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AN EXAMINATION OF THE LEGAL AND REGULATORY FRAMEWORK FOR PUBLIC-PRIVATE PARTNERSHIPS IN INFRASTRUCTURE DEVELOPMENT IN NIGERIA

*

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&

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Abstract

Nigeria is a developing nation with huge human and material resources. It is the biggest economy in Africa, the 13th largest producer of oil and gas and the 10th largest in oil reserves. Like many developing countries, the country has a huge infrastructure deficit. There exists huge opportunities within its infrastructure landscape which should make it a preferable choice for private investment destination. The country has since 2005 adopted the PPP initiative as a solution to its huge infrastructure gap. Despite this, there have been serious challenges facing the operation of the PPP initiative in Nigeria. This paper argues that for Nigeria to continue to attract and expand its investment atmosphere through the PPP initiative, there is the need for a clear and transparent legal and regulatory procurement framework which can seriously help in building confidence in the private sector and also guarantee their investment returns.

1.0 Introduction

Nigeria is a developing nation with huge human and material resources. It is the biggest economy in Africa,¹ the 13th largest producer of oil and gas and the 10th largest in oil reserves. Like many developing countries, the country has a huge infrastructure deficit. It also has a very high potential for high returns on infrastructure investment. There exists huge opportunities within its infrastructure landscape which should make it a preferable choice for private investment in infrastructure. The country has since 2005 adopted the Public-Private Partnerships (PPPs) initiative as a solution to its huge infrastructure gap. Despite this, there have been serious challenges facing the operation of the PPP initiative in Nigeria.² This article will therefore examine the existing legal and regulatory regime

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¹ See Nigeria now Africa's biggest economy, overtakes South Africa. Available at <http://www.punchng.com/news/nigeria-now-africas-biggest-economy-overtakes-safrica/>. Accessed on 22nd July, 2014.

² These challenges will be examined in the latter part of this paper.

with a view to recommending reforms aimed at creating a sound investment environment for PPPs to thrive in Nigeria.

There is no universally accepted definition for the term "Public Private Partnerships".³ It can be used to describe different arrangements involving the public and private sectors coming together to provide goods and services. According to the World Bank⁴ the term Public Private partnership can be referred to as arrangements, ranging from medium to long term, between the public and private sectors whereby part of the services or works that fall under the domain of the public sector are provided by the private partners, with a detailed agreement for the delivery of public infrastructure and/ or public services. In general term, it is referred to as an arrangement between the public sector and private parties whereby private parties participate in, or help in the provision of public-infrastructure based services.⁵

A more clearer definition was given by E.R. Yescombe who defined PPP as a long term contract between the government and a private sector party in which the private sector is saddled with the responsibility of designing, financing, constructing and operating a public infrastructure with payment over the life of the PPP contract to the private sector party for the use of the facility, made either by the government or the general public as users of the infrastructure provided, and with the facility remaining in public-sector ownership, or reverting to public-sector ownership at the end of the contract term.⁶

On the other hand, the word "infrastructure" has commonly been used since around the year 1927, as meaning "The installations that form the basis for any operation or system".⁷ The word has its source from French, which literally means "sub-grade", which connotes the native material underneath a constructed pavement or railway. The term Public Infrastructure can be referred to those facilities which are very crucial to the functioning of the society. They help in supporting a nation's economy and social activities

³ It should be noted here that there are number of alternative names given to PPPs. In the United States of America, the term P3 is used; In Australia, it is called Privately-Financed Project (PFP); In England and Japan, it is called Private Finance Initiative (PFI); In Malaysia and Nigeria, it is called Public Private Partnerships (PPP); In Indonesia and Egypt, it is called Private Sector Participation (PSP); It is referred to as Commercially Viable Utilities in India; In South Africa, it is called Partnerships while the World Bank prefers to use Privately Provided Infrastructure.

⁴ World Bank definition of Public-Private Partnerships <<http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>>. Accessed on 8th March 2013.

⁵ Darin Grimsey and L.K. Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* (United Kingdom: Edward Elgar Publishing Limited, 2007) Page 2.

⁶ E.R. Yescombe, *Public-Private Partnerships: Principles of Policy and Finance*, (Oxford: Elsevier Publishing Ltd, 2007). Page 3.

