

Institutionalising Public Private Partnerships in Nigeria

The Journey So Far.



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INSTITUTIONALISING PPP IN NIGERIA: THE JOURNEY SO FAR

INTRODUCTION

Over the last few years, Nigeria has been making slow but steady progress towards developing its Public Private Partnership market. It has been widely acknowledged that Nigeria has a huge PPP market potential that has been largely undeveloped for many reasons. One of the many reasons cited for this slow progress is the lack of a legal or legislative framework that supports PPP in Nigeria. However, this situation is beginning to change as apart from the Federal legislation, more State Governments have in recent times positively demonstrated their willingness to support PPP by enacting legislation to strengthen and institutionalize PPP.

This article will seek to identify the evolution and development of the legislative framework for PPPs in Nigeria; where it came from, where it is now and where it ought to be. In carrying out this assignment, we will look at two distinctive periods which can be classified into Pre-2005 and Post-2005.

The pre-2005 period will review the privatization era which was the forerunner to PPP, the interrelationship between the two, and how the successes and challenges of privatization had a direct impact on the development of PPP in Nigeria. The post 2005 period is a period when Governments in Nigeria started enacting legislation that was specifically tailored to particular transactions. This was followed by enactment of more general and broad based PPP legislation. This article will also seek to proffer suggestions on the way forward for the governments in respect of the existing laws and if need be, the enactment of new laws that will provide a definitive framework for the legislative process of institutionalizing PPP in Nigeria. It should be pointed out that this article is hardly exhaustive but it simply chronicles the events that led to the institutionalization of PPP and how it can be entrenched in Nigeria.

Pre 2005

The process of regulating private sector in running Government enterprises began with promulgation of the Privatization and Commercialization Act of 1988. That year, the Federal Government of Nigeria (FGN) commenced the process of privatization, and it started with the privatization of commercial and merchant banks. This was significantly important because it recorded a huge success and it boosted the country's economy especially the development of the country's Stock Exchange. Over one hundred



public enterprises were slated for privatization and thirty four were slated to be commercialized. In 1999, the Federal Government repealed the 1993 Privatization Act and enacted the Public Enterprise (Privatization and Commercialization) Act 1999 “**BPE Act**” which created the National Council on Privatization under the chairmanship of the Vice President of the Federal Republic of Nigeria to strengthen the privatization programme. The BPE Act was significant because it listed FGN agencies that regulate and operate critical infrastructure such as railways, seaports, airports, water basin etc in the privatization and commercialization programme.

With the successes recorded from the privatization programme especially the sale of most public enterprises or commercial infrastructure entities to private sector, the next challenge was privatizing and commercializing core infrastructure such as roads, airports, seaports railway etc. The FGN agencies managing these core infrastructures such as Nigeria Ports Authority (NPA), Nigerian Railway Corporation (NRC), Federal Airports Authority of Nigeria (FAAN) etc were slated for commercialization and privatization. The next important question that arose was *‘how can government sell or privatize some of its statutory agencies to the private sector?’*

That question was largely answered with ‘privatization of Ports’ under the port reform programme. Unlike the botched airport and railway privatization, the seaport privatization took a different turn, because rather than attempt to sell the ports, the FGN through NPA granted concessions of terminals to private sector companies under the Landlord Port Model. As a result of the Landlord model, the NPA by 2009 had generated revenue in the sum of \$6,535,868,638.91 from lease, commercial and equipment fees into the Federation account. Under the port concession model operated by NPA, the legal ownership of the port still resided with the Government through NPA whilst the equitable ownership was passed on to the private sector. In some way, this met the objective of the government in ‘making money from the ports without putting government money whilst still retaining ownership of the ports’.

The port concession model was not without its problems and one of the main problems was the lack of a clear legislative mandate to support the transactions. Even though the BPE Act did not make specific provision for concession, several other statutes had to be read in conjunction with the BPE Act in order to give the transactions the necessary legal backing. The first transaction that was carried out under the BPE Act did not fall under privatization *stricto sensu*. This situation gave rise for the need to draft a new legislation that would support this ‘hybrid’ kind of transactions between a public sector entity and a private sector entity. The need to have PPP legislation that would resolve the legal challenges posed to other sectors such railway, airport, hospital, schools etc arose.

POST 2005

The defining moment for institutionalizing PPP can be said to have begun in 2005 with the enactment of the Infrastructure Concession Regulatory Commission (ICRC) Act of 2005 and the Lagos State Roads, Bridges and Highway Infrastructure Law 2005. These two pieces of legislation are the first sets of legislation to be passed that were specifically targeted at PPP in Nigeria. They can also be said to be **interventionist laws** or special purpose laws. (SPL) For example, the Lagos State Roads, Bridges and Highway Infrastructure Law ‘was tailor-made’ to give legislative backing to the 30km Lekki – Epe Highway Concession in order for it to achieve financial closure. Even though it was first styled a PPP law, it merely provided for the concession of roads and bridges, and it did not cover other infrastructure services to be provided by the government, and this led to its repeal and replacement by the Lagos state PPP law 2011, which was a more broad based legislation on PPP.

