DRAFTING AND NEGOTIATION OF PUBLIC-PRIVATE PARTNERSHIP CONTRACTS

By

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'Ideas efficacious at sometimes and in some human surroundings are not so at other times and elsewhere'.

-William James[1]

1.0. Introduction

Globally, Public-Private Partnerships (PPPs) are increasingly becoming recognised as a means of procuring infrastructure, indicating a paradigm shift in the relationship between the private and public sectors. Indeed, the boundaries between the public and private sectors are becoming blurred. Various techniques and systems are constantly being established to promote public-private cooperation in order to share the risks and rewards associated with such alliances. The reasons for the growing trend are quite straightforward. In many countries, budgetary constraints and general paucity of public funds impede the development

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[1] William James, *The Varieties of Religious Experience*, Harvard University, March 1902.

of large scale and often capital intensive infrastructure projects and so it has become fashionable to involve the private sector in infrastructure development in order to alleviate fiscal constraints and bridge infrastructure gaps, within the shortest time possible.[2] Added to this, is the fact that such collaborations enable the public sector to step-down most of the risks that come with executing these infrastructure projects by passing them on to the private sector. [3]

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[2] For instance, Nigeria has a huge deficit in basic infrastructure services particularly in the areas of energy and transportation and so in furtherance of its 7-Point Agenda, the Federal Government of Nigeria recognized the need to leverage on private sector investment and capacity to bridge the infrastructure gap by establishing an effective framework for Public-Private Partnership. In pursuance of this objective, the Infrastructure Concession Regulatory Commission (ICRC) Act was passed into law in 2005 and the Infrastructure Concession Regulatory Commission (ICRC) was inaugurated in 2008 to provide the requisite legal and regulatory framework to govern Public-Private Partnerships between Ministries, Departments and Agencies (MDAs) and the private sector. Secondly, in the National Integrated Infrastructure Master Plan (NIIMP) published by the National Planning Commission on 27 August 2014, about N166 billion would be needed between 2014 and 2018 to provide infrastructure like transport, power, water and ICT with the private sector providing 52% of the funding.

[3] In other words, the economic rationale for PPP needs to be considered from two angles, first, is that of the government which is concerned with financial policies for the provision of public services, the cost of these services and their effect on the national accounts and budgets. In many cases, these concerns have resulted in the deferment of expenditure on public assets. Traditionally, procurement of public services have always involved government paying up front for the infrastructure used in providing these services, however with the PPP approach payments are spread over a period of time making it a more attractive option for infrastructure delivery. Second, is that of individual public sector organisations who procure infrastructure and related services within stipulated funding limits and general budgetary constrictions. In doing this, they would usually ascertain the effect of the investment proposals on their current and future budgets and requirements for service provision through an economic evaluation of the various options available. In numerous cases it may be possible to get better value for money for individual transactions through the PPP approach for reasons, such as the transfer to the private sector of risks which it is better able to manage than the public sector and greater integration of the design, construction and management of infrastructure assets. In: Penny Badcoe and others, *Public Private Partnerships & PFI* (Sweet and Maxwell 2008) para 2.001.

PPPs are normally very complex arrangements, which comprise several parties, models and contracts.[4] There is always a public authority which identifies the need for infrastructure and decides that the project is one suitable for financing through PPP; and a private sector participant, usually a Special Purpose Vehicle (SPV) who executes the Public-Private Partnership (PPP) project by providing the required services. Also, there is usually a Project Agreement (Concession Agreement), which defines the roles, responsibilities and obligations of the principal participants in the infrastructure project. This Project Agreement is at the heart of a PPP transaction because it is the major contract around which a chain of other equally relevant contracts and sub-contracts revolve.[5]

The complex nature of PPP transactions demand that extreme care and consideration goes into the drafting and negotiating process of not only the major contract but also the associated

[4] Another area of infrastructure development which is even more complex and which requires more parties and players than normal is the Power Sector. Infrastructure projects in this sector are normally governed by Power Purchase Agreements (PPA). There are usually the following players: the off-taker (buyer) and the power producer (seller) [usually referred to as the primary actors] and then the government; the regulator; the customers (end users); the transmission company; the distribution company; the lenders; the construction company; the plant operator; the fuel supplier and the system operator [usually referred to as secondary actors]. The usual contracts include: Grid Connection Agreement; Fuel Supply Agreement; Fuel Transportation Agreement; Engineering; Procurement and Construction Agreement (EPC); Operation and Maintenance Agreement (O&M Agreement); Long Term Service Agreement (LTSA); Loan (Funding) Agreement; Equity Contribution Agreement; Sovereign Support Agreement; Credit Support Agreement and Direct Agreement.

[5] See generally Michael U Klein and Bita Hadjimichael, *The Private Sector in Development* (World Bank, 2003); HK Yong (ed), *Public-Private Partnerships Policy and Practice, a Reference Guide* (Commonwealth Secretariat 2010); Luis A Andres and Others, *The Impact of Private Sector Participation in Infrastructure: Lights, Shadows, and the Road Ahead* (The World Bank 2008); Gerd Schwartz, Ana Corbacho and Katja Funke (eds), *Public Investment and Public-Private Partnerships* (IMF 2008); Ioannis N Kessides, *Reforming Infrastructure: Privatization, Regulation and Competition* (The World Bank and Oxford University Press 2004); Nicholas Avery (ed), *Public-Private Partnerships* (Globe Publishing Ltd 2006) and *Infrastructure at a Crossroads: Lessons from 20 Years of World Bank Experience* (The World Bank 2006).

contracts and sub-contracts to ensure that they are aligned.[6] Attention should be given to detail and care should also be taken to ensure that there is no mismatch between the major contract and the other contracts on the one hand and amongst the other contracts on the other. For instance, the import of the *force majeure* clause in one contract should be the same for the related contracts. Again, the preferred dispute resolution mechanism should provide for the same means and consolidation in all the contracts. Hence, the need for the principal parties to engage a competent and experienced Transaction Advisory Team cannot be overemphasized. Further, in negotiating PPP contracts, it is imperative to consider the municipal legislation, regulations and requirements for permits, licences, approvals, among others for the conduct of PPPs in the host country so as to avert deadlocks which may arise as a result of non-compliance. [7] This chapter focuses on drafting and negotiation of Public-Private Partnership contracts.

2.0. What is a Public-Private Partnership?

According to the International Monetary Fund (IMF), a Public-Private Partnership is a contractual arrangement where the private sector supplies infrastructure assets and services

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[6]Generally, a line is drawn between the Project Agreement and the Project Documents. The Project Agreement is the major contract (usually referred to as the Concession Agreement) while the Project Documents include the Project Agreement; the Construction Agreement; the Direct Agreement; the Operation and Maintenance Agreement; the Funding/Financing Agreement; the Shareholders' Agreement; the Insurance and other related agreements.