⁷ See the online Etymology Dictionary Retrieved from <http://dictionary.reference.com/browse/infrastructure>. Accessed on 2nd April, 2012.

and they also include facilities which are ancillary to these functions such as government offices.⁸

Infrastructure has been broadly categorized into economic and social infrastructures. Economic Infrastructure are those infrastructures that are so crucial and essential for the daily economic activities of a nation like Energy, Transportation, Dam and Telecommunication among others, while social infrastructure are those facilities that help in the development of human resources in an economy and they also help in structuring the society. Examples of this are Prisons, Hospitals, Schools, Libraries, Housing and what is now referred to as Security Systems Infrastructure.

In this article, reference to infrastructure is made to both economic and social infrastructure. With the above conceptual analysis, we will now examine in brief the history of Public-Private Partnerships in Nigeria.

2.0 History of Public Private Partnerships in Nigeria

The dominant economic policy objective of the Federal Government of Nigeria at independence⁹ was to expand its role through direct intervention and ownership in the nation's economy. With the international donor agencies' supports, the government was able to gain the commanding heights and dominated economic activity in the country.¹⁰ With an unprecedented increase in the oil revenues in the country in the 1970s,¹¹ this government's dominance was further strengthened and this thwarted the growth of the emerging private sector. During this period, governments in Nigeria¹² were able to invest in agriculture, infrastructure and industrial production. The oil boom also caused a major shift in the activities of the private sector away from agricultural and industrial production to government contracting and trade. The increased dominance of the public sector during this period led to a huge gap between the public and private sectors and created an atmosphere characterized with lack of trust.

Towards the end of 1980s, government began to recognize the role of the private sector in economic development; the Nigerian government began to open up to a more private sector-led economy. It was necessary to engage the private sector in dialogue on economic policy making. In July 1986, the Ibrahim Badamosi Babangida administration embarked upon the Structural Adjustment Programme (SAP). Part of the major objectives of SAP

⁸E.R. Yescombe Op cit.

⁹Nigeria got her independence from Britain in 1960 and became a republic in 1963.

¹⁰Mary I. Agboli and James J. Emery, *Encouraging Effective Dialogue and Advocacy in Nigeria: The Better Business Initiative*. Retrieved from www.publicprivatedialogue.org/case_studies/The%20Better%20Business%20Initiative.doc on 15 June, 2014.

¹¹ Oil was discovered in large quantities in Nigeria in the early 1970s. Nigeria generated a lot of revenues especially during the period of the oil boom.

¹²Nigeria is a federation with constitutional delineation of legislative and executive powers between the Federal and State Governments.

were to pursue deregulation and privatization leading to removal of subsidies, reduction in wage bills and the retrenchment of the public sector ostensibly to trim the State down to size.¹³ To actualize this objective, the Federal Government, in July 1987, set up a Technical Committee on Privatisation and Commercialisation (TCPC) which was backed up by the Privatisation and Commercialisation Decree.¹⁴ However, because of long dominance by the public sector, the private sector had been weakened and as a result have diminished role in supporting development of public infrastructure.

The resumption of military rule adversely affected the little economic progress made in the early 1990's; however, with the return of the country back to democratic rule in 1999, Nigerians began to witness a shift in economic policy in favour of a more open, private sector led economy. At this time, effective participation of the private sector became very cardinal to national economic policy deliberations.

In the history of Nigeria, it has been a mix of daunting challenges and boundless opportunities.¹⁵ Since 1999 when the country returned to democracy, the main aim of the Federal Government is to develop regulatory and monitoring institutions in order to allow private sector to play a greater roles in the provision of infrastructure, whilst ministries and other public authorities will focus on monitoring, structuring and planning for the projects. The private sector will be engaged to manage and provide public infrastructure for the nation.

It is now globally recognised that private participation in infrastructure development through PPPs will enhance greater efficiency in the use of resources, quality assurance and scrutiny and it will allow the citizen to get value for money. This policy statement sets out the steps that the Government will take to ensure that private investment is used, where appropriate, to address the infrastructure deficit and improve public services in a sustainable way; and it will ensure that the transfer of responsibility to the private sector follows best international practice and is achieved through open competition.

Former President Olusegun Obasanjo¹⁶ in his assessment of the decline in Nigeria's public enterprises asserts that these enterprises suffer from fundamental problems of defective capital structure, excessive bureaucratic control or intervention, inappropriate technology,

¹³See Ehi Oshio and N.F Stewart, 'The Legal and Institutional Frameworks of Privatisation in Nigeria: A Discourse. Accessed from <http://nigerianlawguru.com/articles/company%20law/THE%20LEGAL%20AND%20INSTITUTIONAL%20FRAMEWORKS%20OF%20PRIVATISATION%20IN%20NIGERIA,%20A%20DISCOURSE.pdf> on 23rd March 2011.

