. from the middle of the 20th century to the present day, partnerships had expanded into financial system and information and Communication (ICT) infrastructure to include highway financing, Internet and interstate banking. These partnerships had, undoubtedly, unleashed the economic abundance we found in many cities of the world and in different continents.^{xviii}

It could also be appreciated that the scope and content of PPP^{xix} has, to a large extent, significantly changed during its historical evolution to such an extent that it could safely assumed to have defied a universally accepted definition.^{xx} Slight differences are noticeable

from epoch to epoch, from jurisdiction to jurisdiction, and even among bilateral, multilateral and financial Development Institutions. The observation of the World Bank was therefore apt that an increasing number of countries are enshrining and tailoring the definition of PPPs in their legislation to their institutional and legal peculiarities.^{xxi}

For our purposes however, PPP is a long-term contractual arrangement between a public authority and private entity for the delivery of public infrastructure and services on the basis of shared resources, risks and rewards.^{xxii} This definition is consistent with that of the World Bank that defined PPP as a long-term contract between a private party and a government entity to provide a public asset or service, to ensure that the private party bears significant risk and management responsibility, and to link remuneration to performance.^{xxiii} It is also consistent with the definition of PPP under the ICRC Act that used the term ‘concession’ and defined it as a contractual arrangement with any Ministry, Department or Agency (MDA) of the Federal Government whereby the project proponent undertakes the construction, financing, operation and maintenance of any infrastructure.^{xxiv}

CHALLENGES OF PPP IMPLEMENTATION

Generally, PPP appears to be more difficult than conventional procurements^{xxv} on account of their long-term nature, larger contract scope and objectives, as well as stakeholder resistance. A PPP arrangement could last for up to 25-30 years and usually, as seen from the statutory definition of PPP in Nigeria, could involve not only the delivery of the project, but also its operation and maintenance.^{xxvi} It also requires complex analysis of the risks, tenor, procurement, funding, and delivery options before its consummation. In addition, it requires adequate support and planning. It is the combination of these factors that pose significant challenges to PPP projects in Nigeria.

This section therefore identifies and looks closely at the present challenges that militate against effective and efficient conceptualization, procurement and implementation of PPP projects in Nigeria. These challenges are discussed under four broad headings, namely, weak PPP framework; inadequacy of the PPP policy and processes; multiple coordinating institutions; and the absence of political support and capacity of relevant officials.

Weak PPP Legal Framework

Nigeria's PPP legal framework comprises of all relevant legal instruments and National plans that enables, obligates and incentivizes the conceptualization, procurement and implementation of PPP projects. The relevant issue, at this stage, is to ask whether or not there is any instrument that comprehensively identifies all laws and policies that impact, one way or the other, to the principles and practice of PPP in Nigeria. Except for the inadequate provisions in the National Policy on PPP, there are no other instruments that seek to make such identification.

The ICRC Act,^{xxvii} which is the dominant legislation that seeks to ensure efficiency and effectiveness of the PPP process, has failed to identify and harmonize the applicability of relevant legislation and National plans to PPP in Nigeria. The National Policy on PPP, which is supposed to be a consistent process and procedure guide,^{xxviii} recognized only very few legislation and institutions as impacting to the PPP process, hence engendering institutional conflicts. In fact, it identified for review only four legislation and six other institutions as relevant to the PPP process.^{xxix} The recent attempt of the Office of the Secretary to the Government of the Federation (OSGF) on resolving PPP institutional conflicts when it issued a circular that delineated the responsibilities of ICRC and Bureau of Public Enterprise (BPE),^{xxx} is to say the least, feeble. It is indubitable that the government had failed to streamline observable institutional conflicts or to hasten the amendment of the ICRC Act and other relevant legislation as stated in the National Policy.

It is trite that the Government's failure at streamlining observable conflicts is systemic as there is no provision in the entire 37 sections of the ICRC Act, which contains either a 'saving'^{xxxii} provision, a 'repeal'^{xxxiii} provision or an 'Exclusion'^{xxxiii} provision. The implication of such absence is that the ICRC Act does not expressly exclude the operations of the BPE, Bureau for Public Procurement (BPP) or any other body established by law from discharging statutory roles relating to private sector participation in public infrastructure and services. This view is consistent with judicial decisions on the absence of such legislative provisions. In *Akingbola v FRN*,^{xxxiv} for instance, the Court of Appeal observed that it is only when an express repeal occurs that the entirety of an earlier statute or part thereof is deemed annulled or abrogated. In the Indian case of *Damji v LLC*,^{xxxv} the Indian Supreme Court held that in the absence of express repeal, there is a presumption that the legislature assumed that the current state of the

law did not intend to generate any vagueness by retaining the conflicting provisions.

