

# Legal framework for public private partnership in Nigeria

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Olufemi Soyaju

BL LLM LLM

Postgraduate Candidate, University of Pretoria

## OPSOMMING

### Die Regsgrondslag vir Openbaar-Private Samewerking in Nigerië

Nigerië staan tans 'n infrastruktuur-tekort in die gesig, wat 'n beperking plaas op die land se vermoë om ekonomies te groei en te ontwikkel ter bereiking van die nasionale visie om deel van die top 20 wêreld ekonomies teen 2020 te wees. Om die land se infrastruktuur te verbeter en sodoende verbeterde ekonomiese groei en ontwikkeling te bevorder, moet daar belê word in die uitbreiding van die infrastruktuur en basiese dienslewering op 'n skaal wat tans vër buite die bereik is van die regering se begroting en finansiële vermoëns. Dus is die Nigeriese regering afhanklik van privaat inisiatiewe en kapitaal om die land se infrastruktuur te onderhou en uit te brei. Die gebrek van finansiering noodsaak die regering om gebruik te maak van privaatsektor hulpbronne en –finansiering vir die voorsiening van infrastruktuur en dienslewering deur middel van openbaar-private vennootskappe. Hierdie artikel ondersoek die regsgrondslag vir privaatsektor deelname in die voorsiening van infrastruktuur en dienslewering in Nigerië. Uiteindelik, bied dit 'n oorsig en lewer kritiek op sekere wetgewing wat die openbaar-private vennootskap raamwerk in die voorsiening van infrastruktuur, onderhoud en finansiering in Nigerië reël. Die artikel argumenteer dat wetgewing wat die grondslag van die raamwerk in Nigerië beheer ontoereikend is. Die ontoereikendheid van wetgewing is deels verantwoordelik vir die gebrek aan private belegging in Nigerië se openbare infrastruktuur en dienslewering. Dit lei daartoe dat die program nie daarin slaag om privaat beleggings vir die ontwikkeling van Nigeriese infrastruktuur te verseker nie. Gevolglik sal die regte wetgewing die privaatsektor aanmoedig om hulle beleggings te verhoog en die nodige finansiële hulpbronne beskikbaar te stel om kritiese ontwikkeling van openbare infrastruktuur en dienslewering te bewerkstellig.

## 1 Introduction

It is an established fact that infrastructure is an enabler. It acts as catalyst and is critical to human and economic development and also the general functioning of every modern society. It defines a country's business competitiveness and also creates jobs. It provides the sub-structure upon which a given society, the super-structure in this context, is built. It could be likened to a "jugular vein"<sup>1</sup> of an existing society. Without it, a society

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1 This is one of the veins in the neck that drain blood from the head, brain, face and neck and convey it toward the heart. See Online Medical Dictionary-<http://www.medterms.com/script/main/art.asp?articlekey=987> (accessed 2011-07-28).

cannot function. A country's state of public infrastructure can be an indicator of the country's economic development and growth. Obviously, an efficient and reliable infrastructure is critical to attract the direct foreign investment and expansion of international trade which are so crucial to growth.

This explains why in every nation, provision of infrastructure assets has always remained on the front-burner of governments' agenda for development and policy. In Nigeria, the three tiers of government have come to appreciate the fact that provision of modern and functional infrastructure plays a vital role in the socio-economic lives of the people. Therefore, raising the bar for service delivery and tackling the lack of infrastructure have been integral components of successive governments' visions in Nigeria.

Analysing the state of infrastructure in Nigeria presents a spectacle of a crushing lack of infrastructure assets across the nation. This huge deficit in infrastructure is easily observed in the critical sectors of the nation's economy such as power, transportation, education, housing, water supply and healthcare. In every way, decades of underinvestment and general neglect in the area of maintenance have taken a toll on the country's public assets.

The *Global Competitiveness Report* of 2010-2011,<sup>2</sup> using infrastructure as one of the twelve indicators and as a factor very fundamental to a country's ability to compete, ranked Nigeria 127th overall out of the 139 economies covered and the country receives poor assessments for its decrepit infrastructure which on its own is ranked 135th amongst 139 economies. According to the report, Nigeria's poor infrastructure is reported to be the most problematic factor influencing trade in Nigeria. The report underscores the poor state of Nigeria's infrastructure in that in overall quality, Nigeria's infrastructure is ranked 134th; in the quality of roads, 128th; quality of railroad infrastructure, 104th; quality of transport infrastructure, 107th; to mention few.<sup>3</sup>

The Debt Management Office<sup>4</sup> has established the fact that Nigeria's current infrastructure deficit requires capital investments to the tune of

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2 The World Economic Forum's Centre for Global Competitiveness and Performance publishes an annual *Global Competitiveness Report* and report series which aim to reflect "the business operating environment and competitiveness of over 130 economies worldwide". The report series identify advantages as well as impediments to national growth thereby offering a unique benchmarking tool to the public and private sectors as well as academia and civil society. [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport-pdf2010-11](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport-pdf2010-11).

3 See the *Global Competitiveness Report 2010-2011* 260-261 [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport-pdf2010-11](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport-pdf2010-11) (accessed 2011-07-28).