¹⁴Decree No 25 of 1988 now redesigned Act.

¹⁵Developing Public-Private Partnerships(PPPs) for Infrastructure Development in Nigeria-Fundamentals of the Contract Agreement, Contract Management and Dispute Resolution. Accessed from www.walisuwais.com/?page_id=788 on 21 June, 2012.

¹⁶Former President of the Federal Republic of Nigeria from 1999-2007.

gross incompetence and mismanagement, blatant corruption and crippling complacency which monopoly engenders.¹⁷

3.0 The Legal and Regulatory Frameworks for PPPs in Nigeria

The Federal Government has enacted laws and regulations aimed at providing conducive atmosphere for the private sector that intends to do business in Nigeria. In addition, there are laws enacted with the aim of curbing the incidence of corruption in the country. Some of these laws have been identified and are discussed below.

3.1 The Infrastructure Concession Regulatory Commission (Establishment) Act 2005¹⁸

This Act provides for the participation of private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the Federal Government through concessions and the establishment of the Commission to regulate and supervise concession contracts in Nigeria. Under this Act, the scope of arrangements that can come under the PPP opportunities in Nigeria exist in virtually every sector of the economy. These include power plants, highways, seaports, airports, water supply, telecommunications, railways, etc as well as other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council. This is specifically provided for under S.36 of the ICRC Act.¹⁹

Another important point which is worthy of mention is whether the Act governs concession of infrastructure only at the Federal Government level or it can be extended to cover the states and the Local Governments' infrastructure investments?

The ICRC Act basically applies to concession contracts by the Federal Ministries, Agencies, Corporations and other bodies empowered to enter into a concession contract. However, the ICRC Act and the National Policy and its Supplementary Notes²⁰ made pursuant to the powers vested in the Commission by the Act will also extend to all the infrastructure projects involving the Federal Government and any state or Local Governments that are partially funded by the Federal Government of Nigeria.

¹⁷[http://wiki.answers.com/Q/What are the problems of Nigeria enterprises](http://wiki.answers.com/Q/What_are_the_problems_of_Nigeria_enterprises). Accessed on 21 June, 2012.

¹⁸ See the Explanatory Note to the ICRC Act, 2005.

¹⁹ "Infrastructure" is defined to include "development projects which, before the commencement of this Act, were financed, constructed, operated or maintained by the Government and which, after the commencement of this Act, may be wholly or partly implemented by the private sector under an agreement pursuant to this Act including power plants, highways, seaports, airports, canals, dams, hydroelectric power projects, water supply, irrigation, telecommunications, railways, interstate transport systems, land reclamation projects, environmental remediation and clean-up projects, industrial estates or township development, housing, government buildings, tourism development projects, trade fair complexes, warehouses, solid wastes management, satellite and ground receiving stations, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council"

²⁰ See the Provision of S.34 of the ICRC Act which gives the commission the power to make regulations.

The law requires that both the States and the Local Governments should have regard to the provisions of the Act and the National Policy and its Supplementary Notes made there under in designing their own programmes for infrastructure investment and procurement processes as representing the best practice for PPP Procurement in Nigeria. Some states in Nigeria have also adopted the PPP initiative as a means of developing their infrastructure. Lagos and River States have been in the frontline. Each of these states is responsible for developing its own investment framework and will also create an enabling environment for investors.

3.2 The Lagos State Public Private Partnership

In 2011, the Lagos State Government enacted the Public Private Partnerships Law²¹ with the aim of establishing the public Private Partnership Office²² and enhancing infrastructure service development in Lagos State through the introduction of Public Private Partnerships. The Office is expected to draw from best practices in project management and delivery to ensure that residents of Lagos State get value for money in Public-Private Partnership programmes. The implementation of PPP projects must focus reflect accountability, transparency, due process and must be in line with the international best practices. This approach will ensure that proper governance standards are in place and white-elephant projects will be avoided.²³ Many of the PPP projects within a state will be financed with the support and a guarantee from the Government of the Federation. In providing this guarantee, the Federal Government should have regard to the international best practices.

