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Funding of Public-Private Partnership Projects Under the Nigerian ICRC Act of 2005: Why is the Act Silent?

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Abstract
The Federal Government of Nigeria passed the Infrastructure Concession Commission (Establishment, etc) Act 2005 (ICRC Act) on 10 November 2005 to underscore the resolve of the government to implement a Public-Private Partnership policy for the country. Whereas the Act *inter alia* makes provision with regards to the setting up of a Commission to superintend over PPP arrangements as well as laying the bedrock for a PPP policy, the Act is silent with regards to the funding of PPPP infrastructure projects. This paper argues that considering the long-term nature in the bidding, arrangement, execution and service phase of PPP projects, the Act ought to make provisions with regards to funding of projects taking into cognisance the peculiar situation of shortage of long-term financing in Nigeria. The paper concludes by recommending a review of the Act with sections to provide assurance to would-be investors in PPP infrastructure projects in the country.
Keywords: Public-Private Partnership, Infrastructure, Funding, Investors Concession, Project

Introduction

The enormous resources required to fund infrastructure projects by the government on the one part and the challenge government faces as a result of budget constraints on the other, necessitates the need for government at all tiers to seek for alternative means for funding infrastructure projects. Consequent upon the foregoing, many countries including the developed and the developing have adopted the public-private partnership (PPP) model in order to solve their infrastructure problems. PPP simply put, is a collaboration of the public and private sectors in the financing and development of public infrastructure. Technically, a PPP can be distinguished as a long term contract arrangement between a public authority and a consortium of private parties based on cooperation aiming at providing a mechanism for developing public service provision involving significant assets or services for a long period of time, say between 20 to 30 years. The asset or service is entrusted to the private sector consortium and a part or all of the funding comes from the private sector.[1]

Infrastructure is important for the growth of any economy. The lack of it will result in a poor quality of life of the citizens of any given jurisdiction.[2] The state of infrastructure in Nigeria is horrendous. The current infrastructure deficit is put at a whopping $8bn per annum.[3] It is glaring that the Nigerian state can not cope with the infrastructure dilemma the country now finds it self in as a result of prolonged years of wanton corruption, mismanagement and lack of maintenance of available infrastructure.

In order to give credence to its PPP policy thrust, the Federal Government of Nigeria (FGN) passed the Infrastructure Concession and Regulatory Commission Act of 2005. The Act *inter alia* established the Infrastructure Regulatory Commission, a body charged with the responsibility of overseeing PPP projects in the country. A number of states have also enacted their local PPP laws to give legitimacy to PPP transactions undertaken in those states.[4]

This paper examines the provisions of the ICRC Act 2005 as it relates to the funding of infrastructure projects. The paper highlights areas that require reform and the need to ensure an infrastructure investor friendly environment in Nigeria.

The ICRC Act 2005

It is worthy to note that the bedrock for any PPP model is an enabling legislation to give legitimacy to PPP transactions as enunciated in the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects.*[5] That Guide states that the existence of an appropriate legal framework is a prerequisite to creating an environment that fosters private investment in infrastructure and where it is in place, 'it is important to ensure that the law is sufficiently flexible and responsive to keep pace with the developments in various infrastructure

[1] Christiana D. Tvarno, Henrik Anderson, Fuguo Vao and Ping Wang, *Public-Private Partnerships: An International Analysis from a Legal and Economic Perspective* Asia Link (2010) Malaya
[2] Solomon O. Babatunde, Akintayo Opawole and Olusegun E. Akinsiku, 'Critical Success Factors in Public-Private Partnership (PPP) on Infrastructure Delivery in Nigeria' *Journal of Facilities Management* Vol. 10 No. 3, 2012 p213.
[3] Editorial, 'Nigeria's $8bn Infrastructure Deficit,' *Daily Independent* 12 November 2014.
[4] Lagos, Rivers, Niger and Cross River States are good examples of states that have passed their respective PPP laws.
[5] UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* UN 2001 A/CN.9/SER.B/4 23. See also Olufemi Soyeju, 'Legal Framework for Public-Private Partnership in Nigeria' *2013 De Jure* 818.

sectors in the economy.'[1] Thus, the FGN passed the ICRC Act 2005 to lay down a legal and regulatory framework for PPP arrangements in the country. It needs to be pointed out as well that the existence of a legal framework does not only portray legitimacy, it actually also serves as an assurance to would-be investors both local and foreign.

