The benefits of infrastructural development for a country cannot be over emphasized, hence President J.F. Kennedy of USA stated “America has good roads, not because America is rich, but America is rich because it has good roads”. However, infrastructural deficit in developing countries has culminated in the introduction of PPP as an emerging trend for infrastructural development, a practice that has greatly encouraged private sector participation in this regard. This article seeks to analyse this trend in the light of statutory provisions.

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Introduction

Nigeria is one of the fastest growing economies among the developing countries and has a flexible rule of law, however, leadership deficiency in our public service (which is a stark contrast to what operates in USA and Europe where the best talents are recruited), political instability, endemic corruption, unpredictable and weak economic policies as well as currency fluctuation have made investors (local and foreign) reluctant to invest in Nigeria.

Presently, we see a shift from the era where foreign investors were considerably restricted under the Nigerian Enterprises Promotion Act 1977 - the so called indigenisation regime, to the current era where foreign investors can invest in literally any part of the Nigerian economy and own its venture 100%. In Nigeria, friendly laws have been adopted in favor of foreign investors following the introduction of the liberalisation laws in 1995.¹

These laws have encourage Public Private Partnership (PPP) investments over the years and has ensured PPPs emergence over the last decade as one of the best ways to foster development thereby giving rise to an increase in its demand as evidenced in various Concession agreements in Nigeria.²

The aim of this article therefore, is to examine how PPP can foster a synergy between government and investors for the purpose of infrastructural development whilst construing relevant provisions of the

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¹ Nigeria Investment Promotion Commission (NIPC) Act Cap. N117 LFN 2004 and the Foreign Exchange (Monitoring and Miscellaneous Provisions) (FEMMP) Act Cap. F34 LFN 2004 liberalized foreign ownership of Nigerian enterprises especially on the repatriation on money invested in Nigerian through the issuance of Certificates of Capital Importation (CCI). S. 24 of NIPC Act guarantees the unconditional transferability of funds attributable to the foreign investment as well as interest thereof. S. 13 FEMMP Act provides for the repatriation of funds, that such foreign currency purchased from the Foreign Exchange Market may be repatriated from Nigeria without further approval. CCI’s are Central Bank of Nigeria (CBN) certificates issued by banks to provide statutory evidence of capital inflow/investment into a Nigerian company and consequently legitimizes and facilitates the repatriation of dividends and capital to the foreign investor as foreign inflows help in local job creation, modernize technology and improve infrastructure.

PPP as an Emerging Trend

PPP can simply be defined as a contract between the public sector and private investor for the provision of public services. The emergence of PPP dates back to centuries in the USA and Europe. Thus the European PPP Report, DLA PIPER (2009) states that the range of structures used for PPPs varies widely; in some countries, the concept of a PPP equates only to a concession where the services provided under the concession are paid for by the public, while in others the government may support the PPP Concession Agreement by procuring the land on which a PPP project will be developed, transferring a government owned asset to the investor for a fixed period of time, providing capital subsidy in the form of a one-time grant or excluding the investor from paying tax so as to make it more attractive to foreign investors.

In Nigeria, PPP is usually executed as Concession Agreement, wherein the private investor provides public services by assuming substantial financial, technical and operational risk in capital investments. On the other hand, the public sector utilises and harnesses the expertise and efficiencies inherent in the private sector to deliver infrastructure - traditionally procured and rendered by the public sector, without having to borrow. In other African countries such as South Africa, a number of successful PPP infrastructure projects have been recorded. For instance the US$3 Billion PPP Gautrain High Speed Rail Link, the success of which is attributed to a highly capacitated PPP team, affordability, appropriate risk transfer, functional legal system and an enabling PPP framework. Furthermore, the PPP Center of the Philippines bagged its second international award after emerging as winner in the annual IJ Global Asia Pacific Awards 2014 held at Singapore. These are clear indications that developing countries are becoming more recognized for their outstanding performance in PPP projects.

Legal and Regulatory Framework of PPPs in Nigeria

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3 S. 36 of the Infrastructure Concession Regulatory Commission (ICRC) (Establishment, Etc.) Act of 2005 defines Concession as a contractual arrangement whereby the project or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure and the provision of any added service.

In a situation where a law is specific, there is likelihood that it will be silent on certain issues such that there will be a lacuna in the law; this lacuna usually introduces elements of uncertainty. On the other hand, if the law is general, it creates room for unambiguity. One area in which the ICRC Act 2005 is silent on is the Swiss challenge, thereby creating a lacuna. Swiss challenge is a PPP principle used by developing jurisdictions of the world to enhance the transparency of a bid process for the construction of a public project. It involves a process where an agency of government receives an unsolicited bid from a private investor; the agency publishes the bid and invites third parties to bid for the purpose of getting the best (lowest) bid; the agency approaches the unsolicited bidder/ original proponent to match the best offer thereby entitling the latter to a right of first refusal in the bid process; in the event he cannot match the lowest bid, the lowest bidder becomes the preferred bidder. This places the unsolicited bidder in a vantage position, rather than having to bid on the same platform with other bidders - in the instance where no unsolicited bid is submitted.

The Swiss challenge, though practicable in Nigeria\(^5\) is not expressly provided for in the legal framework of laws governing the administration of PPP in Nigeria such as the ICRC Act 2005 and the Public Procurement Act (PPA) 2007. Section 4(2) of the ICRC Act merely takes cognizance of the fact that the concession contracts shall be awarded to the bidder who satisfies the pre-qualification criteria and submits the most technically and economically comprehensive bid.

