

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

FOURTH EDITION

Editors

Bruno Werneck and Mário Saadi

THE LAWREVIEWS

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PREFACE

We are very pleased to present the fourth edition of *The Public-Private Partnership Law Review*. Notwithstanding the number of chapters in various publications in *The Law Reviews* series on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement), we identified the need for a deeper understanding of the specific issues related to this topic in different countries.

In 2014, Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004). Our experience with this law is still developing, especially in comparison with other countries where discussions on PPP models and the need to attract private investment in large projects dates from the 1980s and 1990s.

This is the case for countries such as the United Kingdom and the United States. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986 to 2012, approximately 700 PPP projects reached financial closure. The UK is widely known as one of the pioneers of the PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports, and railways. The Private Finance Initiative was launched in the United Kingdom in 1992, aiming to boost design-build-finance-operate projects.

In certain developing countries, PPP laws are more recent than the Brazilian PPP law. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1,299/2000, ratified by Law No. 25,414/2000). The Argentinian PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education, justice, transportation, construction of airport facilities, highways and investments in local security. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 govern the Public-Private Partnerships Law and other related PPP regulations, which establish procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has been enacted (Law No. 5,102) to promote public infrastructure and the expansion and improvement of services provided by the state; this law has been in force since late 2013.

In view of the foregoing, we hope a comparative study covering practical aspects and different perspectives regarding PPP issues will become an important tool for the strengthening of this model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the world.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model in our country. In our last preface, we called your attention to one specific

feature of the PPP law in Brazil: state guarantees. This feature permits that the obligation of the public party to pay a concessionaire be guaranteed by, among other mechanisms authorised by law: (1) a pledge of revenues; (2) creation or use of special funds; (3) purchase of a guarantee from insurance companies that are not under public control; (4) guarantees by international organisations or financial institutions not controlled by any government authority; or (5) guarantees by guarantor funds or state-owned companies created especially for that purpose.

The state guarantee pursuant to PPP agreements is an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions – one that is viewed as crucial for the success of PPPs, especially from a private investor's standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This is made worse by the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. Unlike PPP projects in developing countries, government solvency has not historically been a serious consideration in other jurisdictions. That is the case in countries such as Australia, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks the most.

Brazil must adopt cutting-edge models for awarding PPP agreements. The winner is usually chosen based solely on the price criterion (offering of lower prices or highest offers), which sometimes leads to projects lacking advanced or tailor-made solutions. Despite the legal provisions on the role of technical evaluation of offers, they are becoming less relevant. However, some ongoing discussions regarding amendments to the Brazilian procurement legislation and new criteria, which are based on the international experience, could (fortunately) be approved.

In last year's edition, we highlighted some discussions regarding the amendment to the Federal Procurement Law (Federal Law No. 8,666/1993), which is expected to expedite public procurement in Brazil. One of the main innovations proposed in this debate is the competitive dialogue, a type of bid in which the authority engages with bidders to discuss and develop one or more solutions for the tendered project. After the conclusion of the dialogue phase, the authority will establish a term for the submission of bids.

The competitive dialogue is a reality in many jurisdictions (e.g., Australia, Belgium, China, France, Ireland, Japan and the United Kingdom). In Japan, for example, some projects are procured through the competitive dialogue process. This process may be adopted if a relevant authority is unable to prepare a proper service requirement, in which case it proposes a dialogue with multiple bidders simultaneously to learn more about the specific service it seeks to implement. As another example, in France a dialogue will be conducted with each bidder to define solutions on the basis of the functional programme. At the end of the dialogue period, the procuring authority will invite the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract will be awarded to the bidder with the best price in accordance with the criteria established in the

contract notice or in the tender procedure. We hope the importance of this tool is recognised in Brazil and reflected in our legislation.