[7] In Nigeria, the legal and regulatory framework for Public-Private Partnership transactions include, the Constitution of the Federal Republic of Nigeria 1999 (as amended); the Infrastructure Concession Regulatory Commission (Establishment, Etc) Act 2005; the Public Procurement Act, 2007 and; the Fiscal Responsibility Act, 2007 must be borne in mind. Other laws which are of relevance include, Sectoral Laws such as Federal Highways Act, Cap F13 LFN 2004; Nigerian Railway Corporation Act, Cap N129, LFN 2004; Nigerian Ports Authority Act, Cap N126, LFN 2004, Nigerian Communications Commission Act, Cap N97, 2004; Electric Power Sector Reform Act, 2005; Investment and Securities Act 2007; Companies and Allied Matters Act, Cap 20, LFN 2004; Land Use Act Cap L5, 2004; Utilities Charges Commission Act, Cap U17, LFN 2004; Public Enterprises (Privatisation & Commercialisation) Act, Cap P38 LFN 2004.

that traditionally have been provided by the government.[8] Public-Private Partnerships have also been defined as co-operative ventures between the public and private sectors, built on the expertise of each partner that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards.[9] Thus, with PPPs, the key principle is that government, ministries, departments and agencies are transmuted from being owners and operators of assets into the buyers of services from the private sector or regulators of services, with the private sector assuming the position of long-term providers of service which they deliver by taking charge of the design, construction, financing and the operation of the assets.[10]

3.0. The Principal Parties to PPP Contracts

A Public-Private Partnership is an organisational framework that comprises a number of parties who have converged to promote infrastructure investment. The parties to an infrastructure project may differ remarkably depending on the infrastructure sector, the modality of private sector participation and the project funding arrangements. No two

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[8] International Monetary Fund, 'International Monetary Fund: Public-Private Partnerships' (prepared by the Fiscal Affairs Department in consultation with other departments, the World Bank and the Inter-American Development Bank) March 12, 2004) < https://www.imf.org/external/np/fad/2004/pifp/eng/031204.htm >accessed 26 April 2018.

[9] Marcus Ahadzi and Graeme Bowles, 'Public-Private Partnerships and Contract Negotiations: An Empirical Study' (2004) 22 (9), Construction and Management Economics 967.

[10] The entire Public-Private Partnership procurement process may be divided into four main phases; i.e. the planning and feasibility phase, the bidding and negotiation phase, the construction phase, the operation phase and possibly the transfer of or re-negotiation phase. In: Ahadzi and Bowles (n 9) 967. See also, National Policy on Public-Private Partnership (Infrastructure Concession Regulatory Commission 2013) 14 – 15. A publication of the Infrastructure Concession Regulatory Commission (ICRC) aimed at providing clear and consistent process and procedure guides for all aspects of Public-Private Partnerships projects development and implementation, from project identification, evaluation, selection, to procurement, operation, maintenance and performance monitoring.

infrastructure projects are the same. Each one is unique and so, the parties to each project would be determined by its specific requirements and peculiarities. Regardless, in drafting a PPPcontract, it must be borne in mind that a typical infrastructure project arrangement would generally include the following parties:

a) the public authority (ministries, departments, agencies and corporations)

b) the private sector

c) the financier(s)

d) the sub-contractors;

e) the transaction advisory team which would normally include experts to provide advice on the financial, technical and legal aspects of the structuring process. Insurance advisers, rating agencies and underwriters may also form part of the team.

3.1. The Public Authority

The implementation of a Public-Private Partnership project usually involves a Public Authority[11] in the government of the host country. The public authority is the main body responsible for the infrastructure project within the government. It identifies the need for an infrastructure project and determines whether the project is suitable for financing on a PPP

[11] The phrase, "Public Authority" is also used to refer to the government of the host country of the infrastructure project, including its ministries, departments, agencies and corporations.

basis.[12] In deciding whether PPP is a suitable procurement option for public infrastructure and services, the Public Authority will be guided by certain key principles, which include:

i. achieving the best value for money;

ii. public interest;

iii. the best risk allocation;

iv. verifiable standards of service to be provided based on output requirements;

v. transparency and openness before, during and after the procurement process;

vi. effective competition amongst bidders so as to maximise the benefits of private sector participation in infrastructure development;

vii. capacity of the authority to manage the project facility and partner with the private sector on an equal basis;

[12] The Nigerian government's programme for infrastructure development through Public-Private Partnerships covers the creation of new infrastructure and the expansion and refurbishment of existing assets such as: power generation plants and transmission/distribution networks; roads and bridges; ports; airports; railways; inland container depot and logistics hubs; gas and petroleum infrastructure such as storage depots and distribution pipelines; water supply, treatment and distribution systems; solid waste management; educational facilities such as schools and universities; urban transport systems; housing; healthcare facilities etc. In: Infrastructure Concession Regulatory Commission (n 10) 6. See also the definition of "infrastructure" under section 36 of the Infrastructure Concession Regulatory Commission Act 2005.

viii. effective engagement with the market through a clear communication of the objectives of the infrastructure project.[13]

Where the decision is to finance the project through a PPP, the public authority has to consider its government's policies for infrastructure development in the sector concerned and determine the type of private sector participation that would allow the most efficient operation of the infrastructure facility.[14] The government may also need to consider the current political and economic circumstances as well as the adequacy of the legal framework for PPP transactions.[15]

Having satisfied itself that the project is one that is suitable for a PPP, the next line of action for the public authority would be to define the business and services required, specifying priorities targets and outputs. It then conducts the process that leads to the selection of the concessionaire by executing a carefully planned procurement process[16] including inviting tenders from interested bidders or consortia. The public authority has a permanent interest in the delivery of the asset or service and so determines the performance regime by setting and monitoring safety, quality and performance standards for the services. It ensures that

[13] The Key Principles of Public-Private Partnerships. See Infrastructure Concession Regulatory Commission (n 10) 12.

[14] See generally the United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (United Nations New York 2001).

[15] The government may have to pass legislation that is specifically tailored to the infrastructure project. It may have to refine the laws pertaining to the recognition and enforcement of contractual obligations or security rights or the law relating to nationalisation and expropriation, or to provide for the regulatory regime within which the project is to function. Similarly, the government may need to provide incentives to facilitate foreign investments, for instance, tax holidays on project profits, exemption from customs duties, or concessionary tax rates. In: Wilde Sapte, *Public Private Partnerships: BOT Techniques and Project Finance* (2nd edn, Euromoney Institutional Investor Plc 2006) 4.