It is difficult to even imply that there is such a repeal in the ICRC Act because of the strict conditions stipulated for implying repeals.^{xxxvi} In *CCB (Nig.) Plc v Ozubu*,^{xxxvii} the court held that a repeal of an earlier statute by a later statute could only be implied if the subject matter of the later statute is identical with that of the earlier statute and that the provisions of the later statute are such that both statutes cannot both stand together.^{xxxviii} A similar position is found in India. In *Delhi Municipality v Shivshanker*,^{xxxix} the Indian Supreme Court held that in determining whether there is an implied repeal of a provision, three criteria of determining repugnancy should be applied, namely, whether there is a direct conflict, whether the law tends to occupy the same field, and whether the legislature explicitly focused on the particular subject matter replacing the earlier law.

As an offshoot of these legislative *lacunae*, there are institutional conflicts, which occurred largely on account of the creation and circumstance of the ICRC. The BPE and BPP have had running battles with the ICRC in terms of their regulatory powers and superintendence over MDAs. None of their legal instruments clearly demarcates their functions *vis-à-vis* procurement of public assets. It is imperative to note that the BPE, which was the only PPP institution that was existing at the material times, conceptualized and concluded the respective concessions of air and sea terminals of Federal Airport Authority of Nigeria (FAAN) and Nigerian Ports Authority (NPA), and hence sees itself as having a better standing and experience than ICRC to continue with concessions of public assets. Ironically, the ICRC made it clear on the day of its inauguration in 2009 that its strategy was to inherit from BPE the management of existing concessions.

The conduct of Government officials also exacerbates institutional conflicts. The SGF's Circular with reference SGF.50/S. 37/II/749 of 14th September 2020, which restricted the ICRC to regulation only, is such one culprit. The circular was issued ostensibly without any regard to the fundamental operational, institutional and even legal issues in the ICRC and BPE Acts. In similar fashion, the Bureau of Public Procurement (BPP) fought with the ICRC on oversight of PPP procurement processes, which, at the end of the day, the Federal Executive Council (FEC) resolved that any PPP procurement would require a certificate of No Objection of the BPP. Observably, this decision confounded PPP development process in Nigeria. It is instructive that both the National Policy on PPP and the Nigeria's Integrated Infrastructure

Master Plan (NIIMP) have recognized the need to review some of these legislations and to propose amendment so as to strengthen the PPP implementation process.^{xi} However, for more than a decade, this has not been done.

Another drawback on the ICRC Act is its inadequacy. It is arguably inadequate in terms of its provisions, scope and even name. It is obvious that draftsmen failed to adequately take advantage of model legislation provided by many Multilateral Development Banks (MDBs) in the preparation of the ICRC bill. First, the name 'Infrastructure Concession Regulatory Commission' appears to be both restrictive and contradictory. From its name, it is difficult to determine the PPP models allowable in Nigeria and the regulatory role of the Commission. Both are ambiguous. One may wish to ask: are PPP transactions in Nigeria beyond concessions? And what is the ICRC regulating, is it the concession, the parties or the process? In other words, could ICRC regulate a legally binding contract between the parties?

The caveat in section 11 of the Act that no agreement shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the Act is a red flag. In view of extant judicial pronouncements, it is only the Contract Agreement, duly and freely executed, that could regulate the contractual relationship of affected parties, and hence the ICRC cannot legally regulate any concession agreement. It needs to be pointed out that there is a fundamental difference between infrastructure concession regulatory and PPP process regulatory, and it is obvious that since concession is the agreement, it is only the latter, the PPP process, that the ICRC could be justified in regulating. The Act should have adopted a more all-encompassing, non-controversial, investment friendly term, which gives comfort that contractual obligations are sacrosanct, enforceable and cannot be interfered with by public authorities, no matter how altruistic.