In this edition, we wish to call your attention to the creation of the Investment Partnerships Program, as established in Federal Law No. 13,334/2016. The Investment Partnerships Program is a legal plan regarding infrastructure development in the country, providing conditions for the attraction of investments in infrastructure projects and creating environments for greater integration between public and private sectors. According to information recently released by the federal government, PPI figures are impressive, particularly concerning the total value of projects that have been concluded: 142 billion reais. The expectation is that investments of this size will bring more employment and income in the coming years, ensuring the continuation of Brazil's development.¹

In the fourth edition of this book, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions. We would like to thank all of them for their support in producing *The Public-Private Partnership Law Review*, and in helping with the collective construction of a broad study on the main aspects of PPP projects.

We strongly believe that PPPs are an important tool for generating investments (and development) in infrastructure projects and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as public lighting services and prisons. PPPs are also an important means of combating corruption, which is common in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this fourth edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs.

We also look forward to hearing your thoughts on this edition, and particularly your comments and suggestions for improving future editions of this work.

Bruno Werneck and Mário Saadi

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

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NIGERIA

*Fred Onuobia and Okechukwu J Okoro*¹

I OVERVIEW

The Federal Republic of Nigeria is made up of a central federal government, 36 state governments and 768 local governments. Each federating unit is, subject to some constitutional restrictions, responsible for infrastructural development within the territory over which it has or exercises control.² Theoretically, therefore, there could be as many public-private partnership (PPP) laws and frameworks as there are tiers of governments in Nigeria. However, in reality, PPP is still in its infancy in Nigeria, with only very few states such as Lagos State, the nation's commercial capital, having any form of formal legal framework for PPPs.

The late 1990s and beyond saw the federal government of Nigeria shedding some of its responsibility for infrastructural development by increasing private participation in critical sectors of the Nigerian economy through the privatisation and commercialisation of hitherto state-owned monopolies, especially in the telecommunications, electricity and financial services sectors. Undoubtedly, privatisation had been the preferred vehicle for private sector participation in Nigeria's infrastructural development. There has, however, in recent years, been a gradual shift towards PPPs.

The Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005 (the ICRC Act) was enacted for 'the participation of the private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the federal government through concession or contractual arrangements; and the establishment of the Infrastructure Concession Regulatory Commission (the Commission) to regulate, monitor and supervise the contracts on infrastructure or development projects.'³ In Lagos State, the statutory regime for PPP has evolved from the Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board Law enacted in 2004⁴ to the more streamlined Lagos State Roads (Private Sector Participation) Authority Law passed in 2007 and finally to the Lagos State Public Private Partnership Law, 2011 (the Lagos PPP Law), which is the law currently in force.⁵

1 Fred Onuobia is the managing partner and Okechukwu J Okoro is a senior associate at G Elias & Co.

2 Nigeria operates a federal system of government. Each tier of government has its constitutionally allocated responsibilities. See Constitution of the Federal Republic of Nigeria, 1999 (the Constitution) Sections 4, 5 and 8. Also Schedules 2 and 4 of the Constitution.

3 Explanatory Memorandum, ICRC Act, 2005.

4 This was widely recognised as a first of a kind in the Nigerian PPP sphere.

5 Other states such as Ekiti, Rivers, Kogi and Cross River have their respective PPP laws.

II THE YEAR IN REVIEW

There were significant activities in the PPP sphere in Nigeria in the course of the year 2017. At the federal level, plans to concession Nigeria's four major international airports (Lagos, Abuja, Port Harcourt and Kano) and the eastern and western railway lines, respectively, took centre stage. The federal government in 2017 awarded the concession to rehabilitate two narrow-gauge rail lines in the country (from Lagos to Kano and from Port Harcourt to Maiduguri, respectively) to a consortium led by General Electric (GE). The project is estimated to cost over US\$2.2 billion. Progress has also been made on the Ibom Deep Sea Port project in Akwa-Ibom State Nigeria.