This type of situation did not only affect Lagos State, but it was also the case at the Federal level. With the successes achieved with the level of investment that came into the country during the port concession; the legal difficulties and complexities parties faced in order to give legality to the port concession arrangement, coupled with the need to ensure that infrastructure such as railway, power, roads, airports etc, are also concessioned to private sector, the federal government through the National Assembly enacted the Infrastructure Concession Regulatory Commission (Establishment etc) Act 2005 ‘**ICRC Act**’. The ICRC Act provides a legal basis for Ministries, Agencies and Departments (MDGs) to enter into concession arrangements with the private sector.

One of the major hallmarks of the ICRC Act was the establishment of Infrastructure Concession Regulatory Commission (ICRC). The ICRC has become the ‘federal PPP Unit or agency’. Its PPP resource centre has been very active and it has being the rallying point for PPP activities in Nigeria including offering technical expertise to State Governments in setting up their PPP units. The ICRC was established to regulate Public Private Partnership endeavors of the federal government aimed at addressing Nigeria’s physical infrastructure deficit which has over the years hampered the country’s economic development. The Act provides for the participation of the private sector in financing,



construction, development, operation and maintenance of federal government infrastructure or development projects through concessions or contractual arrangements.

Since the enactment of the ICRC Act by the federal government and the approval of the National Policy on PPP by the Federal Executive Council, there appears a conscious and deliberate effort to ensure that PPP becomes established in Nigeria. A number of states have followed the federal government example by enacting their own PPP laws which are more comprehensive than the federal law. For instance, between 2009 and 2011, Lagos, Rivers, Cross Rivers and Ekiti states enacted their PPP Laws, and are currently developing their PPP master plan and project pipelines.

These laws created a momentum that has enabled the governments to effectively negotiate and carry out PPP transactions in their states and also provide the required legislative framework for PPP projects being carried out in the states. Most of the State Laws have similar provisions. These laws provide the legislative framework for the development and maintenance of public infrastructure and also providing social amenities and other facilities through Public Private Partnership in their respective states. They are comprehensive PPP legislation which seek to institutionalize the PPP process in those States by creating organs of government that promote, facilitate, and regulate the administration of PPP. They have enabled the state to actively partner private sector participants in the delivery of infrastructure. These laws have started to create an investment friendly environment for the development of the PPP market. Expectedly, Lagos State is taking the lead, for instance, the \$350 million 30km Lekki – Epe corridor road concession is a good example. Other examples are Lagos Urban Rail Mass Transit, the 12.15MW Akute Gas Power Plant, Lagos State Bus Rapid Transit Scheme to mention a few. Cross River State is another state that is active, the Cross River State Government has granted a \$ 75 million 20 year Concession for the development of a 50KM toll road network through four quarry communities in the state.

WAY FORWARD

An objective assessment of PPPs in Nigeria would suggest that some level of improvement have been recorded in the development of the institutional frameworks and legislative support for PPPs in Nigeria, but a lot more still needs to be done. There have been calls in many quarters that the ICRC Act, which is the flagship legislation on PPP in Nigeria should be amended to accommodate other contractual



options under PPP such as Leases, Management Contracts, Service Contracts, Build- Operate- Transfer and their variants etc.

We are of the opinion that if the Act is to be amended, there are a few suggestions that could be included in the amended Act which are not exhaustive, such as Regulation of service charge, user fee or toll, Minimum guarantee of revenue for private investors, Detailed procurement process, Content of PPP Agreements, Establishment of specialized Monitoring units for PPP projects, Effective Alternative Dispute Resolution (ADR) system etc.

Also, many states in Nigeria need to enact PPP laws as they do not have a legal framework for the proper development of PPP in their respective states. This will develop the market, make it more investor-friendly and give boost to the level of confidence of the private investors who are bringing in the finance required for the project in the form of government guarantees and Indemnities. It will also reduce the risk of PPP projects being nullified if challenged in a court of law.

CONCLUSION

It is our considered opinion that the development of PPP as a means of procuring infrastructural services has recorded some level of progress especially between 2009 and 2011 with a number of States enacting PPP laws and setting up statutory backed PPP office or Bureau. There has also being PPP councils or advisory boards with senior officials of the government as members. A lot more needs to be done by ensuring that more PPP projects are developed and are brought into the market in order to achieve the accelerated rate of infrastructure development that is required in the country. With the necessary efforts and amendment of the relevant laws, we believe that it will create a stable and effective PPP legal framework, guarantee efficient delivery of infrastructure services and ensure that more PPP projects executed in Nigeria reach financial closure.