



JOURNAL OF PUBLIC LAW & CONSTITUTIONAL PRACTICE

VOL. 9 SEPT. 2016



A Publication of
Department of Public Law,
Faculty of Law, University of Jos.

EXAMINATION OF PROJECTIONS AND PROBLEMS OF REKINDLING NIGERIA'S DEPLETED INFRASTRUCTURAL THROUGH PUBLIC PRIVATE PARTNERSHIP (PPP)

ABDULSALAM LA-KADRI* & KUDIRAT MAGAJI OWOLABI**

ABSTRACT

Infrastructure assets in Nigeria are in a state of comatose as a result of decades of poor maintenance culture, under investment in maintaining the existing facilities and putting new ones in place, and hyper-utilization of existing social welfare facilities. This has adversely affected the Nation's productivity and paved way for numerous societal problems including poverty, unemployment, recurrent inter-group violence and economic meltdown. Various attempts made in the past towards recovering from the immense infrastructure deficit confronting the nation, through the instrumentality of PPP has not recorded any commendable success having been marred by numerous challenges. This study examines PPP arrangements in Nigeria to ascertain the reasons why most PPP projects in Nigeria were unsuccessful in contrast to the tremendous success and infrastructure transformation achieved through PPP in other climes. It was found that poor regulatory framework, absence of standardized PPP contracts, corruption, poor capacity, lack of transparency, and undue political interference are the major factors responsible for the limited success achieved in the past. As the Buhari administration launches new PPP projects, it becomes crucial to ascertain the factors responsible for the past failure in order to prevent history from repeating itself. Recommendations made include commitment by government and putting in place enabling environment.

INTRODUCTION

Nigeria upon gaining independence from Britain in 1960 inherited most of the socio-infrastructure assets and political development as off shoot of colonial heritage. Added to the relics of colonialism is the culture of vesting management and control of public utilities entirely within the purview of the public sector administrators. Infrastructure assets in major cities like Lagos, Ibadan, Kano, Kaduna, Port Harcourt and Calabar which were constructed under the coordination of colonial masters and left in a functional state were being managed by the public sector for several years after colonization. Unfortunately, following independence the country witnessed a turbulent political history involving twenty five years of military rule which led to civil war, several instances of human rights abuses and diplomatic crisis, with an interlude of democratic government marred by ubiquitous bribery and corruption which spread to the public sector before the eventual return to democratic rule in 1999. It is crucial to point out that all the intermediate events between independence and full democratic governance constituted a major distraction to leaders who struggled for political power and paid little attention to socio-economic and human-capital development. Government continuously earned income from existing infrastructure assets without maintaining, modernizing or expanding them and did not put new structures in place as well.

Most infrastructure assets in Nigeria are old, dilapidated and in a state of comatose, the major means of transportation namely road and air have become death traps for both foreigners and citizens, leading to high rate of fatal accidents. Electricity supply in the country is erratic, sewage disposal, access to portable water and housing is generally poor especially in congested urban centers while telecommunication seems to be the only functional sector in the country.¹ The current high level of infrastructural decadence has resulted from numerous factors including corruption, lack of transparency and accountability across every cadre of the public sector, undue political interference in public administration, absence of maintenance culture, poor tariff and over-subsidization. Consequently, human capital development in the country has been greatly hampered. The country's poor infrastructure has been identified as a major factor responsible for the slow rate of economic development. In the circumstance, it has become incumbent on the central government to make urgent and deliberate efforts to renovate, maintain and properly manage existing infrastructure assets as well as fund the construction of new infrastructural projects.

The fact that Nigeria needs to invest hugely in infrastructural facilities is undisputable, this cannot be truer coming from no less but the former Governor of Central Bank of Nigeria Sanusi Lamido Sanusi that, "to check the deteriorating state of infrastructure in the country, Nigeria requires a yearly investment of \$10 billion over the next ten years".² Considering the level of infrastructural deficit, it is obvious that traditional project financing which usually involves sole reliance on government funds and resources will be insufficient for the country to breach the present gap as a result of numerous factors which has necessitated a paradigm shift. These factors includes contraction in fiscal space and resultant budget deficit, inability of government to provide specialised skills required, huge capital demands in funding projects, the need to share project risk and obtain the best value for tax payers' money. It is therefore incumbent on the authorities to source for other means of financing projects. A model that has been adopted by both developed and developing nations all over the world in financing and arresting enormous infrastructural deficit is Public Private Partnerships (PPP). Today Nigeria needs about 1.7 trillion naira to complete 206 road contracts across the country, as a result of the huge capital needed, government through the Minister of works has shown willingness to collaborate with private investors through PPP arrangements.³ However, it is crucial to avoid the various flaws responsible for the failure of PPP projects in the past to aid attainment of the much desired socio-economic growth and sustainable development.