The year 2017 also saw the completion of the first 100 low-cost houses constructed by the Kaduna State government under a PPP initiative. The scheme plans to provide 20,000 housing units within four years. The Lagos State government also announced plans to expand water supply, transmission and distribution facilities within the state using a PPP model. There are other PPP projects at different stages, with values running into billions of dollars, being developed by the federal, state and local governments in Nigeria.

The Commission in the course of 2017, launched the 'ICRC PPP Contracts Disclosure Web Portal', a dedicated portal for all PPP projects in the country. The launch of the portal is aimed at monitoring PPP contracts to ensure greater openness and transparency in PPPs in Nigeria. The platform creates public access to all non-confidential basic information relating to a project (including the parties), overview of the project (covering the PPP model used and the rationale for the model), procurement documents and the project milestones. The portal earned Nigeria a top class in the '2017 year in review' ranking of the World Bank Group (WBG) PPP blogs. According to the portal, the Commission is currently undertaking 65 PPP projects, covering key sectors such as transport, energy, education, housing and health. These projects are at various stages of development, procurement and implementation.

At the time of writing, a bill for the amendment of the ICRC Establishment Act, 2005 is pending before the federal legislature. If passed, the bill will vest the Commission with supervisory and disciplinary powers with respect to concession agreements. The bill also seeks to change the name of the Commission from 'Infrastructure Concession Regulatory Commission' to 'Public Private Partnership Commission', to clearly capture the mandate and scope of work of the Commission.

III GENERAL FRAMEWORK

i Types of public-private partnership

A wide range of PPP models are possible under existing legal frameworks in Nigeria. Provision is made for traditional models and there is latitude for innovation where needed. The ICRC Act 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 contract with or grant concession to any duly pre-qualified project proponent in the private sector'.⁶ 'Concession' is broadly defined to

6 Section 1(1) ICRC Act.

include ‘a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof’.⁷

In clarifying the law, the Supplementary Notes to the National Policy on Public Private Partnership (Supplementary Notes) explains that:

*[A] wide range of contract forms – in turn represented by numerous acronyms (BOT, DBFO, BOOT, etc.) falls within the scope of the term ‘public private partnership’. It can be said to include: outsourcing and partnering; performance-based contracting; design, build, finance and operate (or build operate transfer) contracts; and sometimes, concessions.*⁸

Over the years, governments in Nigeria have undertaken different PPP projects under different models.⁹ The Murtala Muhammed Domestic Airport Terminal 2 (MMA2), the domestic terminal of the international airport situated in Lagos and its ancillary facilities, were developed under a Build-Operate-Transfer (BOT) agreement among the federal government, represented by the Minister of Aviation, the Federal Airports Authority of Nigeria and Bi-Courtney Aviation Services Limited, as concessionaire. The Katampe District Infrastructure was undertaken under a design, build, finance and transfer PPP model between the federal government, represented by the Federal Capital Development Authority, and a private partner, Deanshanger Project Ltd.

On its part, the Lagos PPP Law defines a ‘concession agreement’ as:

*[A]ny agreement between the government and any person, firm, company or limited liability partnership for the construction, maintenance, operation or management of public infrastructure, assets and facilities over an agreed period of time including, but not limited to, the following types of agreements – (1) Design, Build, Operate and Transfer (DBOT); (2) Build, Own, Operate and Transfer (BOOT); (3) Rehabilitate, Operate and Transfer (ROT); (4) Joint Development Agreement (JDA); or (5) Operation and Maintenance (OM).*¹⁰

The Lekki-Epe toll road concession was executed on a BOT basis between the Lagos State government (LASG) and a special purpose vehicle specifically established for the project, the Lekki Concession Company (LCC). The Lekki-Epe toll road concession agreement provided for the payment of a toll by users of the road to LCC, the concessionaire.¹¹

ii The regulators

There have been attempts to establish regulators or agencies with mandates that are specific to PPP. At the federal level, the Commission was established in 2008 pursuant to the ICRC Act as a body empowered to, among other things, ‘take custody of every concession

7 Section 36 ICRC Act.

8 See Part 4, paragraph 2 of the Supplementary Notes.

9 Among others, the Tinapa Free Trade Zone & Tourism Resort and the Akampa toll road project were all developed by the Cross River State Government using PPP models. Also the River State Government is developing the Greater Port Harcourt housing project scheme under a PPP.