3.3 The Public Procurement Act 2007²⁴

This Act provides for the establishment of the National Council on Public Procurement and the Bureau of Public Procurement in Nigeria as the regulatory agencies responsible for the monitoring and oversight of public procurements, harmonising the existing government policies and practices by regulating, setting the necessary standards and developing the legal framework and professional capacity for public procurement in Nigeria.²⁵ It is important to state at this stage that the Public Procurement laws play important roles in PPP procurement in Nigeria. This is because the procedure for the procurement of PPPs should be in tandem with the provisions of the procurement laws. Both Public Procurement and Public Private Partnerships reflect market principles and the two of them constitute a strategy for improving public management.

²¹ Law NO 2 of 2011.

²² The PPP office was actually established in 2009 but without a legal backing.

²³ See, Gov. Fashola Creates PPP Office .Retrieved from <http://www.lagosstateppp.gov.ng/news/news4.asp>. Accessed on August 8, 2013.

²⁴ See also the Laws of the Federation of Nigeria, 2010.

²⁵ See the Preamble to the Public Procurement Act, CAP P44, Laws of the Federation of Nigeria, 2010.

3.4 The Fiscal Responsibility Act 2007²⁶

This Act provides for the prudent management of the nations' resources, secure greater accountability and transparency in Fiscal operations within the medium term of Fiscal Policy Framework, and the establishment of the Fiscal Responsibility Commission which would ensure the promotion of the nation's economic objectives.

The functions of the Commission include: monitoring and enforcing the provisions of the Act and by so doing, promoting the economic objectives which is contained in section 16²⁷ of the Constitution;²⁸ disseminating standard practices including international good practice that will result in greater efficiency in the allocation and management of public expenditure, revenue collection, debt control and transparency in fiscal matters;²⁹ undertaking fiscal and financial studies, analysis and diagnosis and disseminate the result to the general public;³⁰ making rules for carrying out its functions under the Act;³¹ and performing other functions that are consistent with the promotion of the objectives of the Act.³²

It should be categorically stated here that the Fiscal Responsibility Act does not have direct provisions on PPPs but on sound financial management of funds by the government ministries, agencies and departments, and in so far as PPPs are linked to the capital votes of departments, invariably, it is part of the legislations to be complied with and the compliance relates to ensuring compliance in the allocation and management of public expenditure. These are the issues which the Fiscal Responsibility Act addresses and that is why it is one of the legislations that must be complied with.³³

3.5 The National Policy on Public Private Partnerships in Nigeria and its Supplementary Notes.

The National Policy on PPP was developed by the Infrastructure Concession Commission in 2009 and duly approved by the Federal Executive Council to provide clear, consistent and a detailed process and procedure guides for all aspects of infrastructure development through PPPs and implementation ranging from project identification, evaluation, selection, procurement, operation, maintenance and performance monitoring.

The Supplementary Notes on the other hand provides further information on the National Policy on Public Private Partnerships in Nigeria. It sets out the roles and responsibilities

²⁶See The Fiscal Responsibility Act, 2007 2007 ACT No. 31 <http://frc-nigeria.org/Fiscal%20Responsibility%20Act.pdf>

²⁷This Section provides for the Economic Objectives of the government in Nigeria. However, the Constitution itself provides in S.6(6) © that all the provisions relating to the Fundamental objectives and directive principles are not justiciable.

²⁸ See S.3(1) (a) of the Fiscal Responsibility Act

²⁹ See S.3(1) (b) of the Act

³⁰ See S.3(1) © of the Act

³¹See S.3(1) (d) of the Act

³²See S.3(1) (f) of the Act.

³³ See especially Sections 7 and 30 of the Act.

expected of Federal Government Ministries, Agencies, Cooperation and other bodies involved in the planning and procurement of infrastructure investment projects. It further explains the roles of the ICRC Board in issuing guidelines in project selection and procurement. It also sets out the processes that private sector bidders will need to follow in order to prepare for a bidding opportunity, to submit a bid, and to arrange finance in finalizing a contract with government for the provision of new infrastructure or public services.

3.6 The Freedom of Information Act 2011

The Freedom of Information Act is expected to help in enthrone transparency, unearthing facts, battling corruption and holding public officials and institutions accountable in PPP procurement. The Act establishes the right of every Nigerian to have access to information. Section 1 of the Act provides thus;

- (1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.
- (2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.
- (3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.