The Act was signed into law on November 10, 2005 and provides for the participation of the private sector in financing the construction, development, operation or maintenance of infrastructure or development projects of the FGN through concession or contractual arrangements.[2]

It seems that the Act is intended to regulate concessions or that only the concession model of PPP has legal backing in Nigeria. This can be gleaned from the title to the Act and the provision that 'with respect to projects under this Act, the concession contract (*emphasis supplied*) shall be awarded….'[3] Thus, for instance, the Private Finance Initiative (PFI) that is operational in the United Kingdom is not provided for in the Act of 2005. The major difference between the two models is that under the concession model, the public pays for the service whereas under the PFI model, the government pays for the service. Furthermore, concessions always require a specific law relating to the project or a 'framework' law relating to concessions in general, to allow the private sector consortium to charge and collect revenues from users for providing a public sector service.[4]

It is submitted that based on the law regulating PPP in Nigeria, that the PFI model is not contemplated. Except an enabling law is passed, no PPP project maybe executed using the PFI model. This situation is rather limiting, as there are particular projects suited for the PFI model for example, prison projects, schools, hospitals etc.

General Provisions of the ICRC ACT 2005

The Act specifically deals with private sector participation in federal infrastructure. It has been pointed out earlier, that states in the federation require enacting their own laws to establish a PPP regime in their respective states.

In order to qualify for execution, proposed projects are to be considered in an order of priority before qualifying for concession and only upon the approval of the federal executive council.[5]

The Act provides under Part II for the establishment of the Infrastructure Concession Regulatory Commission.[6] It is within the functions and powers of the commission to take into custody every concession agreement made under the Act and to monitor compliance with the terms and conditions of the agreement.[7]

It is noteworthy that the Act does not make any specific provision with regards to how PPP infrastructure projects should be funded.

Funding of PPP Projects

The sourcing of funding for the execution of PPP projects is vital for the success of any PPP regime. According to Yescombe, one of the first steps a bidder for a PPP contract normally takes is to engage a financial adviser, with experience in project finance and PPP.[8] Normally, private-sector finance debt is provided from two main sources, namely commercial banks and bond investors. Whereas commercial banks provide long-term loans to project companies; bond holders such as insurance companies and pension funds purchase long term tradable debts issued by project companies.[9]

Notably, PPP infrastructure projects have high debt component in their capital structure. This is so, as it offers alternative funding to the traditional government funding of public projects. The equity component is usually provided by the project promoter while the debt financing is normally provided by commercial banks, capital markets and national and regional development banks[10]. There are also instances where funding for PPP projects have been provided by the following:

- National and Development Banks
- Equipment suppliers
- Export Credit Agencies
- Institutional Investors

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[1] *Ibid.*
[2] Olufemi Soyeju, *Ibid.* 823. See also S.1 (1) ICRC Act 2005.
[3] See S. 4 (2) of the ICRC Act 2005.
[4] E.R. Yescombe, *Public-Private Partnerships: Principles of Policy and Finance* 2007 London Butterworths-Heinemann 31.
[5] See S. 2 ICRC Act 2005.
[6] See S. 14 ICRC Act 2005.
[7] See S. 20 (a) ICRC Act 2005.
[8] E.R. Yescombe, *op cit.* 124.
[9] *Ibid.* 124
[10] Hans Wilheim Alfen *et al, Public-Private Partnership in Infrastructure Development: Case Studies from Asia and Europe* 2009 Bauhasat-Universitat Weimar 30

- The Public Authority

Usually, the banks finance the project on a 'non-recourse' or 'limited recourse' basis. This means they look only to the project's assets and revenue stream for repayment set forth in the project agreement, but not to additional sources of security, such as the total assets or balance sheet of the sponsors.[1]

PPP contracts are very complex contracts and the need to have experienced financial advisers involved in initial stages cannot be over stressed. The failures of a number of PPP projects in Nigeria already have been attributed to lack of experience in PPP arrangement and execution.[2]

The Lekki Epe Concession Road Project

The Lekki Epe Concession road project[3] is a good example to illustrate the funding of a PPP project in Nigeria. The project commenced in 2000 with the placing of adverts by the Lagos State Government (LASG) for proposals as to how key road infrastructure within the over growing metropolis of Lagos could be developed using the PPP model.[4]Asset and Resource Management Company Ltd (ARM) submitted a proposal in relation to rehabilitation, construction, operation, maintenance and tolling of numerous stretches of highway infrastructure within Lagos and was mandated to develop a roll road along the Lekki Peninsula in 2003. The Concession agreement was signed three years later in 2006.[5]