[16] Darrin Grimsey and Mervyn K. Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* (Edward Elgar Publishing Limited 2004) 111 – 112.

outcomes are delivered to the required standards and that community expectations and public interest is safeguarded.[17] Further, the public authority (government) provides an enabling environment for the project to thrive and so, it may have to provide various forms of support - legislative, administrative, regulatory - so as to ensure that the project is successful. It may also provide land, fuel or energy or simply grant concessions or issue the relevant permits, licences, authorisations required by law.[18] It is pertinent to note that the public authority is not necessarily the federal or central government. Municipal, state or local authority are also often involved in PPP transactions.[19] Where this is the case, it is of utmost importance to ensure that the authority is empowered under the relevant laws to grant or issue the license.[20]

3.2. The Sponsors (The Private Sector)

In most Public-Private Partnership projects of substantial value a number of sponsors will converge to form a consortium in order to bid for and subsequently, promote the project. This consortium, in PPP transactions is often referred to as "the private sector"[21] simply because it will consists of companies and corporate entities with little or no government affiliations.[22]

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[17] ibid 111 – 112.

[18] According to section 3 of the Infrastructure Concession Regulatory Commission Act, 2005, no ministry, department, agency or corporation can give a guarantee without the approval of the Federal Executive Council.

[19] A number of State Governments in Nigeria have keyed into Public-Private Partnerships as a means of developing infrastructure. Even though each state is in charge of its own investment projects, a good number of such projects will be funded with the support of a guarantee by the Federal Government. The government will normally consider best practice as demonstrated by its own PPP policy and guidelines in providing any such guarantees. In: Infrastructure Concession Regulatory Commission (n 10) 6.

[20] Sapte (n 15) 4.

[21] It is also referred to as 'the promoter' or 'the contractor' or 'the concessionaire'.

[22] For instance, a construction company and a supplier of major plant or feedstock and a future operator of the new project business may collaborate as a consortium to establish or bid for a project. They may even be joined by a future purchaser of the product or service to be provided by the new project business. In: Sapte (n 15) 67.

The members of the consortium will have a common interest in ensuring that the infrastructure project is established and financed and so, will need to agree the legal form in which the project business will operate.[23] Thus, they would normally create a legal entity known as a Special Purpose Vehicle (SPV) or a Project Vehicle Company specifically for the purpose of entering into the contracts and sub-contracts that will need to be concluded in relation to the PPP project. This approach is very beneficial for the consortium for the simple reason that by creating the new limited company, it isolates or steps down any risks and liabilities, which may arise from running the project within one company. Further, putting an SPV in place is a relatively straightforward way of dealing with issues of participation and ownership between parties.[24]

The members will also have individual interests to promote and protect in their dealings with the SPV. The extent of each party's interest can vary considerably and would usually pose questions pertaining to the part to be played by each party; the amount of financial involvement of each party at different phases of the project; the formula for apportioning loss; decision making and the contractual relationship between the consortium and the SPV.[25] As a general rule, the SPV will not come into existence until a bidder has been chosen and the contract negotiations are under way, so it goes without saying that the public authority's interest in identifying its prospective partner would focus, not on the corporate entity itself, but its shareholders who are also the sponsors, investors and promoters that comprise the consortium responsible for the successful bid.[26]

[23] ibid 69.

[24] Badcoe and others (n 3) para 3.011.

[25] Sapte (n 15) 67.

[26] Badcoe and others (n 3) para 3.011.

The consortium and other equity holders in the SPV will be responsible for honouring their contractual obligations, which will include:

i. producing and delivering the defined services to the required standards;

ii. designing and building or upgrading the infrastructure;

iii. raising funds for the capital needs of the project and;

iv. focusing on government's objectives in the project and returning the infrastructure in the specified condition at the end of the contract.[27]

Generally, the (parties) companies and other entities that comprise the consortium and will be thoroughly involved in the development of the project during its early stage and their ability to work as a team and engage other reliable partners will be crucial for a prompt and successful completion of the project.[28]

It is debatable whether a public authority should have equity interest in the SPV. Over the years, it has become clear that public authorities are not good managers or providers of infrastructure. Secondly, assuming any financial responsibility generally leads to contingent liabilities on the part of the public authority. While it may be desirable for public authorities

[27] Grimsey and Lewis (n 16) 112.

[28] United Nations Commission on International Trade Law (n 14) ch A, para 71.

to have equity stake in the SPV, it is inadvisable. Experience has shown that government does not usually meet its financial obligations in such circumstances.[29]

3.3. The Financiers

Public-Private Partnerships would typically have a 90:10 ratio of debt to equity. The equity capital would be provided by the sponsors and investors who constitute the consortium. But, as such equity only represents a negligible portion of the expected project cost, the SPV would normally enter into a funding arrangement with financiers to enable it meet the total capital requirements of the infrastructure project.[30]

Whether the financing is on a non-recourse or limited recourse basis,[31] there are huge amounts of risks involved for the lender. For instance, where the security value of the physical assets e.g. roads and bridges involved in the project is hard to realise because there is no market for it, the financiers may be running at a loss and so will need to consider this eventuality in deciding the percentage of the anticipated project cost that it is willing to lend and on what terms.[32] The financier will also need to assess other attendant risks as well as

[29] For instance, in most privatized public enterprises where government has equity interest, it has not been able to meet its obligations. Some examples include the Delta Steel Company Plc, Aladja Warri; Alumunium Smelter Company Plc, Ikot Abasi, Akwa Ibom State and of course, Nigerian Telecommunications Limited (NITEL) which was eventually sold to Transcorp. Indeed, the failure of PPP projects in Nigeria is more often than not, a problem of the key actors involved in the transactions.

[30] In the initial years of the infrastructure project, the funding would normally be needed to cater for the construction element of the project where there is one.

[31] See John D Finnerty, *Project Financing: Asset-Based Financial Engineering* (John Wiley & Sons, Inc 1996); Scoff L Hoffman, *The Law and Business of International Project Finance* (3rd edn, Cambridge University Press 2008).

[32] United Nations Commission on International Trade Law (n 14) ch A, para 72.

consider factors such as the project sector, the scope, the setting, the projections and the source of project revenue,[33] amongst others.

3.3.1. Financial Sources for Public-Private Partnerships

Conventionally, Public-Private Partnerships projects have been funded partly by debt and partly by equity investment but today, there are a number of other funding sources which are increasingly being used to finance infrastructure projects. The various financial sources are discussed below:

i. **Equity Capital:** This form of capital is usually the first for infrastructure projects and is provided in the form of equity investment. It is obtained from the project promoters (consortium) or other investors interested in the infrastructure project. Because equity investment represents only a negligible fraction of the total project cost, the consortium would need to look to the financiers to supplement the total project cost, usually on the basis that their own (the consortium's) investment will only be recouped after the financiers have been paid. The merit of this form of funding is that it lessens the burden associated with regular debt service. Additionally, it shows that the private sector is committed to the project and so serves as assurance for the public authority.[34]

ii. **Commercial Loans:** These are syndicated loans with one or more banks acting as agent for the syndicate and negotiating the terms and conditions of the loan agreement on behalf of the other banks, usually commercial banks, that comprise the syndicate.

[33] Sapte, (n 15) 5.