4 Established by the Debt Management Office (Establishment, etc.) Act 2003 to, among other functions, "maintain a reliable database of all loans taken or guaranteed by the Federal or State Governments or any of its agencies and also verify and service external debts guaranteed or directly taken by

US\$100 billion to US\$111 billion,<sup>5</sup> and this magnitude of financing required to bridge the country's infrastructure deficit, currently outstrips the supply of capital available from the public sector.<sup>6</sup>

So, given the scale of the nation's infrastructure requirements and the ever-widening investment deficit in provision of public assets and service delivery in an environment of budgetary constraints, lack of capacity, general incompetence and endemic corruption, the governments, at all levels in Nigeria, are drawing on private initiatives and capital to tackle the menace of infrastructure deficits and lack of financing. This entails leveraging private sector resources and capacity for provision of infrastructure assets and services to the public through public private partnerships (PPPs) to bridge the widening infrastructure financing gap and open up the country's vast economic potentials, fast-tracking the development process.<sup>7</sup>

However, it must be noted that, by implication, the legal framework includes the regulatory system, which itself is a subset of the legal framework.

As a run-up to the proposed discussion in this article, I will look at the framework for PPP as a financing technique or model in Nigeria.

## 2 Framework for Public-Private Partnership in Nigeria

PPP fundamentally about applying the private sector's skills in technical and financial risk management in ways that represent real value for the public sector. In the infrastructure projects landscape, PPPs are seen as financial models that enable the public sector to make use of private finance capital in a way that enhances the possibilities of both the government and the private company.<sup>8</sup>

Since the beginning of the fourth democratic experience in May 1999, the Federal Government of Nigeria has embarked on an extensive liberalisation and privatisation program to inject private sector money and expertise in order to ensure quality infrastructure service delivery to the teeming population.<sup>9</sup> The assumption is that private sector

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the Federal Government or by the State Governments and any of their agencies where such debts are guaranteed by the Federal Government". See s 6(1) Debt Management Office (Establishment, etc.) Act 2003.

5 The World Bank (2011) Project appraisal document 6.

6 *Ibid.*

7 Delaine E (2008) 39-40

8 Hodge & Greve (eds) *The challenge of public-private partnership: Learning from international experience* (2005) 4.

9 Conference on Infrastructure Development in Nigeria *Report of the Nigerian Economic Summit Group International PPP and infrastructure development in Nigeria* (2004) 1.

investment in infrastructure is a key priority in moving Nigeria to the status of top 20 economies by the year 2020.<sup>10</sup>

However, over the years, at the central level, the government has taken serious steps in pursuit of its infrastructure targets. In 2007 specifically, the Federal Government of Nigeria articulated its Seven Point Agenda which outlined the seven key drivers for Nigerian development.<sup>11</sup> At the top this list of indicative parameters, is the adequate provision of critical infrastructure<sup>12</sup> as a means to catalyse economic growth with the transport sector as a high priority for PPP investment.<sup>13</sup> At the level of the states, the national infrastructure strategy has been endorsed and a commitment has been made towards the agenda for country-wide infrastructure development.

Pursuant to the above, the Federal Government inaugurated the Infrastructure Concession Regulatory Commission (Commission)<sup>14</sup> in late 2008 to drive the program in Nigeria. As a first step towards establishing the proper legal and regulatory environment to attract private sector investors, the Federal Executive Council approved the National Policy on Public Private Partnership, sponsored by the Commission after stakeholder consultations and technical inputs from, *inter alia*, the World Bank and the United Kingdom Department for International Development (DFID). The key PPP principles driven by the Commission are: Value for money; public interest; output requirements; transparency; risk allocation; competition; and capacity to deliver.

This policy sets forth the ways in which private investment could be leveraged in tackling the menace of poor infrastructure stocks and boosting delivery of services to the public in a manner that is sustainable. This is pursuant to sections 33 and 34 of the Infrastructure Concession Regulatory Commission Act (ICRCA) which empower the Commission to

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10 *Ibid.*

11 Project Appraisal Document 46.

12 The critical infrastructure include: Power, transportation, national gas distribution and telecommunications. For electricity – to develop an integrated, lowest cost, expansion plan for the development of the Nigerian electricity industry in the medium and long-term; upgrade and reinforce distribution network; develop appropriate gas policy to encourage production and supply of gas for electricity generation; develop gas production and supply infrastructure; and develop a policy on IPPs. For transport – provide platforms for PPP, with capacity building in MDAs. For roads – explore mechanisms to ensure funding for maintenance investments. For railways – revive the system and involve the private sector. For aviation – the priority is to establish the National Civil Aviation Authority as the cornerstone of reform, including a recertification project.

13 Project Appraisal Document. Others are: the Niger Delta region; food security; human capital; land tenure changes and home ownership; national security; and wealth creation.