10 Section 35 Lagos PPP Law.

11 Control of LCC has since December 2014 being taken over by the LASG pursuant to a share purchase agreement between stakeholders of LCC and the LASG.

agreement made under this Act and monitor compliance with the terms and conditions of such agreement; [and] ensure efficient execution of any concession agreement or contract entered into by the Government'.¹² For states with PPP-specific laws, such laws invariably establish a body with responsibility for PPPs in the state. In Lagos State, for instance,¹³ the Office of Public Partnerships (the Office) has the power to grant concessions; negotiate with prospective private partners; inspect and monitor concessionaires to ensure compliance with the terms of any concession agreement; designate a public infrastructure or public asset as a service charge-, user fee- or toll-paying public infrastructure or public asset and specify the condition for the use of such infrastructure or assets. Further, the Office is empowered to approve the amount of money that may be charged by a private or public operator with respect to any public infrastructure, public assets or amenities as toll or user fees, subject to the approval of the Lagos State House of Assembly.¹⁴ Apart from the Office, the Lagos State Public Procurement Agency established by the Lagos State Public Procurement Act 2011, the Lagos State Ministry of Finance, Ministry of Budget and Economic Planning and Ministry of Justice, are also involved in PPPs in Lagos State.¹⁵

The Bureau of Public Enterprises (BPE), established under the Public Enterprise (Privatisation & Commercialisation) Act, 1999 (the PE Act) is charged with the responsibility of effecting the privatisation or commercialisation of government enterprises identified under the First and Second Schedules of the PE Act. The BPE in the performance of this function has been seen to make use of traditional PPP models such as BOT or concessioning in some circumstances. For instance, the Nigerian Ports Authority currently has about 25 terminals operated under concession agreements with private entities, with the concession terms ranging from 10 to 15 years. There are also at least two ports operating on a BOT basis, namely, the Tin Can Island Port Complex and the Rivers Port Complex.

The Supplementary Notes outlines the roles and responsibilities of ministries, departments and agencies (MDAs) and other stakeholders in PPPs to avoid duplication, reduce bureaucracy and promote consistency, clear responsibility and accountability. Apart from the Commission and the BPE, the key MDAs involved in PPPs are the National Planning Commission, the Federal Ministry of Finance, the Debt Management Office, Office of the Accountant-General of the Federation and the Bureau of Public Procurement (the BPP). There are also sector-specific regulators, such as the Nigerian Communications Commission (for telecommunications projects), the Nigerian Electricity Regulatory Commission (for power projects), the Nigerian Maritime Administration and Safety Agency, Nigerian Ports Authority and the National Inland Waterways Authority (for maritime projects) and so on.

iii General requirements for PPP contracts

PPPs can be utilised for any project in Nigeria, except those that relate to matters on the 'negative list'.¹⁶ The actual terms of a PPP contract will depend on the negotiation prowess

12 ICRC Act Section 20(a) and (b).

13 Other States also have similar 'offices' or 'bodies' under varying appellations, with powers similar to that of the Office, established under their respective PPP laws.