Conceptualization

PUBLIC PRIVATE PARTNERSHIP (PPP)

Public Private Partnership comprises of three important terms the meaning of which must be clearly understood. The word 'PUBLIC' in PPP simply refers to a decision making authority in any society, community or among a group of people responsible for making and implementing policies which affects the general public. They have the social responsibility to provide basic amenities, employment, security, and maintenance of socio-economic stability. They include government at all levels, government ministries, agencies, departments,

¹ A. Akinwale 'The Menace of Inadequate Infrastructure In Nigeria' (2010) 2 African Journal of Science, Technology, Innovation and Development /207-288.

² 'ICRC Act frustrates PPP project pipelines' *Businessday* (17 December 2012).

³ <https://www.informationng.com>.

commissions and enterprises acting through public officials. They are the major decision makers in a PPP arrangement. Webster dictionary describe it as anything connected to government, public service or people generally. The term 'PRIVATE' on the other hand describes all institutions, individuals and enterprises that possess autonomy from government in terms of ownership, management and control of day to day running and conduct of business, usually established for the sole purpose of making profit. Webster English dictionary describes it as restricted to individual person, company or interest. Lastly, 'PARTNERSHIP' describes an agreement between two or more parties coming together to achieve a particular purpose; either profit making or getting a particular project executed, within a specified period of time and upon clear specification of important terms like profit and loss sharing formula, termination, liability et cetera. Webster dictionary describes it as a contractual relationship between two or more persons who jointly own a particular business.⁴

There are no generally acceptable definitions of PPP, however it basically refers to any form of arrangement or group of arrangements between public and private sectors for the purpose of making available facilities which were hitherto solely provided by the government. It enables government to fund huge concession contracts while simultaneously mitigating financial risks and employing private sector's expertise. For instance, the world's largest sports hub at an estimated cost of \$978 million was concluded at Singapore in 2014 through a PPP arrangement.⁵ PPP encompasses any long term arrangement between public and private sectors targeted at jointly financing infrastructural and other types of projects for the purpose of providing public utilities while transferring risk to the private sector. This may be in form of Private Sector Involvement(PSI), Private Sector Participation (PSP), Private Finance Initiative(PFI), Privatization et cetera.

The term PPP may also be described as an arrangement involving public and private entities for the purpose of jointly funding constructing and managing infrastructures while striking a balance between private sector's profit motive and public sector's provision of basic amenities without directly incurring debt. It can be used in financing projects in every sector of the economy. The use of PPP enables government to utilize the dexterity and efficiency of the private sector while simultaneously excluding the public sector from incurring huge project costs. If properly utilized, PPP can deliver value for money, but can also be difficult to execute financially.⁶

Usually, concession contracts specifies the extent of risk and responsibility of the concessionaire, and the work can be paid for either instalment ally by the government or in form of utility bills or toll paid by the public upon utilization of project at the stage of operation. Often times, government only pays for project upon concessionaire's ability to satisfy project specifications.⁷ For a successful PPP arrangement to exist be transparency and accountability of the regulatory bodies cannot be dispensed with. PPP became a globally celebrated means of funding infrastructural investment as a result of need for private innovation in funding and managing capital projects to increase efficiency, and the inability of

⁴ Merriam -Webster Dictionary ' online at <http://i.word/> (accessed 5 March 2014)

⁵ 'Public Private Partnerships- the answer to Nigeria's infrastructure problems?' Insight into Business in Africa (12 December 2010).

⁶ OECD Public Management Committee's Hand-Out 'From Lessons to Principles on Use of Public Private Partnerships' 2012 32nd annual meeting of working parties of Senior Budget Officials.

⁷ Ibid (n 2 above) 1-5.

developing countries to meet up with the huge demand for infrastructural facilities as a result of urbanization and need to resuscitate old structures.⁸ For instance, countries like Korea, RSA, Germany, France, and Spain have high record of PPP utilization. While UK has the highest PPP record followed by Europe.

The basic principles guiding a PPP arrangement are purchasing services not asset, value for money, shared risk between public and private sectors, use of private dexterity and experience, estimated cost of project must be predictable *ex-ante*. In order to have successfully executed PPP projects, the indispensable duties of government includes, transparency and accountability of regulatory institutions, avoidance of unnecessary bureaucratic practices and existence of sound legal frame work implemented by an independent regulatory body.