14 Established by s 14 ICRCA, to regulate, monitor and supervise the contracts for infrastructure or development projects. See particularly the Schedule to the ICRCA.

take directives from the President regarding matters of policy and power to make regulations, respectively.<sup>15</sup>

The entire PPP framework in Nigeria hinges on the principles of achieving better value and affordable services. As expressed in the National Policy Document, there are economic, social and environmental objectives for the adoption of PPP model as a strategy for infrastructure development.<sup>16</sup> It is the belief of the government that a private-sector led drive for infrastructure development through PPPs will open up the infrastructure and service delivery landscape in Nigeria to efficiency, inclusive access and overall improvement of the quality of public service delivery in a sustainable way.<sup>17</sup>

In pursuit of this lofty agenda, they came up with a supposed more investor-friendly legal and regulatory environment so that the provision of infrastructure assets and delivery of services to the public could be private-sector driven.

The ICRC stands as the closest legislation in Nigeria that can easily be referred to as the infrastructure law. The apparent successes that came in the way of provision of telephone services and the global system of mobile telecommunication (GSM) really heightened the expectation that the private sector participation is a sure-footed path to better service delivery and procurement of high-grade and cost-effective public infrastructure stocks.<sup>18</sup>

### 3 Legislative and Regulatory Frameworks

Critical to the entrenchment of the PPP models is an enabling legal framework. This is rightly underscored in the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*,<sup>19</sup> which 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 sectors”<sup>20</sup> in the economy.

Generally, the legislative framework provides the platform by which the governments regulate and ensure the provision of public services to the public and offers protection of rights for public service providers and

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15 The World Bank (2011) Project appraisal document 6.

16 The Infrastructure Concession Regulatory Commission (ICRC) National Policy on PPP (2009) 1012.

17 *Ibid.*

18 Investments in telecommunications industry grew from US\$50 million in 2000 to US\$50 billion in 2010. See Ahmed *PPP for infrastructure development: The Nigerian experience* (2011) 1.

19 UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* UN 2001 A/CN.9/SER.B/4 23.

20 *Ibid.*

the customers. That explains why the legislation needs to be not only transparent, but also fair. A fair legislative framework will incorporate the wide and varied interests of all parties – the government, the private investor who provide services for the public and the public at large – and seeks to achieve an equitable balance between all these wide and varied interests.<sup>21</sup>

Rules are therefore significant in defining the terms and the templates through which financial capital flows. It is the legal framework that breathes the “breath of life” into the entire gamut of the policy framework for private participation in procurement of public infrastructure.

On the other end of the spectrum is the regulatory system which is a sub-set of the legislative framework. The critical imperative of putting in place a regulatory environment that inspires confidence through “open and transparent processes and procedures and a level playing”, is not misplaced. This will promote competition and enables the investors to earn fair returns for the risks taken.<sup>22</sup>

Typically, the regulatory environment embraces the rules of procedure governing the way and manner institutions saddled with regulatory functions exercise their powers. For a regulatory process to be credible it must be transparent and objective. Rules and procedures must be lucid and objective for the purposes of fairness, impartiality and prompt action from the regulatory body concerned.<sup>23</sup> A typically conducive regulatory environment will create a level playing field for all players on the PPP terrain. At minimum, there should be guarantees as to the protection of consumers through regulations that touch on minimum service requirements, coverage, pricing, etcetera, and generally to seek to prevent abuses of the rights of consumers.<sup>24</sup>

Pursuant to the signing into law of the ICRC, the Federal Government of Nigeria inaugurated the Infrastructure Concession Regulatory Commission (the Commission) on the 27 November 2008, to provide the requisite regulatory and institutional framework within which all Ministries, Departments and Agencies (MDAs) of the Federal Government can effectively enter into partnership with the private sector in the financing, construction, operation and maintenance of infrastructure projects as provided for in the ICRC.<sup>25</sup>

At this juncture, the review will now shift to related regulatory and industry specific laws relating to PPPs in Nigeria.

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21 *Ibid.*

22 Shonekan *National Policy on Public Private Partnership* (2011) 1.

23 UNCITRAL *Legislative Guide* 35.

24 Tanyi *Infrastructure finance in emerging markets: lessons from recent experience* (2009) 3.

25 ICRC *National Policy on PPP* (2009) 10.

### **3 1 Legal, Regulatory and Industry Specific Laws**

In this section, I analyse the relevant laws touching on public and private sectors involvement in procurement of public infrastructure and service delivery in Nigeria, starting with the oldest law – the Highways Act of 1971.

#### ***3 1 1 Highways Act 1971***

The Highways Act<sup>26</sup> empowers the Minister of Transport to construct and operate toll gates and collect tolls on the Federal Highways. What this means is that in concessions of federal roads that require tolling, the authority lies with the Minister in charge. Unfortunately, the main infrastructure legislation, the ICRC, does not contain a saving provision with regard to this piece of legislation, nor does it make a reference to the Highways Act.

#### ***3 1 2 Utilities Charges Commission Act 1992***

Utilities Charges Commission Act 1992 established the Utilities Charges Commission that regulates tariff charged by public utilities in Nigeria. The implication of this is that the approval of the Commission may be required in fixing the tariffs between the private investor (concessionaire) and the Government. Like the law discussed above, the ICRC does not contain a saving clause nor does it make a reference to the Utilities Charges Commission Act.