[34] United Nations Commission on International Trade Law (n 14) ch A, para 57.

Usually these loans are provided on the grounds that their repayment takes precedence over any other repayment obligations the borrower may have. Thus they are said to be "unsubordinated" or "senior" loans.[35]

iii. **Subordinated Debt:** Also referred to as Mezzanine Capital, this type of finance ranks between senior loans and equity capital in terms of priority, thus it is subordinate to senior loans. Basically, it is treated as a debt while the project has adequate resources to service it, but is regarded as the same as equity where it has none.[36]

iv. **Institutional Investors:** Financing companies, collective investment schemes, pension funds and other institutional investors also grant subordinated loans. They usually have huge sums available for long-term investment and so is an important revenue source for infrastructure projects. For this category of funders, the attraction lies in prospect of significant returns on their investment and the potential for diversification.[37]

v. **Capital Market Funding:** Capital markets are increasingly becoming recognised as a desirable source of financing for infrastructure projects, mainly because the terms appear more favourable to SPVs.[38] The downside however, is that it is easier for existing entities who have well-known and established credit records to gain access to the capital markets than an SPV which may lack the required credit rating for the

[35] See United Nations Commission on International Trade Law (n 14) ch A, para 58. See generally Sapte (n 15) 118-125.

[36] Sapte (n 15) 9.

[37] United Nations Commission on International Trade Law (n 14) ch A, para 60.

[38] Sapte (n 15) 9.

simple reason that it is an ad hoc arrangement set up for the sole reason of constructing and operating a new infrastructure. [39]

vi. **Islamic Funding:** Islamic financial institutions operate under rules and practices derived from the Islamic legal tradition (sharia law). A key characteristic of this genre of banking is that loans are often interest free and there are no strict limits to the right to charge interest. Other forms of consideration for the loan such as, profit sharing, may therefore be agreed by the parties to this type of loan.[40]

vii. **Financing by International Financial Institutions:** International financial institutions such as International Financing Corporation (IFC), World Bank, Asian Development Bank (ADB), European Bank for Reconstruction and Development (EBRD) perform a very crucial role in the provision of loans, guarantees or equity to privately financed infrastructure projects and also in the formation of syndicates to provide funding for infrastructure projects. Some institutions may operate under special loan programmes through which they become the sole lender to the project acting for themselves and on behalf of the other banks in the syndicate. In this case, they take up the responsibility of processing disbursements by participants and distributing loan repayments received from the borrower in accordance with the terms and conditions of the loan agreement. In addition to the provision of equity or mezzanine capital, they also guarantee against different types of political risks, which

[39] United Nations Commission on International Trade Law (n 14) ch A, para 62.

[40] United Nations Commission on International Trade Law (n 14) ch A, para 63.

may serve to expedite the promoters' duty of raising finances in the international capital market.[41]

Due to the complexities involved in Public-Private Partnership transactions, the terms and conditions under which funding is obtained should always be carefully negotiated and drafted.

3.4. The Sub-Contractors

Specialized sub-contractors such as construction contractors, service company providers amongst others usually carry out the contractual obligations and responsibilities of the SPV to the public authority. These sub-contractors who are often equity investors in the SPV, carry out their contractual obligations under distinct agreements, which incorporate the individual functions they are meant to perform.[42]

3.5. The Advisers

Financial experts, technical experts, consulting engineers, legal counsel and other advisers, perform a very essential role at various stages of the PPP project to both the public authority and the SPV involved in the structuring process. Companies/ Financiers may augment their in-house expertise by retaining the services of independent experts and advisers to assess the financial viability of a project and to advise on issues bordering on evaluating project risks in host countries.[43] Sponsors employ the services of independent advisers or their in-house advisory group to bid for projects. For the public authority, outside advisers may conduct

[41] ibid ch A, para 64-65.

[42] Grimsey and Lewis (n 16) 113.

[43] United Nations Commission on International Trade Law (n 14) ch A, para 76.

checks on each PPP-type transaction and prepare feasibility and other preliminary studies.[44] They also assist in the preparation of requests for proposals as well as the appraisal and comparison of proposals and negotiation of project agreements.[45]

4.0. Public-Private Partnership Models

Public Private Partnerships come in various forms and models. The contracts may vary depending on the roles assigned to the parties, ownership structure, risk allocation, investment responsibilities, operational requirements, structure and incentives for operators. Acronyms are normally used to underscore the particular ownership regimes and responsibilities of the private entity in these arrangements. Some of these models are discussed below.

a) **Build- Own-Operate (BOO)**

These are arrangements where the private sector owns the facilities on a permanent basis and is not obligated to transfer it back to the public authority. In other words, the private sector funds, develops, owns, operates and retains the ownership and control of the facility effectively in perpetuity. Usually, in these types of arrangements, the private sector has a contractual obligation to make the facilities available for a specified period, where this is the case; the private sector still retains ownership and

[44] Grimsey and Lewis (n 16) 113.

[45] Intergovernmental bodies such as United Nations Industrial Development Organisation (UNIDO) and the World Bank have special arrangements whereby they provide technical expertise directly to governments. They may also aid the structuring process by assisting governments in identifying qualified experts and advisers. In: United Nations Commission on International Trade Law (n 14) ch A, para 77.

control at the end of the agreed period, as there is no transfer of the facilities back to the public sector.[46]

b) Build-Own-Operate -Transfer (BOOT)

Under this arrangement, the private sector funds, builds, operates and maintains a given facility usually in exchange for the right to collect fees and other charges from its users. Thus, ownership of the facility and its assets remain in the hands of the private sector until it is transferred to the public authority.[47]

c) Build-Operate-Transfer (BOT)

With this model, the public authority grants concession to the concessionaire who will have the principal responsibility for funding and building the infrastructure usually with the right to operate it commercially for a fixed period of time, at the expiration of which the infrastructure will be transferred back to the public authority. The agreed period of time should normally be enough for the concessionaire to fulfil its repayment obligations to the financiers and achieve the required rate of return on its investment. BOT involves various stages, which include project formulation; invitation to tender; submission of bids; selection of winning bids; negotiation and execution of documentation; construction; operation and transfer, and are perhaps, the most familiar form of PPP. The concept has been employed, albeit with variations, in many different ways.[48]

d) Build Transfer Operate (BTO)

[46] Grimsey and Lewis (n 16) 11.

[47] United Nations Commission on International Trade Law (n 14) ch A, para 19.

[48] Sapte (n 15) 1.