INFRASTRUCTURAL FACILITY

The term "Infrastructural Facility" which is synonymous to "Public Utility", "Public Service" and "Public Work" simply denotes a set of essential and integrated structures which must be in existence in order to make a community/country habitable for the populace. They are services and installations which are necessary for improving the general standard of living of the people and to aid the social-economic development of a nation.⁹ The term "Infrastructural Facilities" is traceable to the United States of America where it was first in used in 1927 for collective description of roads, rail lines, bridges, and other public works which must be in place to aid industrialization in any economy. It is also used precisely for describing permanent military installations used for defending a country. When put in place, such facilities aid provision of public services such as water, electricity, health care, etc¹⁰ Provision of public utilities is primarily the responsibility of government either at the national or municipal level and such is usually made available to the populace at an affordable cost regardless of the class or strata of the society to which they belong. Such services are usually monopoly or monopolistic in nature, although private entities may be granted the authority to provide such services, where such authority is so granted fees chargeable for engaging such public utilities will usually be regulated by government to avoid public exploitation.¹¹

Generally speaking, infrastructural facilities can be divided into two categories namely hard infrastructure and soft infrastructure. Hard infrastructures are tangible permanent facilities that can be physically perceived, seen or touched installed for the purpose of providing public service. Examples of hard infrastructures includes roads, rail tracks, bridges, airports, seaports, telecommunication masts, satellites, wind mills, drainages, solid waste incinerators, dam etc Soft infrastructures on the other hand comprises of intangible assets as well as institutions that set and maintain standards for the day to day running and management of hard infrastructures, including specialised public services. examples of these soft infrastructures includes military and paramilitary services, emergency services, law enforcement agencies, various laws and regulations, banking, insurance and other financial

⁸ V Tan..Allen & Overy 'Public Private Partnership (PPP)' (2012) Advocates for International Development, Legal Guide.

⁹ <http://en.wikipedia.org/wiki/infrastructure> (accessed 12 February 2014)

¹⁰ <http://www.the free dictionary.com/infrastructure> (accessed 12 February 2014)

¹¹ <http://legal dictionary. the freedictionary.com/public=utilities> (accessed 12 February 2014)

services, medical services etc.¹² Both the hard and soft infrastructural facilities are crucial for socio-economic as well as human-capital development of a nation

INFRASTRUCTURE DEVELOPMENT IN NIGERIA

History of public infrastructural facilities in Nigeria is connected to the colonial economy and facilities necessary to operate the system. As far back as 1897 Lagos Race Course Management board was established by the then colonial government to manage Lagos island race course. Several other structures were put in place during this era, including the Nigerian Railway Corporation and necessary rail structures (1898), Central Bank of Nigeria (CBN) 1958, roads, ports, the Federal Civil Service et cetera. After independence, it was necessary to put more structures in place in order to have a system that works. Thus public corporations like Nigerian Television Authority, Nigerian Airways, Nigerian Defense Industries Corporation and several others were established.

Furthermore, regional administrators in order to properly govern their respective regions and manage available resources established several regional enterprises. These include New Nigerian Development Company in the Northern region, Odua Investment Company in the Western region and Eastern Nigeria Development Corporation (ENDC) in the eastern part of the country. Also, there were other enterprises established to aid proper management of the country's oil resources, among these are Nigerian National Oil Corporation (NNOC) which was later merged with National Ministry of Petroleum in 1978 to form Nigerian National Petroleum Corporation (NNPC)

By 1975, Nigeria had up to 800 government owned commercial enterprises with branches all over the country including the steel companies in Abeokuta, Osogbo, Katsina and Jos. Despite this, most of the sectors were import dependent and the enterprises were used as tools for enriching political office holders. This coupled with other challenges like corruption, political interference, fund mismanagement and lack of qualified personnel led to liquidation of majority of the enterprises.¹³

Unfortunately, with the oil-glut of the 80s government earnings reduced drastically, hence investment in infrastructure was cut down. Also, the high rate of rural-urban migration accelerated by state creation; without a corresponding increase in government's efforts at maintaining existing facilities and putting in place new ones adversely affected the quality of public services rendered.¹⁴ Similarly, the idea of neglecting the agricultural sector encouraged migration to urban centers in search for white collar jobs. In order to recover from the effect of global oil glut, government introduced Structural Adjustment Programme in 1986 which was followed by privatization and commercialization of public entities. This further affected the quality of services rendered by private acquirers of the entities and worsened the problem of poor maintenance, lack of technical capabilities and increased the price of those services thus, only very few could afford them. Although government tried to adopt new policy with the hope of improving the nation's infrastructural facilities, most of these policies suffered at the implementation stage.¹⁵ Evidence of poor infrastructural facilities such as poor

¹² <http://www.treehugger.com/clean-technology/the-basics-of-infrastructure.html> (accessed 12 February 2014)

¹³ Unpublished: J Jakutyte 'Analysing Public-Private Partnership' unpublished Master's Thesis, Aarhus University, 2012.

¹⁴ <http://www.onlienigeria.com/economics/> (accessed 16 February 2014).