The ICRC Act has not specifically provided for any classification or model of utilizable PPPs but only provided for entering into any contract or granting of concession.^{xli} Although, the definition of the term under the ICRC Act appears to accommodate many types or models of PPP, it ought, as a legislation of the National Assembly and premier PPP legal framework, to be more robust. The obligation for maintenance and repairs under section 7(2)(b) has further constricted the concept that any arrangement must include maintenance and repairs. The failure of the Act to expressly identify and recognize other specific PPP models had made the

governmental system to see all PPP projects as concessions and to create doubts on the legal status of other PPP models.^{xliii} If it had done so, it would have given PPP desk officers the advantage to widen their horizon in streamlining their projects with more dynamic models. Such philosophy has impacted positively in countries that are specific on PPP models in their legal instruments and guidelines like Brazil, Philippines and UK.

There are also other inadequacies in the legal and regulatory elements that directly affect the confidence of investors to undertake PPP projects in Nigeria. For instance, the ICRC Act and the National Policy on PPP contemplate the development of project pipelines^{xliiii} and procurement price list,^{xliiv} but for more than a decade, neither the National Planning Commission nor the ICRC has come up with any bankable PPP project pipeline, which potential investors could internalize in their corporate and procurement plans. Similarly, the Bureau of Public Procurement, which is now saddled with the responsibility of giving a Certificate of No Objection in PPP procurements, is yet to produce any database of standard prices as required under the Public Procurement Act for the guidance of investors.

One of the hallmarks of a PPP procurement is to ensure value for money, which not only look at the price, availability, affordability and efficiency of service, but also the protection of end-users against unnecessary exploitation. Competition and consumer protection laws are put in place to achieve such objectives. The Nigeria's competition and consumer protection laws however are very weak and ineffective. The repeal of Consumer Protection Act and its re-enactment as Federal Competition and Consumer Protection Act in 2019 did not address the issues inherent in PPP project operations. For instance, neither the Act nor EPSRA or any of the more than ten sector-specific legislations has addressed the interest of an electricity consumer that personally procures an electricity facility, which a DISCO assumes ownership and reflects in its procurement report to NERC.

The Nigeria's court system appears to be slow in both its processes and enforcement of its orders. The system lacks the capacity to dispense justice and enforce obligations with minimum delay. For instance, the Lagos – Ibadan Expressway project could have been saved as a PPP project if there was timely decision by the court. However, by the time the courts delivered its ruling, the Federal Government had already terminated the concession,^{xliv} procured and mobilized contractors, and who in turn, commenced work immediately. Similar scenario

played out with Maevis Limited that in spite of its timely legal action, the courts intervention came two years after the breach.^{xlvi} In fact, it could not even enforce its judgment against Sita Telecoms Limited, which, at the promptings of FAAN, wrongfully took over the concession and facilities of Maevis Limited. Similarly, Bi-Courtney Limited could not enforce its judgment against FAAN^{xlvii} for the continued wrongful use of GAT 1 for more than a decade until 2018 when the Asset Management Corporation of Nigeria (AMCON) brokered an agreement between the airline and Bi-Courtney Air Services Limited (BASL).^{xlviii} Even the main MMA2 Terminal Concession had a lot of litigations and disputations until the ICRC intervened to reach an amicable settlement in 2018.^{xlix}

Inadequacy of the PPP Policy and Processes

To ensure effective implementation of the ICRC Act, the ICRC instituted the National Policy on PPP.¹ While the promulgation of ICRC Act has gone a long way to consolidate the PPP practice in Nigeria, however, the ICRC has straitjacketed the PPP model into another conventional contract contrary to its roots as a product of innovation and dynamism. One would have expected every project to be treated on its merit, but the National Policy on PPP treats all PPP projects of the Federal Government as one without any regard to its complexity, capital outlay or scope. In the absence of project or value threshold under the National Policy, it means that every PPP project, including smaller projects lower than ₦100 Million (Less than \$200,000), must go through the ICRC process. This is contrary to what obtains in more successful climes, e.g. UK, where value thresholds are instituted in PPPs.

Corollary to the inadequacy of the ICRC Act to take advantage of legislative guidelines as discussed above, the National Policy has also not taken advantage of standard contract guidelines in the development and implementation of Nigeria's PPP transactions. For instance, the UK HM's Treasury Standardization of PFI contracts had gone a long way in bringing certainty to investors on the contractual obligations of parties in any PPP transaction. So also was the effort of the United Nations Economic and Social Commission for Asia and the Pacific when its Transport Policy and Development section developed key sections of PPP contract for Asia and the Pacific.ⁱⁱ The only such attempt is Executive Order 007, which seeks to introduce a contractual agreement format (non-binding MOU) as a schedule. Although commendable, it is certainly not comprehensive enough to address salient issues inherent in

PPP agreements.