14 Section 10 Lagos State PPP Law.

15 Paragraph 3.3 Lagos State PPP Manual.

16 Section 31 of the Nigerian Investment Promotion Commission Act, 1995 lists sectors to which investment is barred by both local and foreign investors. They are: (1) production of arms, ammunition, etc.; (2) production of and dealing in narcotic drugs and psychotropic substances; (3) production of military

of the parties involved and any special considerations surrounding the project. There is no standardised PPP agreement that must be adopted by the parties. There are, however, certain provisions that must be complied with as stipulated under the ICRC Act or the laws of the relevant states, including provisions for arbitration as the dispute resolution mechanism. Generally, it is required that the project company possess the financial capacity, relevant expertise and experience in undertaking the relevant infrastructure development or maintenance before it can contract with a relevant MDA.¹⁷

In addition, while the concession agreement might only be executed between the relevant government ministry or agency and the private entity, such an agreement would have been subjected to numerous consent requirements, depending on the peculiarities of the project. For instance, for prioritised projects under the ICRC Act, the approval of the Federal Executive Council¹⁸ is required before the relevant ministry or agency can enter into a PPP agreement. Also, the approval of the Federal Executive Council is required for a government ministry, agency or corporation to give any form of guarantee, letter of comfort or undertaking in a concession agreement.¹⁹

The Executive Council and the governor are the approving authorities in Lagos State.²⁰ However, the Lagos PPP Law further provides that ‘any Concession Agreement to be entered into by the Office must be presented before the House of Assembly for ratification before implementation’.²¹ This provision is peculiar to the Lagos PPP Law. There is no such consent requirement under the PPP laws of Ekiti and Rivers States, for example. The Ekiti State PPP Law provides instead that ‘the award of a Concession by the Ekiti State Public Procurement Board is subject to the approval of the Governor as the approving authority’.²² Finally, where a consortium is undertaking the project under a PPP, members would be jointly and severally liable under the contract and the withdrawal of any member of the consortium before or during the implementation of the project may be grounds for review or possible cancellation of the contract.²³

The duration of a PPP agreement will depend on the nature of the project. The ICRC Act does not limit the duration of PPP agreements.

IV BIDDING AND AWARD PROCEDURE

i The federal government of Nigeria

In addition to the ICRC Act, the Public Procurement Act, 2007 (PPA) also plays a central role in the award of concessions at the level of the federal government. The PPA established the BPP and makes due process provisions applicable to procurements by the federal

and paramilitary wears and accoutrement, including those of the Police and the Customs, Immigration and Prison Services; and (4) such other items as the Federal Executive Council may, from time to time, determine. See also, Public Procurement Act, 2007 Section 15(2).

17 ICRC Act, Section 2(3).

18 This is the name of Nigeria’s federal cabinet or council of ministers.

19 ICRC Act, Section 3.

20 Paragraph 8.19 Lagos State PPP Manual.

21 Section 26 Lagos PPP Law.

22 Section 8 Ekiti State Public Procurement Board, 2011.

23 Section 4(3) ICRC Act.

government and its agencies. Essentially, the PPA requires every procurement entity²⁴ to maintain a record of a comprehensive procurement procedure. Nevertheless, while the actual procurement process may differ from one entity to another, all procurement must comply with the principles and general framework laid down by the PPA. The principal feature of the PPA is that all procurement entities must obtain a 'Certificate of 'No Objection' to Contract Award' from the BPP for every procurement to be formalised²⁵. The PPA establishes different procedures for the procurement of goods and works on one hand, and the procurement of services on the other hand. Central to both regimes is the general²⁶ need for public advertisement of invitation for bids in respect of the procurement with a view to encouraging 'open competitive bidding'.²⁷

Also noteworthy is that the PPA expressly permits preferential treatment for domestic or local bidders in situations where an invitation to bid for goods and works is also extended to foreign bidders. Section 34(1) of the PPA states that 'a procuring entity may grant a margin of preference in the evaluation of tenders, when comparing tenders from domestic bidders with those from foreign bidders or when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad'. The parameters of such domestic preference must be disclosed in the bidding document.