¹⁵ C A Ayedun (n 1 above).

accommodation, epileptic power supply, poor waste disposal and drainage system among others have become common features of both urban and rural areas in the country.

PPP AS A TOOL FOR ENHANCING SOCIO-ECONOMIC DEVELOPMENT

PPP as a tool for enhancing socio-economic development through investment in infrastructure has stood the test of time globally over the last two decades. Considering the existence of several PPP models that can be adopted, almost every country in the world have had one form of private involvement or the other in a bid to construct or maintain infrastructural facilities. Developed and developing nations of the world like the United States of America (USA), United Kingdom (UK), Canada, Australia, India, China, Russia, and Brazil among others have had to rely on PPP to avoid infrastructural decay, especially while recovering from the 2008 global economic meltdown. Canada for instance has one of the most functioning PPP systems in the world which is well established at every level of government having gradually evolved over time. Similarly, UK has a long track record of successful PPP implementation which has contributed to the economy immensely¹⁶. The credible record of PPP also extends to Africa both as regional blocks and as individual countries for instance, Southern African Development Community (SADC) has variously benefitted from Canadian International Development Agency's (CIDA) financial assistance aimed at improving infrastructure and building capacity; countries like Kenya, Mozambique, Ethiopia have also utilized PPP successfully for some projects with RSA taking the lead role in the use of PPP in Africa.¹⁷

However, contrary to expectations, PPP track record in Nigeria is yet to be commendable but, the situation is not completely hopeless as popularly depicted. The country's PPP sector is not an outright failure as there are few projects which successfully reached financial closure; for example the BI-Courtney concession for building and managing Murtala Mohammed Airport 2 was successfully completed and commissioned in 2007. Although, the second lap of that contract, involving the construction of a hotel within the same vicinity has since been abandoned. Also, the Bus Rapid Transport (BRT) scheme which required construction of separate lanes for the specialised buses was successfully implemented in Lagos state. In the same vein, Lekki (toll road) concession contract, and Katampe district contract in Abuja were also completed successfully¹⁸.

However, almost two decades after PPP was officially adopted in Nigeria, its performance is still grossly below expectations. Consequently, it has failed to serve its primary purpose as an instrument for improving the general standard of living and aiding socio-economic, as well as human capital development. Thus, the people's hope for poverty reduction through gainful employment and improved state of national economy has been shattered.

¹⁶ 'Public Private Partnerships: An Essential Tool For Meeting Global Infrastructure Needs, Finds RICS Report' PR Newswire <<http://m.prnewswire.com/news-releases/public-private-partnerships-an-essential-tool-for-meeting-global-infrastructure-needs-finds-rics-report-124083629.html>> accessed 17 June 2011

¹⁷ 'The Role of Public-Private Partnerships in Africa' Ventures 26 October 2013.

¹⁸ 'Exploring Public-Private Partnership for Development' PM News (March 2013).

MERITS AND DEMERITS OF PPP

Merits of PPP

- i) It facilitates sustainable development since decisions are based on long term considerations rather than short term benefits.
- ii) Investment risk is better managed since it is transferring to the most competent party who is capable of preventing *ex-ante* risk and managing *ex-post* risk if and when they occur.
- iii) Competitive pricing of projects helps ensure use of market value as yardstick for financial assessment of such projects.
- iv) it allows for a more accurate projection and valuation thus helps to obtain the best value for money.
- v) it encourages innovation and efficiency through the combination of public and private sectors' dexterity, commitment and efficiency
- vi) The concessionaire performs their very best in order to protect their name and build a lasting relationship with government .
- vii) The risk allocation involved in a PPP helps to secure the best value for money.
- viii) Since PPPs are off budget, it enables government to afford projects beyond existing income.
- ix) It enables government to spread project payment over a reasonably long period of time thus the budget is not adversely affected.
- x) Use of PPP makes it possible for government to finance project even in times of economic crises.
- xi) Use of PPP helps to achieve sustainable development at affordable cost by emphasizing efficiency and accountability.

Demerits of PPP

- i) Multiplicity of parties and long term duration of projects often leads to complex negotiations, and attracts high transaction and legal costs.
- ii) Completion of PPP projects are often interrupted by financial challenges which can cause public mistrust for the government agency that issued the contract.
- iii) Government borrowing is often cheaper than private borrowing.
- iv) Expensive bidding process as a result of *ex-ante* planning of service delivery, operations, reimbursement and vesting the responsibilities in a single party.
- v) PPP is generally more expensive since at the long run, both parties end up hiring technical, financial and legal experts to determine project viability and ensure that value for money is earned.
- vi) The huge cost of tendering bids is lost by competing investors who lose the contract award to a better bidder.
- vii) There are usually discrepancies between public and private sector's idea of *modus operandi*, management, execution and accountability; which might lead to project termination.¹⁹
- viii) Complexity of PPP arrangements necessitates employment of professionals to ascertain value for money by detailed comparison of the *ex-ante* determined cost to proposed cost if project were executed traditionally.