#### ***3 1 3 Bureau of Public Enterprises (Privatisation and Commercialisation) Act 1999***

This Act provides the legal framework for the privatisation programme in Nigeria and establishes the National Council on Privatisation (NCP) and the Bureau of Public Enterprises (BPE) as the supervisory and implementing agencies respectively for privatisation transactions. It however, repeals the Bureau of Public Enterprises Decree.<sup>27</sup>

Under the Privatisation and Commercialisation Act, 1999, the National Council on Privatisation is saddled with the responsibility for determining which public assets the government should divest from. Under the provisions of this Act, concessions have been used severally as a means of commercialisation of existing government-owned enterprises.

Section 9 (1) of the Privatisation and Commercialisation Act establishes the National Council on Privatisation (the Council). Section 11 however provides for the functions and powers of the Council which among others include: Approving policies on privatisation and commercialisation, public enterprises to be privatised or

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26 See s 2 Highway Act

27 78 of 1993.

commercialised, and the legal and regulatory framework for the public enterprises to be privatised.

In the same vein, section 12 (1) establishes the Bureau of Public Enterprises. The functions of the Bureau with respect to privatisation include implementing the Council's policy on privatisation; prepare public enterprises approved by the Council for privatisation; advise the Council on further public enterprises that may be privatised; and advise the Council on the capital restructuring needs of the public enterprises to be privatised, among others.<sup>28</sup>

The Act only applies to the privatisation and commercialisation of the list of public enterprises set out in the Act. The Act does not apply to the primarily "greenfield" kinds of PPP transactions.

However in practice, the agreement between the two regulatory agencies – Commission and BPE – is that all assets mentioned in the Privatisation and Commercialisation Act that are to be developed into PPP will be led by the MDAs with the Commission coordinating and the BPE providing technical advice.<sup>29</sup>

The BPE as an agency has driven the privatisation process of many state-owned business enterprises in Nigeria since 1999. It holds the public assets in trust for the Ministry of Finance until successfully sold or commercialised. Over the years, the BPE has gained experience, skills and capacity through the concession method used during the privatisation of state-owned business enterprises. This institutional expertise and experience could be made available in implementing the PPP projects under the new PPP policy, while the Commission drives the process. The synergy could be well deployed, without conflict between the two institutions. For an instance, the BPE may serve as advisors to the MDA PPP project teams in conjunction with external transaction advisors whose services may be secured by the Commission. They could work together to expand the space and opportunities for private sector participation in the procurement of infrastructure and service delivery.<sup>30</sup>

#### **3 1 4 Debt Management Office**

The Debt Management Office (Establishment, Etc) Act<sup>31</sup> was enacted to establish the debt management office<sup>32</sup> (DMA) which is responsible, among other things, for the preparation and implementation of a plan for the efficient management of Nigeria's external and domestic debt obligations at sustainable levels compatible with desired activities for

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28 *Idem.* See s 13 Highway Act.

29 The World Bank (2011) Project appraisal document 56.

30 ICRC National Policy on PPP (2009) 74; The World Bank (2011) Project appraisal document 55.

31 18 of 2003.

32 See s4 Debt Management Office Act 2003.

growth, development and participation in negotiations aimed at realising the objectives.<sup>33</sup>

It has specific responsibilities with respect to all loans and borrowings of the Federal Government and empowers the Minister of Finance to give guarantees for such borrowings and to approve loans from financial institutions to the Federal, State or Local Governments or any of their agencies. Since all PPP processes may involve Federal Government borrowings and guarantees and other long-term contingent liabilities, by virtue of section 6 of the Act, the DMO's approval will be required.<sup>34</sup>

The DMO supervises the money and capital markets by ensuring that the two segments of the financial sector work perfectly together and develop the range of appropriate instruments that are needed to hedge financial risks in the PPP projects. An example of this is developing the secondary market for government bonds in both liquidity and depth and this will ultimately provide a reference interest rate for PPP financing.<sup>35</sup>

Part of the DMO's mandate is to be satisfied that any contingent liabilities are manageable within the government's economic and fiscal forecast.<sup>36</sup> To this end, the DMO advises the FEC as part of the approval process for individual projects. The project teams consult the DMO for approvals before involving the multilateral agencies such as International Finance Corporation (IFC), Multilateral Investments Guarantee Agency (MIGA) or International Development Agency (IDA) for provision of guarantees or other financial instruments.<sup>37</sup>

### **3 1 5 Electric Power Sector Reforms Act, 2005**

The Electric Power Sector Reforms Act 2005 was signed into law on 11 March 2005. Generally, it provides the statutory framework for participation of private companies in electricity generation, transmission, and distribution. Specifically, the Act provides for the formation of companies to take over the functions, assets, liabilities and staff of the defunct National Electric Power Authority (NEPA).<sup>38</sup> It also provides for development of competitive electricity markets and the establishment of the Nigerian Electricity Regulatory Commission (NERC). Besides, the Act also makes provision for the licensing and regulation of the generation, transmission, distribution and supply of electricity. Regulatory issues in respect of enforcement of matters like performance standards, consumer rights and obligations and determination of tariffs are also governed by the Act.<sup>39</sup>

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33 See the Explanatory Memorandum to the Debt Management Office Act. See also ss 1, 8 Debt Management Office Act.