The ICRC has not shown sufficient dynamism to be receptive to new PPP models. For instance, it was ambivalent to the legal status of FCT Land-for-Infrastructure Swap model, which it ought to be considered as a substantive PPP model under which infrastructure projects and services could be conceptualized, prepared and executed exclusively within the framework of the Land Use Act. In the same vein, it glossed over the unique amortization policy in NPA contractual arrangements in which many of its hitherto dilapidated terminals of Apapa, Warri and Onne were successfully rehabilitated for efficiency and profitability. The reference to amortization as repayment option by the Act^{lii} is not sufficient to have created a distinct PPP model. The ICRC ought to rise in accommodating the peculiarities of new PPP models and innovations in its processes.

The dispute resolution mechanism in the National Policy is weak or almost non-existent. In view of the slow process of Nigeria's justice system, the National policy ought to have provided a quicker alternative dispute resolution mechanism. Restricting PPP dispute resolution to the only two traditional methods, i.e. litigation and arbitration, would impede the growth of PPP and its implementation in Nigeria. This is more so with obvious deficit of capacity in PPP knowledge, the weakness in the legal framework and the absence of standard contract terms applicable to all transactions. It is therefore no surprise that there was high incident of project failure in ICRC records. Out of the fifty PPP agreements executed by public authorities in Nigeria, only eleven were being implemented smoothly, while twenty-four agreements were undergoing review, one had expired, five were terminated, one was suspended, six were subject of disputes, and the implementation of two had been stalled.^{liii}

In the face of the Circular from the Office of the Secretary to the Government of the Federation (OSGF) ceding preparation of PPP projects of MDAs to BPE, the status and workability of the National Policy, which was prepared by the ICRC, is in serious jeopardy. This is because the BPE had, over the years developed its own system and processes of privatizing, commercializing and the concessions of public enterprises. In the execution of the terminal concessions, it was professionally advised and assisted by international consultants and transaction advisers as well as technically supported by relevant MDAs. It has therefore garnered sufficient knowledge and experience to implement its internal processes for PPP

practice effectively. While awaiting its decision on the National Policy, it is predictable that the BPE would leverage more on its regulations than those of the ICRC, thereby breaching the conceptualization, procurement and contract administration principles under the ICRC Act.

Multiple PPP Coordinating Institutions

The status of the National Policy in the face of OSGF's Circular in favour of BPE is only a fraction of the problems. There seems to be confusion as to who is actually in charge of PPPs in Nigeria. There are overlapping responsibilities among government ministries and agencies. It is doubtful if there is, presently, any single and exclusive central authority that directs the PPP process. Apart from the ICRC and BPE, the BPP, as indicated above, had successfully agitated that every PPP project would require its 'No Objection' Certificate. In a way, it has indirectly, taken over the decision on the validity or otherwise of PPP projects.

Another contending entity is the Ministry of Finance, which now spearheads the implementation of Executive Order 007^{liv} on account of FIRS' tax credits. The Management Committee created under the Executive Order is headed by the Minister of Finance with the Permanent Secretary of the Ministry as the secretary of the Committee. This has effectively put the development, implementation and supervision of the tax swap PPP projects in the Ministry of Finance.

To add to the confusion, the Central Bank of Nigeria (CBN) came up with the initiative of establishing the Infrastructure Corporation of Nigeria Limited (InfraCorp), which would be a corporate entity to catalyze and accelerate investments in Nigeria's infrastructure sector.^{lv} It was to be domiciled in the CBN with the Governor as its chairman while the Africa Finance Corporation (AFC) and the Nigeria Sovereign Investment Authority (NSIA) were its co-shareholders.^{lvi} This was in addition to the CBN's leading role in anchor borrowers' scheme, which is a PPP programme in the agriculture sector. It is doubtful if the ICRC or BPE could regulate the processes of the PPP projects coordinated or facilitated by either the Minister of Finance or the CBN Governor, higher and more influential public authorities.

The National Assembly is also another institution that plays a role in PPP project implementation. It has over the years, using its oversight function under section 189 of the Constitution, forayed into PPP project implementation. Its intervention in the PSC agreement

between the NNPC and oil companies which led to the public hearing and subsequent amendment of the Deep Offshore and Inland Basin Production Sharing Contract Act in 2019^{lvii} is a good example of its assumed role in Nigeria's PPP institutional framework. Similarly, its resolution in October 2017 to probe the dispute between INTELS and NPA on the termination of Bonny Pilotage contract and its effect on the amortization arrangement of the Deep Offshore terminal^{lviii} is another example that points to PPP institutional weakness in Nigeria. The oversight function, though could review the conduct of public officials, should not affect the sanctity and preservation of contractual obligations.