¹⁹ Ibid 1 & 2 above

ix) Government incurs contingent liability upon acting as project guarantor.²⁰

TYPES OF PUBLIC PRIVATE PARTNERSHIPS

There are six major types of PPP arrangements that interested parties can reach, with each possessing different characteristics, merits, demerits, risk sharing formula, parties' responsibility and suitability for particular project, sector and circumstances. The available types are as follows:

Service Contracts

In a service contract, government engages a private investor in executing a specific portion of a contract within a given duration of time, government is responsible for executing a substantial part of the contract and only unbundles a portion to the private investor. The investor who is chosen via competitive bidding is expected to execute the contract in strict compliance with cost and performance specifications indicated in the agreement, hence more profit can be realized by cutting cost. A variation of service contract allows parties to agree on cost, fee and provides possibility of allowing the private investor to participate in profit sharing. Generally in a service contract, government bears the cost of executing the contract and the investor does not relate with the consumers directly. A service contract is advantageous because it clearly spells out the private investor's task and allows for close monitoring, investor's risk is relatively low hence efficiency is mostly achieved, aids transfer of technology, skill and can be completed within a short duration. On the other, it may not be desirable to public authorities because it is not suitable for foreign direct investment, government bears all the financial expenses, government determines user charges which makes it susceptible to political influence and corruption.

Management Contracts

Here government awards a contract involving expansion, and operation of a part of or the whole of a facility to a private investor, vests the day to day running and control of the facility in that investor for an agreed duration of time, the investor raises working capital while the remaining fund is provided by government. Operating cost is ascertained *ex-ante*, but the private investor may earn extra income as a reward for meeting set targets or may be permitted to share from profit made. The contract clearly states extent of investor's duty, investor is permitted to relate with consumers but government still determines user charges. It is a desirable method of project financing as it enables government to utilize private funds and skill. Although it has a number of flaws, for example distinction between duty to manage and duty to control may be difficult; because parties duties are closely linked autonomy and privacy of function is often lost. Also, where payment is made in advance, it may lead to dereliction of duty by the investor²¹. Examples of service contracts are Operation and Maintenance (O&M), Operations-Maintenance and Management (OMM)

²⁰ M Alshawh 'Concept and Background to Public Private Partnership (PPP)/(PFI) UK Experience (2009) Iraq Institute for Economic Reforms.

²¹ Unpublished : P L Ninh 'Why should Transportation Companies Join Public Private Partnership (PPP) Proposed by Public Sector to support the implementation process of Freight Electric Vehicles (FEVs) in Copenhagen municipality' unpublished masters thesis Denmark Aalborg University, 2013 25-35.

Affermerge or Lease Contract

Here, private investor is employed to maintain the facility usually for a considerable period of time between 10 to 20 years during which decision as to the standard and quality of maintenance is made by the investor. During the pendency of the contract, private investor bears cost of operation, maintenance, services and setting off of consumer debts and answering consumer claims. Government constructs the facility and leases it to the private sector but does legal title rests with the government throughout the contractual term. Affermage is slightly different from lease because after payment of affermage fee investor keeps the remaining profit. Investor's profit is contingent on amount realizable from user charges, and may reduce the quality of maintenance provided by investor over time in order to increase profit. A disadvantage is the fact that determination of user charges becomes crucial, sensitive and may involve making of complex arrangements. Examples includes Lease-Develop-Operate, Lease-Back, Tax-Exempt Lease etc

Concessions

In a concession contract, the concessionaire has an obligation to provide services stipulated in the contract, these may include operations, maintenance, management, construction, rehabilitation and control of the facility in question, legal title rests with the government who sets performance standards, ensures compliance and regulate user charges. The contract regulates price and quality of services to be provided, tariff rate and periodic adjustment of such tariff where agreed on. Private investor provides the initial working capital and later recoups it from user charges. Concession contracts are often for reasonably long duration, usually between 25 -30 years, hence concessionaire would have realised both capital and profit, and in certain instances, government provide subsidy or permit concessionaire to share from the profit.

Investors find concession contracts attractive since there will be sufficient time to recoup all their investment and also make profit, it also helps to ensure that Investors are committed since they will do everything possible to avoid loss of investment. Although its complex nature, requirement of strong legal and regulatory framework, possibility of complications, high cost and skill required and possibility of creating a monopoly makes it undesirable. Examples includes Refurbish-Own-Transfer (ROT), Design-Build (DB), Design-Build-Operate (DBO).