34 The World Bank (2011) Project appraisal document 56.

35 *Idem* 75.

36 *Ibid.*

37 *Ibid.*

38 Onogoruwa (2009) [www.sec.gov.ng/files](http://www.sec.gov.ng/files) (accessed 2011-07-28).

39 See the Explanatory Memorandum to the Electric Power Sector Reform Act 2005.

Section 1 of the Act provides for the transformation of the defunct NEPA to the Power Holding Company of Nigeria (PHCN) which was then unbundled into autonomous companies comprising of: One transmission company, seven generation companies and eleven distribution companies. Part of the reforms which was provided for in the Act was the establishment of the NERC, the Rural Electrification Agency (REA) and the National Electricity Liability Management Company (NELCO) – a special purpose vehicle expected to take over and manage the residual assets and liabilities of the defunct NEPA, after privatisation of the unbundled companies. Section 83 empowers the Commission to set up and administer a fund under the name: “Power Consumer Assistance Fund” to be used to subsidise under-privileged power consumers as may be specified by the appropriate minister.<sup>40</sup>

### **3 1 6 Infrastructure Concession Regulatory Commission Act 2005**

The ICRC was signed into law on the 10 November 2005. The Act provides 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 Commission to regulate, monitor and supervise the contracts on infrastructure or development projects.<sup>41</sup>

The Act has two distinct points of focus set out in Part I and Part II. Part I provides that Federal Government entities can enter into agreements with the private sector for the provision of infrastructure. Part II establishes the Commission and provides that its functions are to: Take custody of every concession agreement made under the ICRC and monitor compliance with the terms and conditions of such agreement; ensure efficient execution of any concession agreement or contract entered into by the government; ensure compliance with the ICRC; and perform such other duties as may be directed by the President.<sup>42</sup>

The ICRC provides for the granting of the PPP contracts or concessions by the government or any of its ministries, agencies, corporations, or bodies. Under the ICRC, the term “concession” does not imply that the rights to any revenue stream from user charges are also transferred to the private sector entity involved in its operation, but include an obligation to finance the infrastructure. In the schedule to the ICRC, there is a list of infrastructure assets to which the provisions of the ICRC apply but requires the Federal Executive Council (FEC) to approve any other form of infrastructure and development project.<sup>43</sup>

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40 See the Transmission Company of Nigeria’s Website <http://www.tcnng.org/StatusOfPower.aspx> (accessed 2011-07-28).

41 See the Explanatory Memorandum and the Schedule to the ICRC.

42 See ss 1, 14, 19, 20 of the ICRC Act, 2005; The World Bank (2011) Project appraisal document 53.

43 The World Bank (2011) Project appraisal document 53.

Under the ICRCA, however, there is an obligation on the part of each Federal Ministry to prioritise its infrastructure projects and secure the formal approval of the investment decision from the FEC as required in the National Policy Statement. The ICRCA also makes it mandatory that the approved projects should follow a transparent competitive procurement process which is openly advertised. It also requires that any subsequent guarantees, letter of comfort or undertaking given by the ministry may only be given with the prior consent of the FEC. Hence, the ICRCA provides the legislative basis for the procedures set out in the National Policy for PPP.<sup>44</sup>

The Commission is the statutory regulatory body established by the ICRCA with a mandate to evolve and issue guidelines on PPP policies, processes and procedures (including those for concessions), and to act as a national centre of expertise in PPP. It is expected to, in conjunction with the relevant MDAs, identify potentially “bankable” PPP projects, “and will act as the interface with the private sector to promote communication on national policies and programmes”.<sup>45</sup> The communication envisaged “will be continuous, clear, timely, and accurate”.<sup>46</sup>

The Commission is empowered to grant PPP type contracts or concessions by any of the Federal Government ministries, agencies, corporations or bodies.<sup>47</sup> The Commission is expected to incorporate a PPP Resource Centre which is to play an important aspect in the institutional framework.<sup>48</sup>

As part of the regulatory functions, the Commission will see to the smooth implementation of the Government’s policies and processes and give advice to the Federal Executive Council (FEC) on the national policy on PPP. This will include giving advice to “FEC on whether projects submitted to it for approval meet the requirements of the regulations”.<sup>49</sup> The Contract Monitoring Unit within the Commission framework will be responsible for monitoring of compliance with the terms and conditions of the contracts between the contracting parties arising from the PPP processes.<sup>50</sup>

However, there are some of the provisions of the ICRCA which still need more details and clarifications.<sup>51</sup> Besides, there are some observed lacunae in the legal framework that would need to be plugged to make significant strides in the implementation of the infrastructure law and the PPP policies.<sup>52</sup>

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44 *Ibid.*

45 *Idem* 15.

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Idem* 53.