The idea to legislate the National Integrated Infrastructure Master Plan (NIIMP) for its effective implementation is worthwhile. However, the provision for creation of a unit in the Ministry of National Planning to be called 'Infrastructure Implementation Coordinating unit' will, certainly, add to the confusion in Nigeria's PPP institutional framework. The National Policy did not envisage this innovation as it provided that every MDA, including the National Planning Commission, is to set up a PPP Unit Office.^{lix} This PPP Unit Office seems to be a bundle of confusion, as the National Policy is not clear as to which specialist department should be in charge of the Unit with the resultant effect that some MDAs have the Units under Engineering department, Finance, Procurement, Legal or even Planning departments. This has increased the uncertainty in Nigeria's bureaucracy on the nature of PPPs as to whether they are engineering projects, financial arrangements or legal transactions. The National policy must be reviewed to identify and assign roles to all relevant and participating stakeholders.

Lack of Institutional Capacity and Political Support

The absence of expertise on PPP processes both among the public and private sectors is another challenge to the effective implementation of PPP projects in Nigeria. The expertise is necessary to ensure that projects are properly conceptualized, efficiently procured and effectively supervised. The expertise required in efficient implementation of PPP process is two-pronged, namely, the PPP training and on-hand experience. There is quite a number of formal training on PPP facilitated by the ICRC and its development partners like the World Bank and the UK Nigeria Infrastructure Advisory Facility (NIAF). On the other hand, Nigeria is yet to experience a matured PPP project that has reached its life circle. Except for the few projects that were consummated before the coming on board of the ICRC, there are few projects that create

opportunity for learning on the nuances of project development and implementation. MDAs should be allowed to consummate smaller PPP projects and quick-wins projects to be able to gain requisite experiences that could deliver bigger transformative PPP infrastructure projects. NPA and FAAN have fared better in this respect.

Lack of support by political leaders and opposition parties impedes the smooth implementation of PPP projects. The highest political leader must be able to lead from the front, but must not be overreaching. The commitment of political leaders will stem any criticism, which usually arises out of mischief, corruption or ignorance. This could be mitigated through the Steering Committee, which is usually headed by the chief accounting officer of the public authority^{lx} and the interest of political leaders.

There are varying examples of the success or otherwise of projects directly linked to adequate, lack of, or overreaching political support. For instance, the concessions of ports and MMA2 terminals were largely successful because of the interest and active involvement of President Olusegun Obasanjo at all stages of the transactions including the negotiation and resolution of labour issues of the relevant workers. In contrast, in spite of the efforts of the Minister of Aviation and the aspiration of National leadership of the ruling party, the APC, to establish Air Nigeria as a National air carrier on the basis of PPP in 2018, the project collapsed like pack of cards at the Federal Executive Council meeting when it was presented for approval.^{lxi} On the other hand, the Centenary City project, though initially conceptualized as a conventional government procurement project but later converted into a PPP project, saw the active support and coordination of the then SGF, Prince Pius Anyim Pius. It created negative impression of conflict of interest that the interest he showed in the project could be beyond the line of official duties.^{lxii}

In spite of the robust PPP guidelines instituted in the National Policy on PPP as well as such anti-corruption legislation like the Economic and Financial Crimes Commission (EFCC) Act of 2004, the Independent Corrupt Practices Commission (ICPC) Act of 2000 and the Freedom of Information Act 2011, the incident of corruption in the PPP process cannot be ruled out. Bribery, extortion, misappropriation, engagement of unqualified entities, conflict of interest, undeserved or illegal tax waivers, weak oversight or supervision by officials, and lack of transparency in the PPP process have been identified as the different forms of corruption in the

Nigeria's PPP procurement process.^{lxiii}

For instance, one of the factors that made the MM2 Terminal concession litigious was the allegation that the Minister of Aviation was compromised in unilaterally extending the concession term to thirty-six years. The same thing with the Lagos-Ibadan Expressway concession, alleged to be lopsided against the government. In all these transactions, the Chairman of Bi-Courtney Limited was at the thick of it that he allegedly peddled money and official influence as the Special Counsel of the then president to sway favourable decision in his company's favour. If Nigeria is to stem the tide, the PPP process must be transparent, simple and straightforward; it should strictly adhere to rules and regulations; and must ensure proper oversight functions.^{lxiv}