Build-Operate-Transfer (BOT) and Similar Arrangements

A BOT is a specialized concession based on an arrangement whereby a consortium funds construction of a facility, and manages it within the agreed duration during which the consortium is vested with legal title to the project, but government agrees to purchase a particular level of services during the operation stage. Parties may include a mechanism to reduce demand risk by having separate payment for capacity and distribution charges, at the expiration of the contract legal title reverts back to the government. Other variations which exist are named depending on assignment of responsibilities toward construction of the structure, transfer of risk, ownership, management, and operation of the infrastructure in question. These variations include Develop-Build-Financed-Operate (DBFO), Build-Transfer-

Operate (BTO), Build-Operate-Transfer(BTO), Build-Own-Operate(BOO), Buy-Build-Operate(BBO), Build-Rent-Operate-Transfer(BROT) etc. Governments find it attractive as it enables the authority to embark on capital projects by sharing risk and cost of investment while giving out the concession to the most competent party chosen through competitive bidding.

Joint Venture

This is an alternative to privatization involving joint ownership of a project by both private investor and government, parties can register a company afresh or assume ownership of an existing company and have it transformed into a joint venture. The company jointly owned may be publicly traded and must be autonomous from any form of government control. Its operation and management is usually handled by the private partner while parties cooperate to successfully operate the company.²²

Before the project in question commences, parties must agree on terms of execution, risk of business is shared and both parties must be willing to invest in the project. Because a real partnership relationship exists between the parties, they are committed to the success of the project, although government's dual role may lead to corruption.

Hybrid Arrangements

Besides the major types of PPP contracts, parties may combine different contract types suitable for achieving the particular purpose intended, the types to be combined depends on several factors such as project requirements, sector of economy involved, duration of contract, and several other specific circumstances. Parties may also vary specific terms such as risk sharing formula, payment options, unbundling of sub-contracts etc. Examples of possible hybrids are: Developer-Finance, Lease-Purchase, Turnkey etc.

PUBLIC PRIVATE PARTNERSHIP IN NIGERIA.

The use of PPP as a tool for putting infrastructures in place is not entirely new to Nigeria, for instance Dolphin estate in Lagos was constructed via a PPP arrangement by the concessionaire HFP Construction Limited. Conversely, to Nigerians' utmost surprise majority of the PPP projects in recent times have failed woefully. The use of PPP in Nigeria has recorded immense failure, in fact most of the concession contracts end up being cancelled, reassigned or abandoned by the parties to it. Contracts like Lagos-Ibadan Expressway, Kuto-Bagana Bridge, Lekki-Epe and Macvis management of Airports were eventually abandoned/terminated. Since the country has not been adopting a particular PPP pattern, the several failed PPP projects have their particular unique reasons for failing thus learning from previous mistakes has been difficult. For instance, the 30 years DBOT contract for the construction of 49km Lekki Expressway assigned by Lagos State government was bought back at the end of August 2013. This was seen as the best way of settling dispute among stakeholders since the construction has been stagnant upon claims of high interest rate, increase in construction cost and Naira devaluation.

Similarly, the Muritala Muhammed Airport concession contract awarded to Messrs Maevis to be remunerated partly from airport landing fee-collection failed as a result of

²²K. Felsing, *Asian Development Bank (ADB) Public-Private Partnership Handbook*.pdf (2008) 24-43.

corruption. The concessionaire had to pay some huge amount of money up-front without any form of evidence indicating that such payment was made. In the same vein, the Victoria Island-Epe express way concession contract also failed as a result of the concessionaire's failure to work hand in hand with other stake holders. The concessionaire attempted to erect three toll gates within a five kilometer distance, this led to development of alternative routes thus residents were not obliged use the road.²³ Nigeria being the most populous country in Africa definitely offers a huge infrastructural market opportunity for private investors, considering the high demand for basic infrastructure by the people. PPP having being successfully employed in several countries globally, including the United Kingdom, United States of America, India, China, RSA and Canada one will expect it to be a useful tool in breeching Nigeria's infrastructural gap. Unfortunately, the reverse has been the case.²⁴