52 *Ibid.*

First, the ICRC empowers the ministries, departments and agencies of the Federal Government of Nigeria to enter into PPP related agreements after the approvals of the Federal Executive Council without mentioning or considering the other government establishments that may be affected by such agreements or other relevant laws. Besides, no mention is made of the need to take into account the effect of the proposed PPP transactions on the finances of the Federal Government.<sup>53</sup>

The ICRC makes no mention of the ownership of infrastructure assets by the private sector, nor does it provide for the stream of income through users' fees to be collected by private sector operators from the general public for the use of infrastructure assets, nor does the Act provide for the possible acquisition of land.<sup>54</sup>

It should also be noted that the provisions of the ICRC are cloudy concerning the approval process for PPP projects and, in particular, the granting of a concession.<sup>55</sup>

In the same vein, the powers conferred on the Commission are minimal and restricted to taking custody of already signed agreements and monitoring them. No specific responsibilities are given to the Commission in the evaluation and tendering process for PPP projects and there are no provisions on the relationship and coordination between the Commission and other MDAs of the Federal Government regarding the monitoring of the PPP contracts.<sup>56</sup>

Similarly, the ICRC makes no reference to the scale of projects to be considered for private sector participation and does not provide a mechanism for dealing with unsolicited proposals.<sup>57</sup> Also, no provision is made for a fair, efficient appeals process for illegal amends or aggrieved parties.<sup>58</sup>

The ICRC does not provide for a proper audit/review of processes and outcomes or for the need for proper public financial management.<sup>59</sup>

Unfortunately also, no provisions are made in the ICRC for alternative dispute resolution mechanisms.<sup>60</sup> Misunderstandings and disputes are inevitable between parties involved in PPP transactions and alternative dispute resolution mechanisms would have offered several ways of settling such misunderstanding and disputes in business in a less

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53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Idem.*

60 Ahmed "Infrastructure development for Nigeria-the PPP imperative" ICRC website-<http://www.icrc.gov.ng/> (accessed 2011-07-30).

painful and more accommodating manner than the adversarial way of settling issues through the judicial process or litigation in a court of law.<sup>61</sup>

In order to make the regulatory functions of the Commission more effective, the ICRCa should have contained a provision that any PPP transactions done without compliance with the ICRCa would be unlawful.<sup>62</sup>

In relation to the functions, the legislation lacks the regulatory and enforcement provisions that are vital in delivering the Commission's mandate.<sup>63</sup> The statutory functions are somewhat restricted in scope in a number of instances.

One instance relates to the role of the Commission which is restricted to monitoring and ensuring compliance of post-transaction activities. Ordinarily, the Commission should be allowed to have oversight functions over the pre-financial close arrangements so as to ensure that the contractual arrangements are legally sound.

The ICRCa does not provide for the role of the Commission as it relates to evaluating or approving of proposals, and says nothing in reference to processes for preparing or analysing projects or for deciding which projects should be privatised by federal agencies. The inclusion of the word "regulatory" in the title of the ICRCa and in the name of the Commission is not reflected in the statutory powers conferred on the Commission in the ICRCa regarding industry regulation and it seems it is not intended to have such powers.

There is no specific link to other related laws<sup>64</sup> that touch on

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61 *Ibid.* ADR is an acronym for "Alternative Dispute Resolution" a generic name for resolution of disputes outside the judicial process or litigation in a court of law and include the following methods: Negotiation, mediation, conciliation, arbitration, expert determination and what is sometimes called the multi-door approach. Out of these options, arbitration seems to be the most developed and the commonest. Generally, one of the reasons for ADR is the undue delay suffered by litigants in the normal courts. Justice Adam (Alternative Dispute Resolution and Canadian Courts: a time for change, 1989, p. 14), identified the following reasons as the basis for the adoption of ADR: lower caseloads and related public expenses; more accessible for people with disputes; reduced expenditure of time and more for parties; speedy and informal settlement of disputes otherwise disruptive of the community or lives of the parties to the disputes and their families; tailored resolution to the parties' needs; increased satisfaction and compliance with resolutions in which the parties have directly participated; restoration of neighbourhood and community values which are more cohesive; enhanced public satisfaction with the justice system, among others.

62 *Ibid.*

63 The World Bank (2011) Project appraisal document 53.

64 For example: the Privatisation and Commercialisation Act 1999; the Fiscal Responsibility Act 2007; Public Procurement Act 2007. These legal instruments especially the Public Procurement Act might impact on the PPP procurement processes in the country.

infrastructure procurement processes<sup>65</sup> and no provision in the Act shields the Commission from all forms of interference, given the peculiarity of the prevailing political environment in Nigeria. To this end, the Commission needs to be insulated from executive and political interference and given the necessary tools to fulfil its functions.<sup>66</sup>

The Commission ought to be given primacy on issues regarding the PPP processes touching on the Federal Government-sponsored infrastructure projects. A typical example is the conflicts between the Commission and the BPE in relation to the PPP processes. It is obvious that while the BPE is mainly saddled with the mandate for the privatisation of public enterprises, the Commission is concerned with superintending and moving the PPP processes forward, especially the concession transactions. The ICRCAs ought to have empowered the Commission to impose sanctions on those who contravene the provisions of the ICRCAs. There is also the need to include the provision that MDAs may receive and consider unsolicited bids subject to guidelines issued by the Commission from time to time.<sup>67</sup>

Section 20 of the ICRCAs, however, empowers the Commission to “perform such other duties as may be directed by the President from time to time, as are necessary or expedient to ensure the efficient performance of the functions of the Commission ...”.<sup>68</sup> However, pursuant to the provisions of section 34, the Commission may, with the approval of the President, “make such regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions”.