In these arrangements, the facility becomes the property of the public authority as soon as it is completed. However, the concessionaire will be granted operation rights for a specified period.[49]

e) Build-Rent-Operate-Transfer (BROT)

This model is a variation of BOT or BTO projects and is also known as Build-Lease-Operate-Transfer (BLOT). This, in addition to the obligations and other terms usually apply to BOT projects, the concessionaire leases the physical assets on which the facility is situated for the term of the agreement.[50]

f) Refurbish-Operate-Transfer (ROT) and Design-Build-Finance-Operate (DBFO)

In certain types of infrastructure project, extant facilities may be handed over to private sector entities to be refurbished, operated and maintained. Where the arrangement is such that the private entity will transfer the facility back to the public authority after the refurbishment, it is referred to as, "refurbish-operate-transfer" (ROT). Where the private entity has the added responsibility of designing the facility and financing its construction the expression, "design-build-finance-operate" (DBFO) is used to highlight the private entities obligations under the contract. [51]

4.1. Other Forms of Public-Private Partnership Arrangements

[49] United Nations Commission on International Trade Law (n 14) ch A, para 19.

[50] ibid ch A, para 19.

[51]The arrangement is also referred to as "modernize-operate-transfer" (MOT). However where the reverse is the case i.e. ownership is retained by the private entity after the upgrade, the arrangement is referred to as, "refurbish-own-operate" (ROO) or "modernize-own-operate" (MOO). See United Nations Commission on International Trade Law ch A para 19.

In addition to the above models, there are other forms of public–private cooperation, some of which include:

a) **Service Contracts:** These are contracts where the private sector provides services on behalf of the public authority for a specified period and at an agreed price. In this arrangement the private sector does not take on any funding or demand risk.[52]

b) **Operation or Management Contracts:** Here the private sector is the only party involved in the sense that it either provides a service or manages the operation, usually for a limited period of time.[53]

c) **Leases:** In these arrangements, all or a significant portion of the risks that come with financing, building and operating infrastructure are shouldered by the private sector, with the public authority taking the infrastructure on lease.[54]

5.0. The Contractual Structure of a Public-Private Partnership Transaction

A standard Public-Private Partnership project consists of an intricate web of contractual relationships linking the various parties involved in the project. The structure of the contractual relationship in such projects would depend on the model adopted. Thus, to ensure the success of a new infrastructure project it is imperative that the relationships and responsibilities of the parties are clearly defined at the initial stage of the transaction. The benefits and risks associated with the project must also be properly identified. Proper identification must be shadowed by an appropriate apportionment of these benefits and risks in the project documents. Essentially, the key players should analyse the risks, which may arise under the project, identify each contract to be put in place as well as the party to whom the risks are to be apportioned. Risks apportionment and mitigation are critical factors in a

[52]Sapte (n 15) 1.

[53]Grimsey and Lewis (n 16) 11.

[54] Sapte (n 15) 1.

PPP transaction. More importantly, they must also make certain that appropriate provisions appear in the relevant contracts to achieve this. The relevant contracts would normally include the following:[55]

5.1. The Project Agreement (or Concession Agreement)

The Project or Concession agreement is the agreement made between the public authority and the private sector (consortium) for the delivery of the Public-Private Partnership project. The agreement, which is the principal contract in an infrastructure transaction, outlines the scope and aims of the project as well as the rights and obligations of the parties. It also provides information on the implementation of the project and maps out the terms and conditions for the operation of the facility and/or the delivery of the associated services.[56] The Project Agreement may be encompassed in one document or as is commonly the case, the obligations and responsibilities of each party may be detailed in two or more separate agreements, which taken together, comprise a single contract, the Project Agreement. For instance, one of the agreements could define the overall relationship between the public authority and the consortium with regards to the procedure for dealing with defaults, rights of termination and dispute resolution mechanism, while the other would set out the construction or operation requirements of the infrastructure project.[57] As a general rule, the Construction Agreement and the Operation and Maintenance Agreement, would reflect the provisions of the Project Agreement that relate to construction work and operation and maintenance.[58]

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[55] See generally, Sapte (n 15) ch 4.

[56] ibid 95 – 112.

[57] Not all types of projects require more than one agreement. For instance, for information technology projects such as provision of computer software, there may be just one agreement. In: Badcoe and others para (n 3) 3.050.

[58] ibid para 3.050.

5.1.1. Drafting of the Project Agreement or Concession Agreement

In drafting the Project or Concession Agreement, these parts need to be given particular attention:

i. **Commencement:** In the law of contract, the "Execution date" and "Effective date" of a contract may have different meanings and implications. The execution date is the date on which the parties sign the agreement while the effective date is the date on which the contract becomes effective especially where there are conditions precedent in the agreement. The effective date can be a date other than the date on which the agreement was signed. This should be borne in mind when drafting PPP contracts because for these types of contracts, there are often condition precedents to be fulfilled before the contract becomes effective. Generally, where there is distinction between "Execution Date" and "Effective Date", it is normal to indicate which clauses will be effective from execution of the agreement. For instance, clauses dealing with parties, definitions, term, representations, warranties, force majeure and similar clauses are usually effective from execution.

ii. **Parties:** The principal parties to the Project Agreement, which is the major agreement in a Public-Private Partnership transaction, are the public authority (ministries, department and agencies) on the one hand and the private sector, often referred to as the Sponsors or Concessionaires, on the other.[59] These should be clearly delineated in the Project Agreement. The agreement may also need to make reference to the parties

[59] Section 1 of the Infrastructure Concession Regulatory Commission Act 2005 provides that,"…any *Federal Government Ministry, Agency, Corporation or body* involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contact with or grant 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…" (emphasis added).

to the other contracts. For instance, where the project comes with a construction element, the Project Agreement may make references to the construction contractors and service providers as the terms of the Construction Agreement and the Operation and Maintenance Agreement pertaining to any construction work to be carried out as part of the project will often be mirrored in the Project Agreement and vice-versa.

iii. **Recitals:** These provide an insight into a transaction by explaining the reasons for the transaction. In a typical PPP setting, the Recitals in the Project Agreement should ideally give a historical background to the transaction; define who the parties are; state how the transaction would commence and the *modus operandi*. It should also specify the procurement process that was adopted and the how the preferred bidder emerged, amongst other things.

iv. **Definitions and Interpretations:** This part of the agreement should explain the meanings of certain key terms and phrases and how they are to be used in the context of the PPP transaction.

v. **Specific and General Provisions:** Certain provisions are specific to Public-Private Partnership contracts and must always be incorporated into the agreement. However, as every infrastructure project is unique and as no two contracts are the same, care must be taken during the negotiation and drafting process to ensure that the peculiarities of the contract under consideration are given due attention. Some of these provisions relate to concessions and the rights and obligations of both parties;

conditions precedent to be satisfied by both parties; financial close[60] and funding agreement; financial provisions; performance bonds; land use rights; tariff setting; covenants, representations and warranties; other contracts that need to be concluded; the contract design; the concession fees; key performance indicators; technical inspections and constructions; operation and maintenance; insurance; taxes; *force majeure;*[61] step in clauses/rights or substitution agreement; events of default; confidentiality; compensation, indemnity; termination, amongst others.[62] Failure to meet the conditions precedent especially financial close, may lead to the termination of the contract.

vi. **Boilerplate Clauses:** There are also boiler plate clauses which should be included in the Agreement. They include clauses pertaining to agency and partnerships, announcements, assignment and novation, confidentiality, capacity, completion, costs and expenses, cumulative remedies, further assurance, intellectual property, joint and several liability, governing law, notices, sub-contracting, etc. The preferred dispute resolution method, be it amicable settlement, mediation/conciliation, expert determination or arbitration, should be clearly delineated in the Agreement. The seat of arbitration should also be specified.