A form of PPP highly employed during the Obasanjo's regime is privatization. The use of privatization in Nigeria commenced in the 1980s as a follow up of Structural Adjustment Programme Delegation of government functions to Ministries, Agencies and Departments started after the military coup of 1966, government spent a lot of money on statutory corporation and private companies, government invested extensively in establishment of corporations with the oil money. By early 80s government investment in corporation dropped as a result of fall in revenue caused by global oil glut, and the returns were also not encouraging as a result of corruption and gross inefficiency. Privatization began officially in 1988 with the establishment of TPCP later renamed as BPE in 1999, the first few were successful thus expanding the economy. National Council on Privatization (NCP) was also established by the same Public Enterprises Privatization and Commercialization Act of 1999 to oversee the activities of BPE Within the first five years of full implementation of privatization, during which there was strict compliance with provisions of the enabling Act and International best practices, the sector thrived. But upon adopting a policy that differ five years later, things took a sudden down turn. By the end of the last democratic dispensation, almost every privatized enterprise was battling with one crises or the other. Including NITEL, PHCN, Daily Times, Ajaokuta and Delta steel companies, Unity schools, African Petroleum among others. In fact, in a recent press release of the BPE it was stated that only about 10% of the 400 privatized enterprises are in a thriving state, with majority being confronted by technical complications, poor legal and regulatory frame work poor policy formulation and implementation among other challenges.

A major challenge of the Nigerian PPP sector is failure to follow due procurement process, political interests supersedes due procurement process. Ministries, Departments and Agencies (MDA) usually fail to pay contractors within the duration stipulated in the Public Procurement Act. There has been no unified way of running projects each contract follows the pattern convenient for the MDAs at that time in question. Although the ICRC Act does not envisage privatisation as a form of PPP, the country has settled for mass privatization. Unfortunately, the Bureau of Public Enterprise (BPE) which ought to oversee all privatization exercises is a toothless bull dog. Privatization has led to winding up of several companies in the country. Study has shown that privatization is harmful to the nation's economy but has been preferred as a result of selfish interest of those in positions of authority. This has resulted

²³ O A Oyedele 'Construction Project Financing for Sustainable Development of Nigerian Cities' (2013) Peer review paper commission 10-6398 Abuja.

²⁴ *ibid*

in poor service delivery, mass retrenchment of ex-civil servants, exorbitant price of public services and high level of class stratification, poor regulation, absence of checks and balances, among other challenges. In order to improve on the situation, it becomes necessary for the government to improve the privatization model, improve on the legal and regulatory framework, amend the necessary competition and trust laws, ensure that the system allows for proper checks and balances, improve on human capital development and capacity building et cetera.²⁵

ASSESSMENT OF SOME PPP PROJECTS IN NIGERIA

Lagos/Ibadan Express Road Concession Contract

It is important to emphasize that a PPP arrangement is usually very complex, thus every step of it requires detailed planning, calculation, monitoring and assessment by the relevant authorities through qualified experts. Where adequate preparation is not made prior to commencement of a PPP arrangement, and the contractual agreement is not meticulously drafted, the likelihood of project failure becomes relatively high. Like many failed PPP concessions in the country, the Lagos/Ibadan express road contract appears to be heading towards failure right from the beginning for numerous reasons to be outlined later.

The Contract involves a DBOT arrangement assigned to Bi-Courtney Highways Nigeria Limited in 2009. It requires the concessionaire to solely fund the rehabilitation and expansion of the road at the cost of 89.6 Billion Naira, within four year duration. At the completion of the contract, the Concessionaire is to manage the facility for the duration of 25 years during which cost of rehabilitation and profit is to be realized from user charges; while simultaneously paying the government annual consortium fee of 100 million Naira and 5% of all accrued profit. The contractual arrangement was highly faulty and should not have been signed as advised by the ICRC in its 2010 annual report²⁶. Principal among the noticeable flaws in the contract include:

First, since the road to be reconstructed is a federal road being funded jointly by the governments of Lagos, Ogun, and Oyo states, it becomes necessary to resolve easement issues with the Federal government. It will also be necessary to obtain necessary permits and approvals in order to obtain right of way which is crucial to the contract execution, however this was left unattended to.²⁷ Second, before a PPP contract can be awarded it ought to go through a competitive bidding process; this helps the authorities to select the most competent bidder and guarantees proper performance. In this instance, the bidding process lacked credibility and transparency; in the words of the incumbent Minister of Works, there were numerous bidders but a contrary information was made available to the public to the effect that Bi-Courtney was the only bidder hence the contract was assigned to the existing bidder.²⁸

Furthermore, the ministry of works lacked the technical skill required to consummate such a complex contract and failed to employ the services of qualified experts to make requisite detailed assessment needed to draft a good PPP agreement, government relied on the concessionaire's expert who drafted the contract in his client's favour. It is necessary to determine project bankability because if a contract is not bankable, sourcing for funds will be a

²⁵ O Adoja 'A Critical Appraisal of Privatization in Nigeria' (2014) Brooke Chambers

²⁶ 'Infrastructure Concession Regulatory Commission Annual Report' (2011).

²⁷ 'Lagos-Ibadan Expressway: ICRC Vindicates Bi-Courtney' *This Day Live* (10 December 2012).

