Public/Private Partnership Contracts and Concession Agreements

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Agenda

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- What is Public-Private Partnership (PPP)
- PPP Models
- Legal and Regulatory Framework
- Risks Involved
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- The PPP Contracts/Concession Agreement
- Challenges to successful Implementation
- Conclusion

Introduction

- Infrastructure services are critical inputs in the provisions of goods and services and significantly affect the productivity, cost and competitiveness of the economy
- Policy decisions regarding their provision and sector development have ramifications throughout the economy.
- Historically, all infrastructure sectors – power, gas, water, telecommunications and transport were thought to exhibit monopolistic characteristics and, therefore better provided by the public sector.

……. Introduction

- Huge capital costs that governments alone could afford
- It has become obvious that governments alone do not have the resources to finance the provision of these services even without the economic meltdown.
- However, the paradigm of the monopolistic public enterprise has been losing ground and relevance since the early 1980s in the face of technological progress and lessons from successful de-monopolization and privatization programmes.
- Consider telecommunications, compare power

.... Introduction

- A need to re-think the structure of the infrastructure sectors, the introduction of competition, regulation and private sector participation became imperative and hence the concept of public/private participation (PPP) or private sector participation (PSP).
- There is infrastructure gap of about 80%
- In this presentation, therefore, we will focus our attention on PPP contracts – meaning, various transactional models, legal and regulatory framework, the risks involved and how the transactions are designed, drafted and negotiated.

What is PPP

- A public private partnership or PPP refers to a contractual agreement between a public authority (Ministry, Department or Agency - MDAs) and a private sector entity that allows for greater private sector participation in the delivery of public infrastructure projects. (s1 ICRCA, 2005)
- For the purpose of this transaction, a special purpose vehicle (SPV) is usually incorporated.
- Consider level of public sector participation in the SPV; bearing in mind that the aim is to transfer most if not all risks to the private sector

……What is a PPP

- As a concept, PPP has assumed many meanings and models.
- PPPs are used around the world to build new and upgrade existing public facilities/infrastructure such as schools, hospitals, roads, power plants, waste and water treatment plants and prisons, among other things.
- Compared with traditional procurement models, the private sector assumes a greater role in the planning, financing, design, construction, operation and maintenance of public facilities.

….. What is PPP

- In most jurisdictions, PPP is not new but it is evolving in Nigeria.
- Care should be taken therefore during the conception, design, and implementation stages
- Potentials for failure are high.
- If a PPP transaction is properly structured, it will end in a Contract that may be called a Concession Agreement, a Project Agreement, a Lease Agreement, a Franchise, etc

PPP Models

- Design-Build (DB)
- Design-Build-Maintain (DBM)
- Design-Build-Operate (DBO) or DBOT
- Design-Build-Operate-Maintain (DBOM)
- Design-Built-Finance-Operate-Maintain (DBFO, DBFM or DBFO/M)
- Build-Own-Operate (BOO)
- Build-Operate-Transfer (BOT)
- Service Contract,
- Management Contract
- Lease/Concession
- Divestiture

….. Models

- PPPs are patently attractive but inherently full of pitfalls. PPPs are not panaceas to all public sector procurements.
- The MDAs still have their primary responsibility for the provisions of these facilities. In this regard, budgetary provisions are imperative.
- In rushing to adopt PPPs in Nigeria, care should be taken to ensure that the design, construction, maintenance, financing and operations are carefully evaluated.
- More fundamentally, PPPs involve several contracts (financial arrangements, construction, O&M, etc). Care should be taken to ensure that there is no contract mis-match.

….. Models

- The choice of projects that will involve the private sector should be selective.
- It must be stressed that where a project is economically weak and cannot provide acceptable rate of return to investors, PPP is unsuitable except where the public sector is ready to provide subsidies or guarantees or shadow tolling in the case of roads.
- Each contract differs in terms of the roles assigned to the parties, ownership structure, risk allocation, investment responsibilities, operational requirements, structure and incentives for operators.