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[60] 'Financial Close' means the execution and delivery of the Financial Agreement and the satisfaction or waiver by the Finance Parties of the conditions precedent for the initial availability of funds under the Financial Agreement (other than the satisfaction of the Conditions Precedent under the Agreement). In other words, financial close refers to that stage in the transaction when the Concessionaire will have access to the funds under the Financial Agreement.

[61] In some transactions, a line is drawn between natural and political *force majeure.*

[62]The Agreement should also consider issues pertaining to Contracts Review; Inspection and Monitoring Audit of Accounts; Take Over; Handback etc. For further reading see generally Badcoe and others (n 3)

When drafting the other agreements, which are associated with a PPP transaction, a lot of care should be exercised so as to ensure that there is no contract mismatch. For example, the phrase *'force majeure'* should mean the same for all the contracts. Again, if the dispute resolution clause provides for arbitration, there is the need for the contract(s) to provide for 'consolidation' and 'concurrent hearing.' This is because in the event that there is a dispute which is referred to arbitration, an arbitral tribunal will have no powers to consolidate separate arbitral proceedings in the absence of a contractual provision empowering it do so. Further, there must be only one arbitral tribunal for consolidation to take place. It cannot happen where there are separate arbitral proceedings.

5.2. The Construction Agreement

Where the infrastructure project comes with a construction element, a sub-contract will be needed to realise this aspect of the project. This sub-contract is referred to as the Construction Agreement and is normally entered into by the SPV and the major construction contractor.[63]
The Construction Agreement is vital for all the parties to the infrastructure project because it is likely to take up a considerable chunk of the SPV's capital expenditure and also the effectiveness of the construction aspect of the project will impact on project expenditure and turnover throughout the operation of the project. Again, any delay in completion of the construction within the agreed timeframe will affect project economics.[64]

The construction stage of the project is often regarded as the riskiest. The private sector entity (the SPV)[65] will unavoidably be expected to carry much of this risk in the Construction

[63] The construction company may be an Engineering, Procurement and Construction (EPC) Contractor that will be responsible for building the plant to the specification defined in the Project Agreement.

[64] Sapte (n 15) 74.

[65] In the Lagos-Ibadan Expressway Concession, the SPV was known as "Bi-Courtney Consortium" represented by Bi-Courtney Highways Limited while in the case of Lekki-Epe Expressway, it was known as "Lekki Concession Company"

Agreement.[66] Since the SPV cannot directly control and manage the risk of designing and carrying out any construction work, it would normally wish to pass on this risk to the construction contractor and to successfully achieve this, the SPV has to ensure that the terms of the Project Agreement that touch on design and construction risks are at par with the construction contractor's obligations as contained in the Construction Agreement.[67] This approach places responsibility for practically all aspects of design and construction in the hands of a single contractor (or a group of contractors) and apportions to the SPV, very little responsibility, where the work done does not meet the specified standards. More importantly, the approach appeals to financiers because it enables a clearer and more robust assumption of risk to be achieved.[68] However, it is worth mentioning that the Construction Agreement will, as a general rule, come with a ceiling on liability set at a fraction of the value of the construction contract. It will also contain a further cap on liability for liquidated damages where the construction company fails to complete construction within the agreed time frame. The import of these liability clauses is that "stepping down" of design and construction risks will not remove all risks from the SPV.[69]

5.3. The Operation and Maintenance Agreement

The SPV will need to conclude one or more sub-contracts with the major service provider for the operation and maintenance of assets, which are subject of the infrastructure project. This contract is usually referred to as the Operation and Maintenance Agreement. The major

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beneficially owned by Asset and Resource Management Company Limited (ARM), Larue Projects Limited and ARM Trustees Limited.

[66] Sapte (n 15)75.

[67] Badcoe and others (n 3) para 3.052.

[68] Sapte (n 15) 75.

[69] Badcoe and others (n 3) para 3.053.

service provider, will in turn, sign further sub-contracts with other service providers to enable it meet its obligations under the Agreement.

The Operation and Maintenance Agreement would normally reflect terms of the Project Agreement, which are relevant to the operation and maintenance part of the infrastructure project e.g. the operation, and maintenance provisions. It would also incorporate the specification, service level, performance monitoring and measurement, contract management and payment mechanism provisions entrenched in the Project Agreement. As is the case with the Construction Agreement, the provisions of the Operation and Maintenance Agreement should also mirror that of the Project Agreement.[70]

The service provider is not normally a party to the Project Agreement and so; any negotiations regarding stepping down of obligations and to what extent would have to be held with the SPV. In essence, it is easier for the SPV to just pass on all the risks to the service provider, usually with little or no credit even where the minimum performance standards are exceeded. Nonetheless, in adopting this approach, the SPV has to be conscious of the need to encourage increase in the quality and value of the service delivered, and so should, ensure that the Operation and Maintenance Agreement provides ample incentives for the service provider.[71]

5.4. The Direct Agreement

[70] The import of this is that where the standard of service level as specified in the Project Agreement gets to as standard higher or below the agreed (expected) level, the financial consequences will be replicated in whole or in part by the Operation and Maintenance agreements. In: Badcoe and others (n 3) para 3.055.

[71] ibid para 3.055.

The security taken by the financiers of the PPP Project is usually not enough to provide adequate protection for them in the event of a default and so, they would need to have direct access to sub-contractors to the SPV who are involved in the process. This is achieved by a concluding a Direct Agreement between the financiers and all or some of the subcontractors on the one hand and the public authority and the private sector, on the other. The Direct Agreement should always be a condition precedent of the Project Agreement and Funding Agreement where there it is to form part of the project.[72]

Essentially, a Direct Agreement allows the public authority direct access to the sub-contractors if the sponsors fail to honour their obligations under the contract. It also provides the infrastructure project with an additional chance of survival and continuity with a substitute supplier maintaining delivery of the service. For the funders, the agreement is crucial because in the event that the agreement is terminated, they would still be able to recover compensation as the agreement empowers them to step in and take over assets and keep the income stream flowing. [73] It is necessary to include the private sector as a party to the Direct Agreement because that way, an acknowledgement of the arrangements entered into between the public authority and the financiers is obtained from it. Also joining the private sector would serve as a form of undertaking that it would not do anything to thwart the operation of the Direct Agreement.[74]

[72] Badcoe and others (n 3) para 3.057.