Interference with the terms of executed agreement not only brings instability to the private party but also scares potential investors and lenders. Government should therefore resist the temptation to interfere with PPP implementation, which is very common in respect of political differences and price increases. The Lekki Concession where the State Government suspended tolling for a particular point in time is a good example.^{lxv} So also is the NPA attempt to take over the pilotage contract from INTELS despite the fact that corresponding amortization repayments for Deep Ocean terminal was not completed.^{lxvi} The refusal of government to allow electricity Distribution Companies (DISCOs) to increase tariffs under Multi-Year Tariff Order (MYTO) 2020^{lxvii} is also a bad signal.

A PPP project does not exist in isolation. The objectives of a PPP project may not be fully achieved if the risk of the sector in which it operates is not comprehensively analyzed and adequately managed. For example, the traffic gridlock in Apapa became worsened because the remote offshore infrastructure of Apapa port, i.e. the ports' access and exit roads, were not properly captured in the conceptualization of the NPA Terminals' concession. Only the sea depths, ship and cargo handling equipment were properly captured. We also saw similar scenario of mismatch in the Power sector privatization. The Government only concentrated on the generation infrastructure without giving adequate attention to the distribution infrastructure to the extent that while the Generating Companies (GENCOs) were generating about 8,145MW of electricity, the DISCOs only had the capacity to distribute about 3,000MW.^{lxviii}

The Nigeria's financial system has refused to rise up to the demands of adequate PPP funding. There is the absence of long term funding and, in spite of the financing difficulties experienced by the Lekki Concession Company (LCC) in Nigeria's pioneer toll road project, Nigerian banks are yet to put any strategy to institute long term financing of projects. The five-year maximum tenor that the Lekki concession faced is still the dominant practice in the banking system. The interest rate of over 20 percent of average Nigerian bank cannot encourage a reasonable debt-equity mix in PPP project funding. Foreign loans may not be a reasonable option in view of foreign exchange conversion risk, which lenders consider as a red flag. With inflation hovering over 16.95% of GDP as at December 2021,^{lxix} repayments of dollar-denominated loans from Naira-denominated cash flows could be extremely difficult.

Process Deficiencies and Perceived Negative Interests

Leveraging on above discussions and beyond the weak legal framework, inadequate PPP policy, institutional conflicts and capacity deficiencies, it is obvious that inadequate project preparation and perceived negative interests could affect successful deliveries of PPP projects in Nigeria. A careful analysis of some concluded PPP projects in Nigeria has shown that the success or otherwise of a transaction is underpinned on detailed project preparation and diligent project implementation. The NPA terminal concessions, for instance, were largely successful due to the excellent project preparation and implementation processes. The respective engagements of Haskoning DHV for diagnostic study of Nigeria's ports industry, CPCS Transcom for transaction advisory services, and Maevis Limited for staff PPP capacity building had significant positive impact to the success of the NPA concessions.

In contrast, such detailed project preparation seemed to be absent in respect of the MMA2 concession to Bi-Courtney Limited with the attendant consequence of more than a decade of litigations. The controversy that trailed the increase of the MMA2 concession period from twelve years to thirty-six years in order to ensure cost recovery for the company is a clear indication of weak project preparation. This tenor increase also gives a clue of how negative perception, i.e. conflicting political interest, corruption, influence peddling, etc., could destroy requisite trust between partnering stakeholders in a project.

Another factor that could result in the failure of a PPP transaction is conflicting political interest. The Lekki Concession was a classic example. The transaction was well designed and

excellently structured to such an extent that it got adequate international financing in spite of currency exchange risk, and that the project was delivered within good timeframe even though not a single reputable international construction company indicated interest. The Lagos State Government however, had to prematurely terminate and buy back the concession because of peoples' agitations that was feared could influence a negative voting pattern against the ruling administration in that year's election.

Another example of negative perception that could affect smooth implementation of a PPP project was NPA's attempted cancellation of INTELS pilotage services contract, which forced the former Vice President, an opposition politician to the incumbent government, to sell off his equity interest when it became obvious that the dispute could never be resolved so long as he continued to maintain a stake in the company. It is important to point out that until the change of political administration in 2015, INTELS never had any serious problem in its concession and amortization arrangements with the NPA.