…. Models

- BOT arrangements in a green field agreement are spelt out in detailed provisions covering construction, quality control, time schedules, milestones and transfer of assets at the end of the concession period.
- Others are exclusivity rights, guarantee that no other entity would be given similar rights over the same assets

Legal and Regulatory Framework

- The success of PPPs is dependent, to a large extent, on the existence of a strategic framework comprised of a clear guiding policy, appropriate legal framework and/or institutional set up capable of efficient implementation of PPP projects
- Need for standard procedural guidelines for the process and adequate transaction, technical, contract management and project monitoring expertise.
- The overall implementation framework will help ensure that PPP implementation is uniformly coordinated and managed, and expected outcomes for government optimized

….. Legal/Regulatory Framework

- In Nigeria, apart from the powers to grant leases, licenses, management contract and contract services provided in some legislations, the only federal law on PPPs is the Infrastructure Concession Regulatory Commission Act of 2005.
- At the state level, there is the Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board Law, 2004.
- The law provides a legal and regulatory framework for PSP in the development, rehabilitation, upgrading and construction of infrastructure within Lagos State.
- There is a National Policy on PPP issued by the ICRC

The following States have laws on PPP

S/N	STATE	PPP LAW STATUS
1	Abia	✓
		✓
2	Bauchi	✓
3	Bayelsa	✓
4	Cross Rivers	✓
5	Delta	✓
6	Ebonyi	✓
7	Edo	✓
8	Ekiti	✓
9	Imo	✓
10	Kaduna	✓
11	Katsina	✓
12	Kogi	✓
13	Kwara	✓
14	Lagos	✓
15	Nasarawa	✓
16	Niger	✓
17	Oyo	✓
18	Rivers	✓
19	Sokoto	✓

….Legal/Regulatory Framework

- The ICRC has published Guidelines in the exercise of their powers under the ICRCA
- Procurements must comply with the provisions of the Public Procurement Act, 2007 – applies to goods, works and services -need for Certificate of No Objection, compliance with financial thresholds, etc
- The provisions of the Fiscal Responsibility Act, 2007 should also be borne in mind to avoid the legal sanctions arising from non-compliance e.g. an offence to procure if there are no budgetary provisions

… Other Laws

- The Constitution
- Nigerian Investment Promotion Commission Act 2004
- The Land Use Act 2004
- Companies & Allied Matters Act 2004
- The Utilities Charges Commission Act 2004
- Sector Laws e.g. Federal Highways Act 2004, Nigerian Ports Authority Act 2004, Civil Aviation Act 2006, Nigerian Inland Waterways Act 2004, Federal Roads Maintenance Agency Act

Risks Involved

- Risk is the unpredictable variation in value – includes the possibility of unexpectedly good, as well as unexpectedly bad outcomes.
- The risk of a project is the unpredictable variation in the total value of the project, taking account not only of the value of the project company but also of the value accruing to customers, the government and other stakeholders.
- The risks involved in the PPP transaction include:

- Development Risk
- Design risk

…… Risks Involved

- Construction risk
- Operating risk
- Currency Risk
- Nationalization, Expropriation and Expatriation risks
- Change of Law risk
- Political violence, hostage taking
- Sovereign risk
- Choice of Law risk
- Export prohibition risk
- Commercial or Political Risk

….. Risks Involved

- In allocating risks, the principles of risk allocation should be adopted – risks allocated to the party best able to manage them – anticipate, influence, respond and absorb
- Parties allocated the risks should have the right to make associated decisions
- Similarly, Value for Money (VfM) should be borne in mind – optimum combination of costs, risks, completion date and quality
- Contract design and negotiation is essentially about risk allocation
- Risk allocation features prominently in a PPP

Design of the Transaction

- There are four main stages of a typical PPP
- ✓ Formulating policy
- ✓ Establishing the legal and regulatory framework
- ✓ Tendering the Contract
- ✓ Managing the Contract
- The first two stages are usually handled by the Government while the other stages involve the private sector
- Caution is key to a successful PPP programme

….. Design

- In some of the models, there is a combination of models e.g. DBO and BBO and Management Contract.
- Transfer is conducted immediately upon the completion of construction and the operator receives the equivalent of a management contract
- No ideal model and no two models are exactly the same – technical provisions differ from sector to sector e.g. ports, rail, roads