The FOI Act guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services. The Act also, among others, require all institutions established in Nigeria to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act.³⁴

4.0 Legal Requirements for Private Participants in Infrastructure Development

All private participants in the bidding process must be commercial companies or partnerships operating under the relevant laws of their country of registration and in addition must possess the following:

1. They must possess the legal capacity to enter into the concession contract;³⁵

³⁴Freedom of Information Act Signals Consolidation of Nigeria's Democracy. Retrieved from <http://www.stakeholderdemocracy.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=342&cntnt01origid=67&cntnt01returnid=122>. Accessed on 28th Nov, 2012.

³⁵Sections 2(3) of the ICRC Act 2010 and S.16 (6) (b) of the Public Procurement Act 2010.

2. The project proponent must possess the required professional and technical qualifications to carry out the contracts;³⁶
3. They must possess the financial capability to execute the contract;³⁷
4. They must possess the equipment and other relevant infrastructure to carry out the infrastructure development or maintenance;³⁸
5. Shall have adequate personnel to undertake and perform the obligations required under the contract;³⁹
6. Not be insolvent or bankrupt and must not be involved in any insolvency or bankruptcy proceedings, or the subject of any form of winding up petition or proceedings;⁴⁰
7. Must have paid all its taxes, pensions and other required social security contributions;⁴¹
8. Must not have any director who has been convicted in any country for any criminal offence relating to fraud or financial impropriety or criminal misrepresentation or falsification of facts relating to any matter;⁴²

5.0 The Public Sector Authorities

The ICRC Act allocates specific roles and responsibilities to only ministries, departments and agencies (MDAs) within the Federal Government for PPP project identification, planning, approval, procurement, and implementation.⁴³ It therefore means that it is only the MDAs that can enter into a contract and grant concessions to the private sector proponents on behalf of the Federal Government of Nigeria.⁴⁴ In granting concessions, it is important to first determine which ministry, department or agency of the government that is empowered by the constitution and the Act establishing same to grant concession to the private proponent. This would involve determining whether the subject matter falls within the Exclusive, Concurrent or residual lists as contained in the Second Schedule to the 1999 Constitution.

It is only the National Assembly by virtue of the powers conferred on it by the Constitution that can make laws in respect of the items listed on the Exclusive Legislative Lists.⁴⁵ Some

³⁶See Section 16 (6) (a) (i) of the PPA 2010

³⁷S.16 (6) (a) (ii) of the Public Procurement Act 2010.

³⁸S.16 (6) (a) (iii) of the PPA, 2010.

³⁹S.16 (6) (a) (iv) of the PPA, 2010.

⁴⁰S.16 (6) (c) of the PPA, 2010.

⁴¹S.16 (6) (d) of the PPA, 2010.

⁴²S. 16(6) (e) of the PPA, 2010.

⁴³ The Act provides that any Federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure may enter into a concession to any duly pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure that is financially viable or any development facility of the Federal Government in accordance with the provisions of this Act.

⁴⁴See S.1 of the ICRC Act.

⁴⁵S.4 of the 1999 Constitution of Nigeria gives the National Assembly the powers to make laws for the Federation and also the State Houses of Assembly the powers to make laws for their respective states.

of the items that are on the Exclusive Legislative List are telecommunications; defence; railways; prisons; arms and ammunitions; aviation, including airports, safety of aircraft and carriage of passengers and goods by air; construction, alteration and maintenance of federal trunk roads; maritime, shipping and navigation on national waters; military (Army, Navy and Air force) including any other branch of the Armed forces of the Federation; National Parks; Police; Posts, telegraphs and telephones; water from such sources as may be declared by the National Assembly to be sources affecting more than one state.

While Concurrent Legislative List is a list in which both the National Assembly and State Houses of Assemblies can legislate on. Some of the items on this list are; Education, Electricity/Power generation; Industrial, commercial or agricultural development to mention but a few. The residual legislative list covers those areas in which it is only the state legislators that have the powers to legislate and grant concessions in respect of the matters contained therein.⁴⁶

6.0 Basic Principles in PPP Procurement

6.1. Transparency and Openness in PPP Contracts

Transparency and openness are very cardinal to a successful Public Private Partnership contract. This is because of the variety of services involved in these contracts and the need to demonstrate value for money. It is crucial that the contract is understood and agreed upon by all the interested parties and the quality of information within it is properly publicised.⁴⁷ The principle of transparency focuses on the entronement of accountability in the procurement process and that PPP procurement conforms to statutory provisions. The implication of this is that PPP procurement must follow a transparent procedure in all cases and at all times.