The relevant stakeholders have agreed to the fact that there are many lacunae and cloudy areas in the ICRCAs and the urgent need for a modern, comprehensive PPP law that would provide answers to so many questions in the ICRCAs and also create a platform for consistency across all infrastructure sectors and clarify the decision-making processes. However, the Commission has articulated the argument that quite a number of the observed lacunae

[c]an be resolved or mitigated through the issuance of detailed regulations under the Commission Act, developed in consultation with the MDAs and other interested agencies, and through operational guidelines, PPP Regulations and, where necessary, amendments to other applicable legislation.<sup>69</sup>

This argument will not be in the interest of the private sector players in the PPP processes given the successive Nigerian governments’ penchant for policy reversal or “summersaults”. The Act should be amended to capture all these perceived lacunae for the sake of predictability and

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65 Ahmed *op cit*.

66 *Ibid*.

67 Ahmed *op cit* 4.

68 See subsection (d).

69 The World Bank (2011) Project appraisal document 54.

protection of private investments in procurement of public infrastructure and delivery of services to the public. Leaving all these observed legal gaps to be corrected through the operational guidelines and regulations will be tantamount to leaving it to the whims and caprices of public officers and the political class and it will surely not be in the interest of private investors. As a matter of priority and urgency, the ICRCA must be amended to address all these gaps and controversies pointed out above if the purpose for its enactment is to be accomplished.

The transitional arrangements apply to PPP projects which started the procurement process before June 2007<sup>70</sup> but where FEC approval is required under the ICRCA. They apply to projects based on unsolicited proposals by a private sector party as well as projects which are financially free-standing (that is, which do not require funding from the Federal budget) but which involve the transfer of rights to exploit public assets and/or to charge users of an unregulated service through a concession.<sup>71</sup>

The *Operational Guidelines* address procedures which will apply to all new infrastructure facilities selected for implementation as PPP projects. Specifically, the *Guidelines* spell out the roles of the different MDAs within the Federal Government with regard to the identification, selection, appraisal, procurement, negotiation and monitoring of PPP projects. The authority of these arrangements and guidelines needs to be reinforced by issuing them in the form of regulations approved by the President.<sup>72</sup>

The proposed Commission regulations will strengthen the role of the Commission and seek to provide clarity and consistency for all aspects of a PPP transaction. A preliminary review of the arrangements and guidelines indicates, however, that there are areas of overlap with procurement regulations. To avoid uncertainty and inconsistency, the proposed Commission regulations will be limited to those matters that are outside the present Procurement regulations and these regulations will be incorporated by reference or appropriately cross-referenced.<sup>73</sup>

In agreement with the Document,<sup>74</sup> many variances could be seen between the provisions of the ICRCA and the procurement regulations on the one hand and the PPP Policy on the other hand. A typical example is

the conduct of due diligence by third party investors, the potential renegotiation of terms over the life of a project, financing by third party investors, the use of variant bids and the right of the Federal Government to step-in in the event that the contractor fails to perform, are all matters that are specific to PPP projects and not contemplated by the Procurement Act or the Regulations.

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70 The date of enactment of the Public Procurement Act 2007.

71 The World Bank (2011) Project appraisal document 56.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

This reinforces the conclusion that the Act does not apply on all fours to privately financed infrastructure development.

The argument is that there is a compelling need for the appropriate authorities to rapidly move to enact new legislation that will address all these grey areas concerning procurement of infrastructure assets through the private sector. Pursuant to broad-based consultations amongst the top government functionaries and the stake-holders, a comprehensive set of regulations for infrastructure procurement through the PPP should be drafted to move the PPP process in the country forward. Clarity of rules will, without doubt, enhance the confidence of prospective investors and attract the right kind of capital needed to fix the infrastructure financing gaps.

### **3.1.7 Public Procurement Act 2007**

The Public Procurement Act 2007 (PPA)<sup>75</sup> established the National Council on Public Procurement and the Bureau Public Procurement (BPP) as the regulatory authorities responsible for the monitoring and oversight of public procurement, harmonising the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria, and other related matters.<sup>76</sup>

It is applicable to all forms of procurement of goods, works and services carried out by the Federal Government of Nigeria and all “procuring agencies” and all other entities which derive at least 35% of the funds appropriated, or proposed to be appropriated, for any type of procurement from the Federal share of the budget.<sup>77</sup>

Section 60 of the PPA defines a procuring entity as any public body engaged in procurement and includes a ministry, extra-ministerial office, government agencies, parastatals and corporations, while the term “procurement” is defined tersely as “acquisition”. The PPA does not apply to procurement by the states except to the extent that such procurement falls within (b) above.<sup>78</sup>

A careful perusal of the PPA reveals that the PPA applies to traditional public procurement of goods, works and services. No exact reference is made to infrastructure procurement or to PPPs. However, where the procurement of goods, works and services necessary for infrastructure projects is involved, the PPA will apply but it is silent on the non-tender or concession aspects of PPP transactions;<sup>79</sup> and there is no reference to

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75 No.14. Signed into law on 2007-06-04.