Finally, in determining the successful bid, the procurement entity must be mindful of the bid offering the most value for money with regard to the requirements of the proposal for bid.

ii The state governments

The bid and award process will differ from state to state depending on the specific regulatory framework in place. For Lagos State, the extant legislation on procurement applies to PPPs. The Lagos PPP Law expressly provides that 'the Office shall be a procuring entity for the purpose of the Lagos State Public Procurement Law and shall comply with the intendment of that Law'.²⁸ The provisions of the Lagos State Public Procurement Law, 2011 (the Lagos Procurement Law) are very similar to that of the PPA. A significant difference is that under the Lagos Procurement Law, there is no provision for the issuance of a Certificate of No-Objection by the Office. Moreover, unlike the PPA, the Lagos State Procurement Law makes provision for e-procurement.²⁹ Nevertheless, procurement by any procuring entity is governed by the same principles of open competitive bidding, promotion of competition and system of accountability, among others.

24 Procurement Entities 'means any public body engaged in procurement and includes a Ministry, Extra-Ministerial office, government agency, parastatal and corporation'. PPA section 60.

25 Section 16(1)(b) PPA.

26 Exceptions to the need to publicly advertise the invitation for bids include emergency, and the availability of goods, works or services from only a particular supplier.

27 Open competitive bidding is defined as 'the process by which a procuring entity based on previously defined criteria, effects public procurements by offering to every interested bidder equal simultaneous information and opportunity to offer the goods and works needed'. Section 24(2) PPA.

28 Section 11 Lagos PPP Law.

29 Section 60(2) Lagos State Procurement Law provides that 'subject to the provisions of this Law and its Regulations, it shall be lawful for any procuring entity to consider any or all of its tenders by electronic auction and or simulation on its electronic portal, provided that the use of electronic system shall be transparent, efficient and economical'.

iii Unsolicited bids

The Commission's Guidance Notes on Unsolicited Proposals govern unsolicited proposals at the level of the federal government. The Commission's Guidance Notes encourage unsolicited proposals on the premise that they might contribute to the infrastructural development of the country. Unsolicited proposals are to be submitted directly to the relevant MDA. MDAs on their part are to review submitted unsolicited proposals against the following laid down criteria:

- a Does the project serve a credible public interest?
- b Is the project in line with the national development goals of the relevant MDA?
- c Does the project fall under the category of critical infrastructure?
- d Is the project viable without need for viability gap funding?
- e Does the project proponent possess the requisite competence and profile to implement the project?³⁰

Upon completion of the MDA's review, the proposal is forwarded to the Commission for its review and issuance of 'no objection' after a favourable technical and financial due diligence exercise. Thereafter, ministerial approval is sought, and if obtained, the project proponent is issued a formal acknowledgment as the project author and the project proceeds to a competitive bidding stage. At the bidding stage, the Swiss Challenge System³¹ will be applied to allow for submission of competing bids by other potential proponents via a transparent process. However, the investments made by the project proponent in preparing the proposal to the requisite OBC standard³² is taken into consideration, and as such, the original proponent is granted the right to counter-match the best offer and secure the contract.³³ The successful bidder is determined on the basis of the most economically and financially viable submission.

For unsolicited bids, the approach of the Office in Lagos State is similar to that of the Commission outlined above. The Lagos State PPP Manual (the Manual) provides that 'in select cases, the project could be initiated by the private sector as an Unsolicited Proposal under a transparent, competitive process which will also be managed by a MDA.'³⁴ It appears, however, that Lagos State is less disposed to pursuing unsolicited proposals, as the Manual further provides that 'while all proposals will be treated on a case-by-case basis, consideration of unsolicited proposals will be the exception rather than the rule, limited mainly to projects that demonstrate genuine innovation and/or use of proprietary technology.'³⁵

V THE CONTRACT

There is no standard or model PPP agreement. Thus each PPP agreement will be unique to the project and parties involved.

30 Paragraph 3.2.1 ICRC's Guidance Notes on Unsolicited Proposals.

31 This refers to the system where it is mandatory for a procurement entity that has received an unsolicited bid to request for competing bids from the public. The bid from the original project proponent is then assessed against the competing bids before a decision is reached.