In PPP procurement, transparency relates to openness and fairness in all the processes and stages involved in PPP procurement. Starting from the conception of the PPP project through planning, to the stage of the invitation of the project proponent to bid and even up to the award level. The Infrastructure Concession Commission and other procuring agencies shall exercise and display the highest level of transparency. Transparency in PPP procurement helps in eradicating corruption, coercion and collusive practices.

It is important to state here that bidding for public or private sector contracts is a significant cost on business that has a direct impact on their profitability. Companies will only participate in the bidding process if they believe that the chances of successfully being awarded the eventual contract are proportionate to the costs incurred in bidding. This fact places an obligation on the procuring authorities to set out in a transparent manner, the

⁴⁶ See further, *Attorney General of Lagos State Vs. Attorney General of the Federation* (2003) 12NWLR (PT 833) Page 1 on the ambits of the legislative powers of the National Assembly and that of the State Houses of Assembly.

⁴⁷ See *Why PFI Contracts need to be more transparent*. Retrieved from www.guardian.co.uk/local-government-network/2012/jun/29/pfi-contracts-transparent. Accessed on 6th September, 2012.

basis on which the successful bidder will be selected to all potential bidders from the outset, when describing the range of works or services that they will require.

Potential bidders can then make an informed decision on whether to participate in the competition, and, if they do, to maximize their chances of submitting a successful bid. Given the cost of bidding for more complex projects like PPPs, it is good practice to limit the number of bidders invited to submit bids to a number sufficient to ensure effective competition and to progressively reduce the number of bidders, whilst maintaining competition.

PPP procurement will therefore use a two- or three-stage procurement process, where the first stage has the objective of selecting those bidders that are best qualified to submit fully priced bids. This stage is often referred to as prequalification, and the basis in which the shortlist of bidders will be selected should be stated clearly in the prequalification documents issued to all potential bidders. These selection criteria should also be consistent with the grounds for excluding bidders given in the Public Procurement Act.⁴⁸

The second and third stages will progressively reduce the number of bidders based on the evaluation of priced bids until the Preferred Bidder is identified.

6.2 Open Competitive Bidding

The benefits of private sector participation in infrastructure are increased by effective competition and by ensuring that business activities are subject to appropriate commercial pressures, dismantling unnecessary barriers to entry, and implementing and enforcing adequate competition laws. Given the very particular nature of the services required for a PPP contract (including their complexity, amount of investment involved and completion time), it is important for the contracting entity to have the freedom to choose the private partner who appears to be the best in terms of professional qualifications, financial strength, ability to ensure the continuity of the service, equal treatment of the users and quality of the proposal.

The ICRC Act provides that the commission shall invite open and competitive public bid.⁴⁹ By this, it means that the Act gives room for the participation of more than one bidder. This will give room for the emergence of a bidder with the most technically and economically comprehensive bid.⁵⁰ The open competitive bidding method has also been adopted under the Public Procurement Act as the primary method of bid solicitation for the procurement of goods and works including related services.⁵¹ The rationale for adopting this method as the principal method for soliciting bids from the public is that it presents the best process for adhering to the laid down objectives of public procurement as it relates to

⁴⁸See S.16 for the categories of bidders excluded by the Public Procurement Act.

⁴⁹See S.4(1) of the ICRC Act, 2005.

⁵⁰See S.4 (2) of the ICRC Act

⁵¹See S.40 of the Public Procurement Regulations for Goods and Works.

transparency, equality of opportunity, fairness, economy, competition and value for money.⁵²

Under the open competitive method, the winning bid is always the bid which is the lowest evaluated responsive bid which has been responsive to the bid with regards to specification and standard. A procurement bid under the open competitive bidding method may adopt the International Competitive Bidding method (ICB) or National Competitive Bidding Method (NCB). While International Competitive Bidding method connotes the solicitation of bids from both domestic and foreign contractors, National Competitive Bidding method, on the other hand, means the solicitation of bids from domestic contractors and project proponents registered or incorporated to carry on business under the Nigerian Laws.