A similar scenario, even though the negative perception was corruption as seen above, played out in the concession of Lagos-Ibadan Expressway granted to Bi-Courtney Limited. It was perceived that the concession was lopsided against the Federal Government because it was given at a time when its chairman was the Honorary Legal Counsel in Nigeria's Presidency, and hence compromised relevant public officers to obtain the concession rights. In cancelling the concession, the succeeding government did not even follow the due process stipulated in the contractual agreement for termination.

Notwithstanding the scenarios in MMA2, INTELS and Lagos-Ibadan Expressway concession agreements, there are instances where weak project preparations and perceived political interests do not necessarily result in PPP project failures. The projects under Executive Order 007 and amortization programmes are projects that are immersed in such deficiencies. However, the Dangote's 35-kilometer Apapa-Oshodi-Ojota-Oworonshoki Expressway project and the construction of the 750m-river bridge over the Opobo channel by LNG Nigeria Limited under Executive Order 007 scheme as well as the rehabilitation of berths 1a, 2 and 3 by Flour Mills Plc under the NPA's Amortization programme were being executed effectively and efficiently. The success of these projects reinforces the argument that PPP projects could still succeed in spite of process deficiencies.

PROSPECTS OF PPP IMPLEMENTATION

The concerted effort of every MDA under the Federal Government to provide infrastructure in spite of and within the context of limited financial resources underscores that the prospects of PPP implementation in Nigeria is very bright. This is more so considering the experience of public sector officials in some of the projects that had been procured on the basis of PPP and the near consensus that public authorities do not have the requisite financial resources to provide all necessary and desired public infrastructures.^{lxx} It is obvious that the optimism does not stem from a singular source, but is multidimensional.

Since 1986 when the Federal Government introduced the Structural Adjustment Programme (SAP) with a major paradigm shift for a private sector-led economy,^{lxxi} every subsequent National plan, e.g. the Economic Recovery & Growth Plan, the Nigeria's Integrated Infrastructure Master Plan (NIIMP), Vision 2020, etc., had created opportunities for private sector participation in the provision of public infrastructure and services. In fact, there is observable increase on the role of the private sector in public infrastructure financing in every subsequent long or medium term plan since 1986 to the extent that, by 2014 when the NIIMP was produced, the private sector was projected to contribute 40 percent funding of the \$3 Trillion public infrastructure investment national requirement.^{lxxii} If we are to continue by the existing trend, the private sector will certainly continue to take a larger role in public infrastructure funding in years to come.

Another factor that makes the prospect of PPP implementation bright in Nigeria is the huge infrastructure deficit, which the NIIMP put at 20 – 25 percent of GDP. The aspiration to increase Nigeria's core infrastructure stock to a minimum of 70 percent of GDP as found in fast growing emerging markets like India and South Africa, will certainly push Nigeria to explore more effective ways of closing its infrastructure gap. Besides the increase, the existing public infrastructure requires refurbishment or maintenance estimated at more than 2 percent of GDP.^{lxxiii} For instance, Nigeria has a total Federal road network of about 195,000km with about 135,000km of it in bad, terrible, unmotorable and unpaved condition,^{lxxiv} and which about 711 roads are either under reconstruction or refurbishment.

However, due to paucity of funds, the work on these roads had either stopped or the progress is at snail-speed. Even critical roads that hold high hopes or which special arrangements were

made for, did not escape these uncertainties.^{lxxv} It needs to be emphasized that this is just one sub-sector in the transportation sector and does not even include the rail, maritime, aviation and urban transport sub-sectors. If the various programmes of the Federal Government^{lxxvi} were to be a pointer, energy, ICT, agriculture, mining, water, housing, health and even the education sectors would, sooner than expected, open their doors for significant PPP arrangements.

Corollary to infrastructure gap is Nigeria's dwindling revenue and inadequate budgetary allocations for capital expenditure. The present public funding of infrastructure in Nigeria cannot achieve Nigeria's aspirations for public infrastructure as enshrined in the various National plans. Nigeria's infrastructure deficit is estimated at \$100 Billion annually, which is 189.77 percent of the 2021 Federal budget.^{lxxvii} The funds provided for roads infrastructure in National Budgets, for instance, are grossly inadequate. In fact, they cannot even take care of current indebtedness not to talk of paying for existing contracts or funding of new ones. The average budget for road infrastructure since 2016 to date is about ₦76 Billion per annum. As at October 2020, the Federal Government required ₦6.6 Trillion to fund its various existing road projects with outstanding indebtedness to road contractors put at ₦392 Billion.^{lxxviii} It should be noted that the figure of ₦392 Billion-debt did not include the claim for reimbursements by State Governments, which as at November 2019, was over ₦900 Billion.