Drafting of the Contract – The Parties

- The public authority – ministry, department, agency, corporation, local government
- The Sponsors
- The Financiers
- The Sub-contractors
- Other Advisers
- Note: Parties vary greatly depending on the infrastructure, the modality of private sector participation and the arrangements used for financing the project

The Contracts

- The Structure of the Contractual Relationship in a PPP Contract depends on the PPP Model adopted.
- The contracts include the following:
  - The Project Agreement or Concession Agreement on Concession Contract
  - The Construction Agreement
  - The Operation and Maintenance Agreement
  - The Direct Agreement
  - The Funding or Financial Agreement
  - Shareholders Agreement
  - The Insurance Agreement

The Concession Agreement

- **Commencement** - Execution Date and Effective Date – all these have different meanings.
- **Parties** – see section 1 of the ICRC Act 2005;
- **Recitals** – give a historical background to the transaction – who are the parties, how was the transaction commenced and carried out, what procurement process was adopted and how the preferred bidder emerged, etc
- **Definitions and Interpretations**

.....Concession

- Concession Rights and Obligations - both Parties
- Conditions Precedent – both parties
- Financial Close and Funding Agreement
- Financial Provisions
- Performance Bonds
- Land Use Rights
- Tariff Setting

…… Concession

- Covenants, Representations & Warranties
- Independent Engineer
- Design
- Contracts
- Concession Fees
- Key Performance Indicators
- Contracts Review

.....Concession

- Use of Nigerian Personnel – if foreign
- Inspection and Monitoring
- Audit of Accounts
- Construction
- Technical Inspections & Construction Milestones
- Take Over
- Operation & Maintenance
- Insurance
- Taxes

.....Concession

- Hand back
- Step-In Clauses or Substitution Agreement
- Events of Default
- Force Majeure
- Supervening Events
- Termination
- Compensation
- Indemnity

..... Concession

- Dispute Prevention – Dispute Resolution Board
- Dispute Resolution – Amicable Settlement, Mediation/Conciliation, Expert Determination and Arbitration (Note: Place of Arbitration)
- General Provisions – Boiler plate provisions on Entire Agreement, 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.
- Schedules
- Testimonium – usually a deed
- Attestation – usually a deed

.....Concession

- Care should be taken in drafting the other contracts to ensure that there is no contract mis-match.
- For instance what is ‘force majeure’ in the Concession Agreement should be the same in the other contracts.
- If dispute resolution clause provides for arbitration, there is the need to provide for ‘consolidation’ and ‘concurrent hearing’.
- Ordinarily, an arbitral tribunal has no powers to consolidate separate arbitral proceedings unless the parties agree.
- Secondly, if they are separate arbitral proceedings, for consolidation to take place, then the arbitral tribunal must be the same

Challenges to successful Implementation

- Regulatory risk – lack of sector regulator and capacity building
- Political risk – uncertain policy direction of government
- Commercial risk – results may not be foreseeable e.g. global financial meltdown
- Interest rate risks – fluctuations
- Barriers to entry into capital market – high cost of issuance
- Limited capacity of all stakeholders in PPP and long-term credit implementation
- Risk mitigation instruments – securitization, subsidies
- Environmental risk – past and future liabilities
- Legal environment – changes in law, rule of law and dispute resolution procedures

Conclusion

- Evidence so far suggests that the biggest efficiency gains from reform in infrastructure sectors come when real competition (competition in the market or head-to-head competition) can be introduced where none existed before.
- There must be a clear separation of the new private firm from the public purse.
- If it is so clear that the public sector will not interfere with commercial decisions and treat cash flow of infrastructure firms as part of the budget, private investors will not fear nationalization or expropriation in some form.
- In designing PPP contracts, the objectives of both the public and private partners are different

…..Conclusion

- Designing a PPP transaction is very complex – need to seek assistance from specialists in the various areas – law, economics, management, accounting, engineering
- Lawyers have a major role to play in terms of designing, drafting and negotiating such transactions
- Public partners must embrace reform
- Risks must be properly allocated
- Monitoring is key to success
- Parties are partners – good faith is essential

Thank you and God bless.