²⁸ 'Why Bi-Courtney Failed on Lagos-Ibadan Expressway-Onolememem' *The Citizen online* (3rd March 2014).

huge challenge. Here the concession contract was not really bankable, this adversely affected availability of fund and speed of construction. Even three years after being assigned the contract construction was still very slow and the visible changes were merely patches here and there.²⁹

Also, the contract was signed based on an inaccurate financial model. Parties could not agree on a precise estimated project cost, the income realizable through user charges was exaggerated as it was not based on a detailed survey of traffic forecast and a study of willingness and ability of road users to pay toll fees, a social and environmental impact study was not carried out to ascertain with precision the extent of rehabilitation and expansion of the road, and there was also no clear risk allocation structure. Hence the contract was terminated by the Federal government and reassigned in 2012 to two different companies, unbundled into two road axis.³⁰

Domestic Terminal of Murtala Muhammed Airport, Lagos (MMA2)

This contract was a BOT arrangement aimed at building new domestic terminal and providing more facilities at the MMA. The contract was awarded the contract in 2013, under the agreement that it will last for duration of twelve years later extended to 36 years period. The contractual agreement involved numerous parties including the ministry of aviation, Bicourtney, Federal Airports Authority of Nigeria (FAAN), and six commercial banks where the syndicated loan for financing the project was obtained. The contract failed as a result of funding challenges as the contractors were unable to access long term loan, coupled with other copious problems including failure of FAAN to fulfill its part of the contract, lack of transparency, weak monitoring and regulatory frame work.

PPP PROJECTS IN-PROGRESS UNDER PRESIDENT MUHAMMADU BUHARI'S ADMINISTRATION

Taking into cognizance the infrastructural needs of the nation and bearing in mind the inability of government to single-handedly provide the funds and technical-know-how needed to rekindle the nation's infrastructure, the Buhari administration has resorted back to PPP arrangements. Today, there are close to fifty PPP projects in progress, these includes resuscitated contracts like the Lagos-Ibadan express way road construction contract, and novel contracts like the Abuja light rail project, PPP High Voltage Transmission, Greenfield High speed Land Railway Lines across the nation, Restructuring and maintenance of Lagos national stadium.³¹ Proper structuring, transparency, political will and commitment are however necessary to attract investors and make a success of these projects.

FACTORS RESPONSIBLE FOR FAILURE OF MOST PPP PROJECTS IN NIGERIA

Nigeria has a history of failed PPP projects which accounts for her present state of infrastructure deficit. Principal among these challenges are financial challenges and inability

²⁹ Termination of Lagos-Ibadan Expressway Concession' *The Sun* (27 November 2012).

³⁰ 'Another Failed Marriage: The Lagos-Ibadan Story, by S.Y Ibrahim' *Premium Times* (29 November 2012).

³¹ Fadeyi. O et al "Assessment of Public-Private Partnership on Infrastructural Development in Nigeria: Challenges and Prospects" (2016), 3rd International Conference on African Development Issues, Covenant University Press.

of private investors to access long-term loans. Most commercial banks are unwilling to issue long term loans needed for such contracts as low interest rates.

Other known problems are conflicts of interest among stake holders, lack of political will, corruption, lack of transparency, poor structuring of concession contracts and inconsistent administrative policies clearly depicted in the MM2 concession contract as concessionaire was faced with changing policies as the FAAN executive position and the position of Aviation Minister changed hands severally within seven years.

The poor legal/institutional frame work is also a major challenge, the ICRC Act does not provide for sequential steps to be taken in the course of assigning and overseeing a PPP contract, and does not attempt of proffer solutions to the potential challenges that an investor may encounter.

Lastly, lack of project continuity is another major challenge, as baton of leadership changes, the new administration usually abandon previous projects. Although the government of the day has broken this jinx as seen in the case of Lagos-Ibadan express road contract.

CONCLUSION AND RECOMMENDATIONS

PPP as a useful tool for enhancing socio-economic development through investment in infrastructure has stood the test of time globally. Its use is most desirable in developing nations because of the need to achieve infrastructural growth and sustainable development regardless of the financial and technical constraint confronting government. Nigeria like most developing countries has joined the PPP band wagon since 2005 but the success recorded has been limited as a result of the above identified problems. In order to make a success of PPP contracts in Nigeria as an important prerequisite for infrastructure growth and sustainable development, this study thus recommends that the Infrastructure Concession and Regulatory Commission Act should be amended to meet the demands of modern PPP contracts and the regulatory body (ICRC) should be equipped to provide requisite monitoring, checks and balances needed. Special anti-graft measures should be put in place to prevent the use of PPP as a fore front for corruption, economic and financial crimes. It is also recommended that government should look into security challenges in order to provide suitable investment climate necessary to attract foreign investors who are often better equipped to take care of financial huge, technical and technological demands of PPP contracts.