Another factor is the renewed enthusiasm of public authorities to leverage on the efficiency and expertise of the private sector, culminating in increased collaboration to provide services in such traditional public sector services like bills payment,^{lxxix} passport issuance, tax collection,^{lxxx} outdoor advertisement, street parking, shoe and garment factory^{lxxxii} and industrial park projects. These services cut across different tiers of government in the Federation, and could likely deepen especially with the promulgation of Executive Order 001^{lxxxii} and the production of the compendium of tax incentives, etc., which are meant to encourage and attract private sector investment.

The call for the amendment of the ICRC Act by stakeholders including members of the National Assembly^{lxxxiii} is a welcome development that could strengthen the National Policy, make the legal framework more effective, and bring all models of PPP into government's regulatory ambit. The amendment of ICRC has the capacity not only to increase the success of PPP, but if properly done, to ensure the standardization of PPP at all tiers of government, i.e.

at the Federal Government level and in the 36 States, the FCT and the 774 Local Governments of the federation.

The conduct of Nigerian judiciary in upholding the sanctity of contractual commitments has given hope to potential investors. Although the judicial process is very slow, it is obvious from the few cases it handled that the system does not appear to be vulnerable to interference. The litigations on PPP contractual breaches could, without doubt, boost investor confidence in the system. The judgment of the Court of Appeal in the *Maervis case*,^{lxxxiv} the decision that Bi-Courtney needed not to join FAAN if its action was against the AGF, and the court's injunction against NPA to maintain *status quo* on pilotage services that was linked to amortization arrangement of the Deep Ocean Terminal project^{lxxxv} is a pointer that Nigeria's court system is an impartial arbiter in the enforcement of PPP contractual obligations.

One of the challenges of PPP in Nigeria is the capacity of local banks for long term financing and the unreasonable double-digit interest rate. This was one of the challenges in the Lekki Road Concession project. The foray of the Central Bank of Nigeria (CBN) into PPP infrastructure funding through the establishment of the Infrastructure Corporation of Nigeria Limited could afford the CBN with the opportunity to appreciate extant PPP financing challenges and, indeed, to push it to institute policies that could make loan access, tenor, interest rates, and correspond-banking more investor friendly.

CONCLUSION

The paper had identified some of the present challenges that militate against effective and efficient conceptualization, procurement and implementation of PPP projects, and notwithstanding those challenges, concluded that the prospects for PPP in Nigeria are very bright. We saw the inherent weaknesses in the issues that are fundamental to successful conceptualization, procurement, implementation and delivery of PPP projects in Nigeria. We also saw the fact that process deficiencies and perceived political interest do not, in all cases, result in project failure. It is therefore arguable that what needs to be reformed are the fundamental legal issues militating against the policy and practice of PPP in Nigeria.

It is in this respect that the paper recommends that the Infrastructure Concession Regulatory Commission (ICRC) Act should be amended thus:

- i. The definition of ‘Concession’ under section 36 and the obligation for maintenance and repairs under section 7(2)(b) of the ICRC Act should be more expansive as found in standard definition of the concept by International development institutions, other national jurisdictions and respected academic writers;
- ii. The recognition of different tendencies, models and classifications of PPPs beyond only ‘concession’ provided in the ICRC Act so as to capacitate public sector officials the leverage to explore different PPP models;
- iii. The inclusion of a ‘savings’, ‘repeal’ or ‘exclusion’ section in the ICRC Act to specifically exclude sister organizations in the regulation, procurement and contract administration of PPP processes in order to mitigate institutional conflicts; and
- iv. The adoption of a more all-encompassing, non-controversial and investment friendly name of the Short Title, which gives comfort that PPP in Nigeria transcends beyond the concession model, and that contractual obligations of partners are sacrosanct, enforceable and cannot be interfered by public authorities.

These amendments could strengthen the implementation of PPPs, ensure successful deliveries of projects and, in turn, galvanize more public sector entities into PPP projects. Like a domino, the more quick-wins are recorded, the more PPP projects are conceptualized and implemented, and the more experience relevant stakeholders would garner for greater economic growth and enhanced national development and gross productivity.

ENDNOTES

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