32 This refers to the 'Outline Business Case' Standard provided under the Supplementary Notes.

33 Paragraph 8.6 ICRC's Guidance Notes on Unsolicited Proposals.

34 Paragraph 2.1.1 Lagos State PPP Manual.

35 Paragraph 8.19 Lagos State PPP Manual.

i Payment

The existing frameworks provide for both direct payment by the public procuring entity to the private entity and also for payment from the proceeds of the project. Under the ICRC Act, where payment is to flow directly from the government, such payment must be by way of amortised payments.³⁶ Unfortunately, the ICRC Act does not further provide for the rate or interval of payment of these amortised payments. Also, under the PPA,³⁷ mobilisation fees of up to 15 per cent may be paid to a contractor or supplier and future payments are subject to the issuance of an interim performance certificate. Payments must be settled promptly as payments that remain unpaid for more than 60 days after the date of the submission of an invoice, will attract a delayed payment interest. The PPA further provides that ‘all contracts shall include terms, specifying the interest for late payment of not more than sixty days’.³⁸

While the Lagos Procurement Law provides that a performance guarantee may be required as determined by the Office, the PPA makes the provision of a performance guarantee mandatory. Section 36 PPA provides that ‘the provision of a Performance Guarantee shall be a precondition for the award of any procurement contract upon which any mobilisation fee is to be paid, provided, however, it shall not be less than 10 per cent of the contract value in any case or an amount equivalent to the mobilisation fee requested by the supplier or contractor whichever is higher’.

ii Guarantees

MDAs are not permitted to give any guarantee, letter of comfort or undertaking in respect of any concession without the approval of the Federal Executive Council. On the other hand, in Lagos, it would appear that there is an outright prohibition on the provision by Lagos State or the Office of guarantees in support of PPPs. Section 17 of Lagos PPP Law states that ‘a public private partnership agreement must not contain provisions for any financial guarantee from the State, any Ministry, Department or Agency for the Public Private Partnership but may include provisions for indemnity or undertaking that would be given in the ordinary course of business.’ Considering Nigeria’s infrastructure deficit and the weakness of institutions of state, it may be prudent for government to incentivise private entities to enter into PPPs by providing guarantees and other fiscal incentives. A total ban on state support is not recommended.

iii Distribution of risk

The guiding principle for the distribution of risk is that risks will be allocated to the party best able to manage them. It is typical for the private entity to be completely or largely responsible for the design, development, finance and eventual completion of the project. Risks borne by government are thus restricted to matters such as those relating to the ownership and availability of the underlying assets, and other matters that are completely within the control

36 Section 7(3) ICRC Act.

37 These provisions are mirrored in Sections 62 and 64 of the Lagos Procurement Law. The Lagos Procurement Law, however, sets a higher threshold of 20 per cent as mobilisation fee (called advancement payment under the Lagos State Procurement Law) and advance payment of more than 20 per cent may be paid upon submission of a written request by the supplier or contractor justifying the need for such payment.

38 Section 37(4) PPA.

of the government or inappropriate for the private entity to bear. In all, the policy as provided under the Supplementary Notes is that the government will aim to optimise, rather than maximise, the transfer of project risks to the private entity.

It is not unusual for the PPP agreement to mandate the private entity to obtain insurance to cover the risks to be borne by the private entity under the PPP agreement.

iv Adjustment and revision

Adjustment and revision of the PPP agreement can only be carried out as provided for under the relevant PPP agreement and this will vary with each PPP agreement. Suffice it to say that there is no law conferring on the government the right to revise a PPP agreement, except as provided under such agreement.