The Lekki Epe Toll Road Concession transaction was initially pitched in favour of Nigerian lenders. With an illiquid bond market at that time with a curve to only five years it was practically not conceivable to structure the project based on local financing. The African Development Bank (AfDB) was identified as a potential source of long term financing and it alongside the Standard Bank was able to offer funding which matched the long-term nature of the project revenues.[6]

Before the Lekki Concession road PPP project, there were no privately financed toll road precedents to follow in West Africa. Local lenders had no real experience of long term financing for infrastructure projects. The project was a learning phase for future PPP projects in the country.

Conclusion and Recommendations

The Nigerian ICRC Act 2005 fails to make specific provisions that should regulate the funding of PPP infrastructure projects. This lacuna does not do so much to encourage private sector participation in the development of infrastructure in the country. While it is given that the Act sets up a Commission to oversee PPP transactions, meaning that the Commission could make policies for PPP transactions, this does not assuage the feelings of investors who consider the long-term nature of investments in infrastructure and would want some assurance that there would be protection for their funds. This is important because the loans from Commercial Banks sourced for PPP projects are more often than not, secured only by expected revenue from the projects. Thus, if for instance, Toll Road Concession Project 'A' fails, Banks B, C or D are unable to recoup moneys lent for that project, as they are not, usually expected to lay claim on the assets of the promoters of the projects.

By being silent on the funding of infrastructure projects, it means that the courts, in the event of a dispute, must rely on the contractual agreements entered into by parties to the PPP arrangement.

Considering that policy summersaults and government unilateral backing out from PPP projects have been one of the bane of a successful PPP regime in Nigeria, both local and foreign investors would want to be assured by law, that investments in infrastructure are protected.

It is therefore recommended as follows:

- The Act of 2005 should be reformed and sections dealing on funding for PPP infrastructure projects must be included in order to gain infrastructure investor confidence.
- The Act should set up a Fund to be managed by a fund manager to source for funds from Pension Fund Administrators (PFAs) in order to have a reserve fund for special projects that would have been catered to by a PFI model, for example hospitals, prisons with a plan for the public sector to repay the loans to the PFAs.

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[1] *Ibid.*

[2] Oluwaseun Oluwansanmi and Odun Ogidi, 'Public Private Partnership and Nigerian Economic Growth: Problems and Prospects,' *International Journal of Business and Social Science* Vol.5, No.11 2014 137.

[3] It is important to note however, that the Lekki Epe Concession Road Project is a State Government road but it provides a good example to the funding of a PPP project in the country.

[4] See www.trinityllp.com/a-review-of-the-lekki-epe-expressway-toll-road-concession-project/ accessed 12 August2015.

[5] *Ibid.*

[6] *Ibid.*

Solomon O. Babatunde, Akintayo Opawole and Olusegun E. Akinsiku, 'Critical Success Factors in Public-Private Partnership (PPP) on Infrastructure Delivery in Nigeria' *Journal of Facilities Management* Vol. 10 No. 3, 2012 p213.
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Augustine Edobor Arimoro was born in Benin-City Nigeria. He graduated from the University of Maiduguri in 2004 and bagged a Bachelor of Laws (LL.B) honours degree and was a recipient of the Dean's Prize for the Best Graduating Student in the Faculty of Law, Rickey Tarfa's Prize for the Best Graduating Student in Jurisprudence and Legal Theory as well as the Justice Mohammed Bello's Prize for the Best Graduating Student in the LL.B programme. He passed the Nigerian Bar Examinations with a Second Class Upper Division and was called to the Nigerian Bar as a Solicitor and Advocate of the Supreme Court of Nigeria in November 2005. Between 2005 and 2014, he worked as a Business Support Officer and Wealth Management Advisor respectively with Asset and Resource Management Company Limited, one of Nigeria's leading non-banking financial institutions. He graduated from the University of Derby, Derby, United Kingdom in 2015 with a Master of Laws (LLM Commercial Law) and is currently a doctoral research candidate at the Kingston Law School, Kingston University London, United Kingdom. He is also a member of the Nigerian Bar Association.