[73] Where the PPP project is of significant value and there are a large number of financiers involved, it is more feasible for one of the financiers to enter into the Direct Agreement as an agent and on behalf of the other financiers. The Agreement will have to specify when the financiers can put in a new provider and will require the financiers to maintain the standard of service as provided under the Project Agreement. In: ibid para 3.058.

[74] ibid para 3.062.

In the absence of a Direct Agreement, there can be "Step-In" Clauses. Such clauses perform the same function as the Direct Agreement though the Direct Agreement will provide for step-in rights.[75] PPP contracts are potentially prone to failure because of several factors including the number of parties, the nature of the transactions and the risks involved.[76]

5.5. The Funding Agreement

The standard ratio of debt to equity in PPP projects is 90:10. The debt is usually made available to the SPV by the financier (banks) under a credit facility agreement referred to as the Funding Agreement. Where the project is of significant value, the Funding Agreement would be entered into between the private sector (SPV) as borrower and a syndicate of banks, with one of those banks acting as agent on behalf of the others.

The financier will make facilities e.g. cash and bonds available to the SPV to fund the project. There would usually be conditions precedent to utilisation of the facilities, which would be set out in the Funding Agreement. Typically, these conditions will include the execution of the Project Agreement, Construction Agreement, Operation and Maintenance Agreement, the Shareholders Agreement and all other contracts, which are relevant for

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[75] Step-in-rights empower the financiers to take temporary control of the infrastructure project. Increasingly, lenders are requiring the right to step in on the acceleration of the loans as well as in the event of a default. Such rights are usually exercised on the understanding that the financiers will step out as soon as the default is remedied. In: Sapte (n 15) 214.

[76] In Nigeria, the MM2 Airport in Lagos is usually seen as a success story. However, for the sponsors and financiers, this may not be true. Similarly the failure of the Lagos-Ibadan Expressway Concession Agreement and that of Lagos-Epe Expressway is attributable to several factors including lack of proper project design, conceptualization, and risk allocation. Indeed, in an Advertorial in This Day newspaper of Sunday, March 1, 2015, the Lekki-Epe Expressway PPP was referred to as "Perpetual Personal Profits". When that of Lagos-Ibadan Expressway was terminated, on 27 August, 2013, the Lagos State Government announced that it was acquiring and buying-out the rights of the concessionaire. Thus this project no longer has a private entity and cannot now be called a PPP.

utilisation of the facility. The project documents and the shares in the SPV are the only assets of the project at financial close and so the banks, as a prerequisite, would normally take security over them. Further, the provision of security to protect the assets of the SPV from its creditors on insolvency will also be a condition precedent for availability of the facilities. The reason for the security would be to safeguard the only assets of the SPV from its creditors in the event of insolvency and to allow the banks access to the income stream, since the principal source of the repayment of the bank's facilities and the interest on debt is the revenue from the project.[77]

The credit agreement will contain provisions for the payment of interest on the facilities, the formula for computing interest as well as alternative interest rates in the event that there is instability in the market. The agreement will also set out the SPV's repayment obligations, including accelerated repayment in certain circumstances and the procedure for the cancellation of the facility.[78]

5.6. The Shareholders' Agreement

As earlier noted, the SPV usually consists of a consortium of companies and entities who hold equity shares in the SPV. The Shareholders' Agreement is important because it records the legal rights and liabilities, which apply between the members of the SPV for the purpose of the PPP project for which it was incorporated. Typically, all the companies who hold shares in the SPV will be parties to the Shareholders' Agreement. The SPV is often a party as

[77] Badcoe and others (n 3) para 3.062.

[78] ibid para 3.062.

well and this is beneficial to the SPV because it means that it will be able to take rights under the agreement and enforce them in the usual way.[79]

The contractual rights and responsibilities of the consortium with regards to the SPV will be partly governed by the Constitution of the SPV, which is its Memorandum and Articles of Association. Thus it is imperative that the provisions of the Shareholders' Agreement are consistent with the provisions of the Constitution because where the reverse is the case, it likely to be perceived by the courts as an attempt to unlawfully change the SPV's Constitution, and so would be unenforceable as between the shareholders.[80]

Complexities may arise in relation to management issues and decision-making procedures. To avoid these, it is crucial that the Agreement specifies the management and voting arrangements, which will apply to the SPV. Thus, the shareholders will have to agree whether different classes of shares would be necessary; whether there will be a Chair for the SPV; how the interests of the minority will be safeguarded, how deadlocks will be resolved, whether a two tier board will be necessary etc.[81]

Ideally, the Shareholders' Agreement should carefully define the position of the chief executive of the SPV with the requirement that there is to be no variation in the absence of unanimity of the shareholders. Other decisions which should be subject to unanimous consent of the shareholders are issues pertaining to the issue new shares, the exit terms of an outgoing shareholder, the admission of a new shareholder; any change in the SPV's Memorandum and

[79] See generally David Baylis (ed), *The Law and Practice of Shareholders' Agreement* (2nd edn, Lexis Nexis Butterworths 2007).

[80] The Shareholders' Agreement will usually have scheduled to it, the SPV's constitutional documents in the form of the Memorandum and Articles. In: Badcoe and others (n 3) para 3.070.

[81] Sapte (n 15) 71.

Articles of Association; the taking steps to enforce contractual remedies against the public authority; increasing loan exposure in excess of agreed limits, amongst others.[82]

Where the consortium or its members would be providing certain services to the SPV and may be in competition with the infrastructure project or with each other by so doing, the nature and scope of competition would need to be clearly and unambiguously defined in the Shareholders' Agreement. Also, applicable competition laws and relevant regulatory requirements would have to be considered.[83]

The need for a Shareholders' Agreement is underscored by the fact that company law offers court-based protection to minority shareholders.[84] Similarly to pass a special resolution, the required majority is 75% of the shares which an entity within the SPV can own.[85] In a Shareholders' Agreement, the shareholders can agree that when a major decision is to be taken, what is required is a unanimous decision thus protecting the rights of the minority shareholders.

5.7. The Insurance Agreement

Public-Private Partnerships are by their very nature complex business relationships, which come with huge financial implications.[86] Thus, being a business enterprise, the consortium

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82 Badcoe and others (n 3) para 3.077.

83 In this case, the parties will have to look at the relevant compliance requirements and make the necessary applications for clearance from the appropriate regulatory authority. For instance, in the United Kingdom regulated sectors such as Power Supply and Water Services sectors, would require such applications for clearance. In: Badcoe and others (n 3) para 3.066.