However, the Infrastructure Concession Act provides the circumstances where public bidding may not be necessary. These are:

1. Where only one contractor or project proponent applied or submits a bid or proposal.⁵³
2. Where only one contractor or project proponent meets the prequalification requirements. The Ministry, Agency, Corporation, body may undertake direct negotiation without competitive bidding for any contract to be entered into pursuant to section 1 of this Act.
3. Where there is an unsolicited proposal: This is purely an initiative of the private sector concerning areas where it deems it is expedient for the government to award a concession contract. Since this is an initiative of the private sector, there may not be any need for competition unless the Commission deems it expedient.

In some cases, where technical specifications are made to bidders, it should be made possible to submit tenders that contain and reflect the diversity of technical solutions so as to achieve a sufficient level of competition. Where technical specification is required, it should be drafted in such a way to avoid narrowing down competition through specifications that will favour a class of economic operator. Technical specifications are better drawn up in terms of functional and performance requirements of the project. This is the only way through which innovation and better services can be achieved.

6.3 Publication

Contracting authorities wishing to award a concession contract shall make public their intention by means of a concession notice. The notices shall contain all the necessary information deemed useful by the contracting entity and in accordance with the procurement procedure.

By the provision of S.2(4) of the ICRC Act, the Infrastructure Concession Regulatory Commission shall publish, in the Federal Gazette and at least three national newspapers having wide circulation in Nigeria, and such other means of circulation, the list of projects

⁵²Oloworaran B. D. *The Law and Practice of Public Procurement in Nigeria* at Page 156.

⁵³See S.5(a) of the Act.

eligible for contract for the financing, construction, operation or maintenance of any infrastructure under the Act.

Also the provisions referred to in S.16 of the Public Procurement Act⁵⁴ concerning the qualification and disqualification of such project proponents where appropriate must be contained in the notice or the standard forms.

6.4 Rules on Confidentiality

Except otherwise provided, the governments or contracting authorities are not entitled to disclose information forwarded to them by the economic operators which have been designated as confidential, including trade secrets and the confidential aspect of tender. The government or contracting authority may sometimes impose some requirements on the economic operators which are aimed at protecting the confidential information which the government or contracting authority makes available during the concession award procedure.

Under the Infrastructure Concession Act, there is a provision for the protection of confidential information and trade secrets which has come to the knowledge of any of the officials of the commission. Section 35 of the Act provides:

(1) A member of the Board, the Director-General or any other officer or employee shall-

(a) not, for his personal gain, make use of any information which has come to his knowledge in the exercise of his powers or is obtained by him in the ordinary course of his duty as a member of the Board or as the Director-General, officer or employee of the Commission;

(b) treat as-confidential any information which has come to his knowledge in the exercise of his powers or is obtained by him in the performance of his duties under this Act;

(c) not disclose any information referred to under paragraph (b) of this subsection, except as required by law.

The section further makes provision for punishment of whoever contravenes the provision of (1) above thus;

(2) Any person who contravenes the provisions of subsection (1) of this section commits an offence and shall on conviction be liable to a fine of not less than N50,000 or imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.

⁵⁴See LFN, 2010.

7.0 Participation by Foreign Expatriates

An alien or a foreign company that is interested in participating in infrastructure development in Nigeria through PPPs will first have to join in the formation of a company in Nigeria. However, such alien or foreign company must comply with all enactments regulating their rights and capacities to undertake or participate in trade or business in Nigeria.

Every foreigner/company intending to carry on business in Nigeria must take all steps necessary to obtain incorporation for the company as a separate entity in Nigeria and until so incorporated; such foreign company cannot have a place of business in Nigeria. However, such a foreign company may be allowed a place of business only for receipt of notices and other documents as matters preliminary to incorporation.⁵⁵ Also, an alien may freely invest and participate in the operation of any enterprise in Nigeria except petroleum enterprises and enterprises in the "Negative List". The alien may operate alone or in joint venture with a Nigerian by means of a company which must first of all be registered by the Corporate Affairs Commission (CAC) and thereafter registered with the Nigerian Investment Promotion Commission (NIPC).

However, by the provision of S.55 of CAMA, a foreign company may apply to the President of the Federal Republic of Nigeria for exemption from the provisions of S.54 of the Act if that foreign company belongs to one of the following categories, that is;

- (a) Foreign companies (other than those specified in paragraph (d) of this subsection) invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project;
- (b) Foreign companies which are in Nigeria for the execution of specific individual loan projects on behalf of a donor country or international organization;
- (c) Foreign government-owned companies engaged solely in export promotion activities; and
- (d) Engineering consultants and technical experts engaged on any individual and specialist project under contract with any of the governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Government.