76 See the Explanatory Memorandum and the Schedule PPA.

77 See s 15 PPA.

78 The World Bank (2011) Project appraisal document 55.

79 In other words, the Act does not apply directly to privately financed infrastructure assets.

unsolicited bids or to the interaction between procurement under the PPA and multilateral donor procurement rules.<sup>80</sup>

The BPP was established by the PPA which also established the National Council on Public Procurement. The BPP serves as the regulatory body responsible for the monitoring and oversight of public procurement, harmonising the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria, and other related matters. It drives the process of entrenchment of due process in the procurement of public works and services. In discharge of this function, it puts into use the techniques such as benchmarking in ensuring that the prices paid for goods and services are fair and reasonable. Part of its functions is the constituting of Tender Boards in each procuring entity in the Federal Government bureaucracy. It is also statutorily empowered to issue a certificate of no objection before a procurement process can be concluded and the required funds disbursed by the Accountant General of the Federation. This procedure is subsumed into the procedure of Government approval of a Final Business Case through the FEC.<sup>81</sup>

The whole idea of the BPP is to entrench best practice in public procurement in the overall interest of national development. Unfortunately, that vision is far from being realised in that there is currently an increasing wave of corruption moving through the procurement process MDAs at the three levels – local, state and federal. This has in no small measure compounded the infrastructure and service delivery woes in the nation.<sup>82</sup>

#### 4 At Sub-Sovereign Level

Out of all the federal states in Nigeria, only Lagos State<sup>83</sup> has infrastructure-related laws that apply within the state. This is against the backdrop of its pro-active approach to infrastructure development which has been quite commendable.

Due to the ever-increasing influx of people from the rural areas and the fact that Lagos State is the commercial and financial capital of Nigeria

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80 See the Explanatory Memorandum and the Schedule PPA.

81 *Ibid.*

82 See “BPP laments rising corruption in public procurement process” *The Punch* 2011-07-20. Recently, the Bureau uncovered and stopped the payment of an astonishing N216 million, being the inflation from a contract resulting from the implementation of 2010 federal budget. The uncovered amount was as a result of over-invoicing by the contractors for jobs claimed to have been done. This underscores “the revolving doors of corruption and collusion that exist between contractors and government Ministries, Departments and Agencies”.

83 It is one of the smallest federal states but has a population that is put in the region of 17 million with an annual growth rate of 8% per annum.

and almost becoming a city state, there has been tremendous pressure on the existing infrastructure assets. This has translated into an urgent and compelling need to upgrade, expand and build new infrastructure. It is in an attempt to address this deficit that the Lagos State Government decided to rely on the PPP approach to generate power, manage waste disposal and maintain the highways and streets, to mention a few. It has also been used to develop, upgrade, rehabilitate, operate and manage state roads, bridges and highways within its geographical and constitutional jurisdiction.

The main infrastructure law in Lagos State is the Lagos State Public Private Partnership Law (LSPPP Law) which was enacted and signed into law on the 24 June 2011. The LSPPP Law, in the main, encompasses in one document the framework for PPPs capturing the entire infrastructure spectrum in all facets of the economy, compared to its predecessor which was limited to roads, bridges and highways as suggested by the title of the law.

Other infrastructure-related laws in Lagos State are: the Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board Law; the Lagos State Water Sector Law 2004; the Lagos State Metropolitan Area Transport Authority Law 2007; and the Lagos State Waterways Authority Law 2008.

The Lagos State Roads (PSP) Law, 2007 has been expressly repealed by the new and main Infrastructure Law in Lagos State.<sup>84</sup>

## 5 Conclusion

This article has been both descriptive and critical in nature in that it reviews and critiques the applicable laws in Nigeria regarding infrastructure procurement and the private sector engagement in provision, maintenance and operations of public infrastructure assets and service delivery. It takes a critical look at the legal framework that underlies procurement of infrastructure and the engagement of private sector capital in infrastructure provision, maintenance and financing in Nigeria. The legal framework necessarily includes the related regulatory and industry specific legislation and the regulatory mechanism as a whole. It also articulates the critical imperative of putting in place a regulatory environment that inspires confidence through “open and transparent processes and procedures and a level playing field”.

The legal infrastructure which underpins the PPP framework in Nigeria is inadequate and the inadequacy of the legal and regulatory environment is partly responsible for the lack of appetite for engagement on the part of the private sector – especially foreign investors in the nation’s public infrastructure assets and service delivery – and the overall

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84 See “Lagos State, Nigeria’s PPP gateway” *Business Day* 2011-08-11.

failure of the PPP mechanism in attracting the required private investment into infrastructure sector.

The conclusion then is that with the right legal and regulatory environment, the private sector appetite for private investment will increase and the required financial resources to upgrade critical public infrastructure and services would flow into the infrastructure market in Nigeria.