84 See sections 299-330 of the Companies & Allied Matters Act (CAMA), Cap C20, LFN, 2004.

85 See section 233(2) of CAMA.

86 For instance at the inception of the Lekki-Epe Expressway Concession, the cost was estimated at $450million with Lagos State Government contributing only 9.4% which was put at about N5billion. However an estimated sum of N25.3bn was expended in buying back the concession. The Lagos-Ibadan Expressway was to cost about N90 billion without equity contribution from the Federal Government.

would normally consider the necessity to insure as part of its commercial activities. It would need to recognise and carry out a full assessment of those risks that are inherent in the infrastructure project which are capable of being managed as far as possible by insurance. For instance, in an infrastructure project, which has a construction element, the public authority would normally require the consortium to include construction risks in insuring the development and the works. The public authority will need re-assurance that any indemnities given, and obligations undertaken by the consortium, are covered by adequate comprehensive insurances and so will seek evidence of same.[87]

6.0. Negotiation in Public-Private Partnerships Transactions

Negotiation in Public-Private Partnership transactions is fundamentally about the allocation and assumption of risks and responsibilities.[88] Prior to the commencement of negotiations in a PPP transaction, the tender documentation especially the Request for Proposal (RFP), which should include the Draft Concession Agreement and other relevant documents, should be made available by the public authority for the interested bidding consortia to indicate interest. Ideally, the public authority should ensure that more issues are adequately dealt with in the tender documentation so that fewer items will be subject to the time consuming and costly negotiations after bids have been received.[89] On the part of the private sector, each interested bidding consortia (the private sector participants) should have unity of purpose so as to avoid complicating negotiations and raising doubts as to the ability of the consortium to

[87] Badcoe and others (n 3) paras 3.087 – 3.089.

[88] Timothy C Irwin, *Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects* (The World Bank 2007).

[89] Owen Hayford, 'Successfully Allocating Risk and Negotiating a PPP Contract' (2007) 113 Australian Construction Law Newsletter < classic.austlii.edu.au/au/journals/AUConstrLawNlr/2007/17.html > accessed 26 April 2018.

effectively work together as a team. A bidder that is able to effectively manage its internal negotiations and present a unified position is a much more attractive proposition to government than one that cannot.[90]

Negotiations commence as soon as a bidder or concessionaire is selected by the procuring authority. In negotiating the Draft Project or Concession Agreement, it is advisable for both sides to have negotiation teams made up of various experts. Where the public authority does not have in-house expertise or competent staff to carry out negotiations, it would have to look outwards and engage external advisers. Negotiations in PPP transactions have to be carried out with extreme care and dexterity, particularly as it relates to allocation and assumption of risks and responsibilities. Thus the principles of risk allocation should always be borne in mind when negotiating these contracts.

The concept of "risks" as it relates to infrastructure projects refers to those circumstances, which, in the assessment of the parties, may have a negative effect on the benefit they expect to achieve with the project.[91] The parties would normally negotiate and agree who should bear the consequences of occurrence of events identified as project risks. This action is often referred to as risk allocation.[92] Some of the categories of risks which may be encountered by infrastructure projects include, *force majeure* i.e. happenings outside the control of the parties such as natural disasters; disruptions caused by adverse acts of government (political risks); technical risks, construction risk, operating risk, revenue risk, financial risks, regulatory risks, environmental risks, amongst others.[93] Certain risks are contingent on some future event

[90] ibid.

[91] United Nations Commission on International Trade Law (n 14) ch II, para 8.

[92] ibid ch II, para 9.

[93] See generally Badcoe and others (n 3). See also United Nations Commission on International Trade Law (n 14) ch II.

occurring, and the cost of these risks is therefore a contingent liability. Risks can have a low possibility of occurring but a high potential impact or a high probability of occurring but a low potential impact, and the allocation of all of these risks in the project will affect the value for money for the public authority.[94] Risk allocation will determine the extent of involvement of the parties and the apportionment of responsibilities, which will in turn be based on an assessment of the public interest.[95] Therefore, the preferred risk allocation needs to be clearly and meticulously set out in the tender documentation at the initial stages of the transaction for the bidders to consider.

Generally, the cardinal principle is that risks should be allocated to the party that is best able to manage them. The party financing the project, usually the private sector, mainly assumes risks. Assigning some of the risks to the private sector could reduce the overall cost to the public procurer, though it may not be cost effective to transfer all risks. Allocating too much risk to the private sector may result in a project becoming non-financeable i.e. investors are not prepared to provide finance at a reasonable cost. This situation may not become apparent until the very end of the project procurement when investors are required to commit to its financing. It is thus imperative that the parties and their project advisory teams are well grounded in the workings of the capital market of the host country and take this into consideration during the drafting and negotiation process.[96] Further, the Draft Concession Agreement must take into account, all the circumstances that may arise and which may create

[94] Infrastructure Concession Regulatory Commission 2013 (n 9) 44.

[95] ibid 12.

[96] For Nigeria, the Public-Private Partnership Centre within the Infrastructure Concession Regulatory Commission (ICRC) would normally have financial advisers who advise in this area.

additional costs or reduce the concessionaire's revenues and define the obligations of each party if a risk materializes.[97]

A very effective way in which the PPP contract should allocate risks should be through output specification, which should specify the standard of service that is expected of the concessionaire for full payment to be remitted to him. Non- compliance with this service requirement will be to the detriment of the contractor, except where the failure to comply is a direct result of the authority's default on its obligation under the contract. Other mechanisms for allocating risks could be provisions in the contract pertaining to indemnities, warranties, payment methods and *force majeure*. For *force majeure,* however, there may be circumstances where risks will be shared. [98]

Generally, when drafting and negotiating PPP contracts, it is imperative that the aforementioned points and issues are given due consideration. Not only for the major contract, but also for all the other contracts and sub-contracts which form part of the PPP transaction. These points should also be borne in mind in PPP contract re-negotiations. Re-negotiation may arise from aggressive bidding, political and institutional issues, faculty contract design, government's failure to honour its own obligations and micro-economic shocks. Re-negotiation should therefore be carried out when justified.[99]

7.0. Conclusion

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[97] Infrastructure Concession Regulatory Commission 2013 (n 9) 50.

[98] See the Supplementary Notes on Project Risks, National Policy on Public-Private Partnership (Infrastructure Concession Regulatory Commission 2013) 42 – 52.

[99] J Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing it Right* (The World Bank 2004).

Public-Private Partnership transactions are no doubt, very complex arrangements that involve several parties, models and contracts. Therefore, a tremendous amount of time, expense and more importantly, expertise has to be invested in drafting and negotiating the Project Agreement and related documents, to ensure its success. The choice of projects that will involve the private sector should be selective. Adequate and comprehensive feasibility studies (engineering, technical, environmental, financial, among others), must be carried out by the procuring authority. It must be emphasised that were a project is economically weak and cannot provide acceptable rate of return to investors, public-private cooperation is unsuitable unless the public authority is ready to provide subsidies or guarantees or shadow tolling. Further, the requirements in the bidding documents- advert for Expression of Interest (EOI), Non –Disclosure Agreement (NDA), Request for Proposals (RFP), the National Policy on Public-Private Partnership and other relevant laws and regulations must always be considered and complied with by all Parties.