It follows from the above provisions that such companies invited into Nigeria to provide financing, engineering and technical experts may be exempted from full registration with the relevant agencies prior to their engagement in infrastructure development projects in Nigeria.

⁵⁵See S.54 of the Companies.

8.0 Conclusion

In Nigeria and other African countries, access to critical infrastructure and services can be accomplished through Public-Private Partnerships, where the government is expected to deliver the minimum standard of services to the people; the private sector brings capital, skills and their competencies.⁵⁶ Such collaborations will help in bridging the information gap between the public and private sector organisations, reducing the level of poverty and promote access to social and economic infrastructure which are critical in national development.

The objectives of a typical PPP arrangement in Nigeria is the mission to contribute to the economic integration of the country, accelerate its economic growth and sustainable development, engender and sustain private sector collaboration in traditionally public sector projects and also expand local access to international market thereby ensuring a deeper economic integration with the global world.

To achieve the above stated objectives, government has to ensure an enabling policy framework for investment and provide adequate capacity at all levels to implement, monitor and manage the agreed projects. The policy framework refers not just to the legislation and regulation of public-private partnerships themselves, but also includes other elements supportive of good public governance such as confidence, integrity transparency and sound control measures.

9.0 Recommendations

The following recommendations are suggested for reforms:

1. There are issues with the legal framework for PPPs in Nigeria. Some of these issues bother on inconsistencies of the relevant laws. Nigeria, being complex federating states, still has conflicting provisions as to which of the Ministries, Departments or Agencies of Governments has the exclusive right to grant concessions. For example, the Nnamdi Azikiwe International Airport concession project was stalled because of the clear conflict as to which of the agencies of the Federal Government has the right to grant concession in respect of the Airport. On one hand, the Federal Airport Authority of Nigeria claimed that by virtue of the provision of S.1 (3) of the Federal Airport Authority Act, it is the only authority invested with the power of granting concession in respect of all Federal Airports in Nigeria. On the other hand, the Federal Capital Development Authority which is the agency that manages all lands within the Federal Capital territory, where the airport is situated also claimed that by the provision of S.4(1) of the FCDA Act,⁵⁷ it is the only authority that can grant concession in respect of the MDAs situated within the Federal

⁵⁶A. A. Uzodima, *Public Private Partnership and Nigeria's Development*. Accessed from www.Phishare.org on 23rd August 2011.

⁵⁷See S.4(1) of the Federal Airport Authority of Nigeria Act, CAP F5. Laws of the Federation of Nigeria, 2010.

Capital Territory. There is the need to have clarity in the legislation so as to avoid conflict between these agencies of government.

2. The ICRC Act has laid down broad principles on which concessions are to be granted and has given certain guarantees to potential concessionaires. For instance, it provides that concessions must be structured in a manner that ensures that the concessionaire derives reasonable profits from the concession. However, other than stating this principle, the Act does not contain any detailed provisions to ensure compliance.
3. Furthermore, the Act does not give the Commission sufficient power to supervise concessions and enforce compliance with its provisions. It appears that the Commission is largely a policy-making body. There is a real need to strengthen the Commission and make it a one-stop shop for handling every detail pertaining to any infrastructure or service the government has decided to concession. Since its sole business will be concessioning, it should not be constrained by the tendency of other government agencies and ministries to hinder the progress of PPPs, due to the perception that it undermines their powers and sources of revenue.
4. The justice system in Nigeria is indeed very slow. Delay of cases in Nigerian courts has become so worrisome. Some cases spend as much as 20-30 years before they are finally concluded. Since PPP contracts are commercial in nature, there is the need to speedily dispose of those cases so that investors will not lose confidence in the Nigerian judicial system.
5. The process for awarding concession contracts should be designed to guarantee more transparency, fairness and non-discrimination; private sector participants, their sub-contractors and representatives will not resort to bribery and other irregular practices, gain control over assets to gain an unfair advantage, or attempt to win favours if the process is very transparent and fair.
6. A sound enabling environment for infrastructure investment - which implies high standards of public and corporate governance, transparency and the rule of law, including protection of property and contractual rights should be put in place to encourage the participation of the private sector in infrastructure development;
7. Public authorities should take effective measures to ensure public and private sector integrity and accountability and establish appropriate procedures to deter, detect, and penalise corruption. With corruption, there can be no sustainable development. In fact, corruption is the antithesis of development and progress.