To start with, the Nigerian Investment Promotion Commission Act, 1995 provides guarantees against nationalisation or expropriation of any enterprise and the compulsory surrender of interest in the capital of any enterprise. Moreover, on adjustment and revision in PPP agreements, ICRC Act, section 11 provides that 'no agreement reached in respect of this Act shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the provisions of this Act.' There are also constitutional guarantees against expropriation of assets. Where assets are expropriated, the Nigerian Constitution mandates the payment of adequate compensation to the affected party. Nigeria is also a signatory of the ICSID Treaty. All these provide some level of comfort to the private enterprise intent on executing a PPP project.

v Ownership of underlying assets

The government usually owns the underlying assets involved in PPP projects and will also be responsible for the acquisition of such assets where the same is not readily available. The right granted to the private entity over the asset will depend on the project and the PPP model adopted. Ownership will invariably remain with the government or will be required to be re-assigned to the government at the expiration of the concession term. However, during the pendency of the concession term, the private entity may use such underlying asset as security for obtaining finance for the project.

vi Early termination

The PPP agreement will typically make provisions for early termination by either party for default or force majeure reasons. Where early termination is as a result of default by a party, the defaulting party will be liable to pay compensation to the counterparty.

VI FINANCE

More often than not, the private enterprise participating in a PPP has the responsibility for financing a PPP venture but the government may provide guarantees that will assist in negotiations with lenders. Most PPP projects have been financed through syndicated loans sometimes involving international lenders. Also important to note is the role played by the World Bank in providing guarantees on certain projects.³⁹

39 An example is the World Bank Partial Risk Guarantee in the Azura-Edo Independent Power Plant project.

VII RECENT DECISIONS

Given that PPP in Nigeria is still in its infancy, there are no significant recent case laws on PPP contracts. Most PPP-related cases before the courts and arbitral tribunals in Nigeria are still at the preliminary stages. The practice of Nigerian courts is to give effect to the terms of agreements freely entered into by parties. The courts are therefore more likely than not to uphold the terms of a duly executed PPP agreement.

In the case of *Maevis Ltd v. Sita Telecommunication Nigeria Ltd & Anor*,⁴⁰ the Federal High Court in Nigeria upheld the right of a private entity under a PPP agreement to enforce its contractual rights without interference from any third party. In this case, Maevis Ltd, the plaintiff, signed a PPP contract with the Federal Airports Authority of Nigeria (FAAN) in 2007 for the provision of services to four airports in Nigeria. In 2010, dispute arose between Maevis Ltd and FAAN in relation to the contract, following which the parties went to court but were referred to arbitration on the basis of the PPP agreement signed by the parties in 2007. The court also ordered the parties to maintain the status quo pending the outcome of the arbitration. However, on 24 March 2011, FAAN terminated the contract with Maevis Ltd and went on to execute another contract with Sita Telecommunications Nigeria Ltd and Société Internationale de Télécommunications Aéronautiques (SITA) (the defendants) on the same project. The defendants were informed during negotiations with FAAN of the PPP contract between FAAN and Maevis Ltd, and the pending litigation and the order of court for the parties to maintain the status quo. The defendants ignored the warning and contracted with FAAN. Maevis Ltd subsequently sued the defendants for inducing and/or procuring FAAN to breach its contract with Maevis Ltd. The court ruled that the defendants acted unlawfully by interfering with the contractual relations between Maevis Ltd and FAAN, even though it had knowledge of the pending litigation.

VIII OUTLOOK

Giant strides have been taken in relation to PPPs both at the federal and state levels. Weak legal frameworks, weak institutions, poor access to finance and lack of expertise have all contributed to the minimal role PPP has played in infrastructural development in Nigeria. Also instructive is the lack of continuity in government policies, especially in the area of infrastructural development resulting in a myriad of abandoned or uncompleted infrastructure projects. This degree of uncertainty militates against the existence of a conducive environment, which is needed for PPPs that are at their very core long-term in nature.

The enactment of PPP laws both at the federal and state levels is a welcome development. With the decline in government revenues following the drop in crude oil prices, more PPP projects are expected in different sectors of the Nigerian economy in the coming year. Nigeria has a huge infrastructure deficit. Hospitals, roads, railways, the sea ports, airports and the power grid require huge investments. It is expected that investments and developments in these sectors would be achieved by the utilisation of the PPP model.

40 (2013) 10 CLRN 124.

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