However the *PPP toolkit: ICRC Unsolicited Proposals*, which is a guide for implementing unsolicited proposals for PPPs in Nigeria, recognizes the Swiss challenge. Paragraph 2.2 of the PPP Toolkit provides that the Swiss Challenge System will be applied to allow submission of competing bids to all qualifying potential proponent irrespective of the original proponent’s unsolicited bid via a transparent process.

The legal implication of this is that the toolkit being a mere guideline only advises or directs as opposed to the legal enactments like ICRC Act and PPP Act, which has binding forces and ensures strict compliance with its provisions.

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\(^5\) For example, the 2014 PPP Concession Agreement between Loh & Or Construction (Nigeria) Limited and the Debt Management Authority (DMO) via a Swiss challenge spanning over a period of 30 years to develop a Corporate Office Complex in Abuja.
The summary of a Swiss challenge principle is that there must be an unsolicited bid. The principle recognizes the investments the original proponent made to prepare the unsolicited bid and as such the original proponent is granted the right of first refusal to counter-match the best offer. The essence of the Swiss challenge is to have a competitive and transparent process rather than granting exclusive development rights to the original proponents unsolicited proposal without a transparent and all-inclusive tendering process.

Implementation of PPPs in Nigeria

The concept of a PPP project is implemented through various contractual arrangements and structures\(^6\) and in Nigeria the most common form is the Build-Operate-Transfer (BOT) as deduced from ongoing PPP concession agreements. The BOT structure gives the investor the leverage and time - subject to terms and conditions of the Agreement, to recoup his investment as well as make profits on the project whilst operating the structure before transferring same to the government.

The advantages of PPP in boosting the infrastructure in Nigeria cannot be over emphasized, however there are limitations such that the length of time advanced to complete a PPP oriented project is longer than the period used in a non-PPP oriented project. The PPP procedure typically involves the following:

- The Ministries Departments and Agencies (MDAs) consulting the ICRC and Federal Ministry of Finance to ensure the viability and bankability of the proposed projects.
- There is also the engagement of a Transaction Adviser (TA) to produce an Outline Business Case (OBC) and getting approvals from the ICRC, other relevant Ministries, Departments and Agencies (MDAs) and Federal Executive Council (FEC), which takes about 24-36 months (2-3 years). The procurement process via the tendering of a bid leads to a competitive bidding process from which a preferred PPP Project Proponent (Investor) emerges. This process is also time consuming even though it enhances transparency.
- Thereafter, negotiations would ensue leading to the conclusion of the Full Business Case (FBC) and submission to the ICRC for review.
- Subject to assessment, ICRC would issue a FBC Certificate of Compliance to the MDA or decline issuance and advise the MDA accordingly. The MDA would again submit the FBC along with the ICRC Certificate of Compliance to FEC through the Minister for approval.
• The FBC once approved by FEC, would be followed by signing a contract between the MDA and the preferred PPP Project Proponent (Investor). ICRC would thereafter take custody of the contract as required under S. 20 of the ICRC Act.

• The MDA is required under S. 12 of the Act to supervise the project diligently and ICRC and the MDAs are required, under S. 10 of the Act to conduct regular joint inspections of the Project until the end of the contract for the purpose of minimizing the risk and contingent liabilities arising from such projects.7

Conclusion

Over the years, the huge infrastructural deficit in Nigeria has prompted the government to engage in PPPs as the government by itself is incapable of taking on the financial and technical expertise required for infrastructural developments. PPPs are critical to economic growth, quality of life, quality of health care, robust and dynamic economy and this is what Nigerians have consistently yearned for. Despite the inherent challenges and risk factors associated with PPPs, it remains a more efficient and viable means to infrastructural advancement. PPP projects must however, be a bankable with funds readily available and should be kept simple in terms of the multiplicity of parties (investor and the relevant government agencies).

John F. Kennedy said, “There are risks and costs to a program of action. But they are far less than the long range risks and costs of comfortable inaction”. The Nigerian building professionals and investors have for long been comfortable in their inactions, despite being surrounded by very many easy opportunities. It is time, the local and foreign investors broaden their horizon and move up to provide specialized infrastructural development services that can account for a large percentage of the GDP of our country. The potential incomes from PPP projects participation can translate our entire industry to the very forefront of the national economy, lead to infrastructural development, job creation and overall circulation of funds in the economy. PPP based development initiatives in which the government and foreign institutional investors such as the World Bank, African Development Bank and other

7 Risks can also be mitigated if foreign institutional investors become parties to PPP project. For instance the African Development Bank is encouraging African countries to create the necessary legal and regulatory framework for PPPs; as well as facilitating networking and sharing of experience among regulatory agencies which will curb lack of technical skills to manage PPP projects, unfavorable investor perception of country risk; which will ultimately lead to building a globally strong trade and investment ties. http://www.afdb.org/en/topics-and-sectors/sectors/private-sector/areas-of-focus/public-private-partnerships/ assessed 5 May 2015.
international institutions can jointly get involved in infrastructural development projects should be encouraged. However, the government should be ready to soften their grips by reducing the bureaucracy, bottlenecks and red tapism involved in obtaining requisite approvals from relevant government agencies, which operate to stall and elongate the PPP process. The government can also enact investor friendly laws for both local and foreign investors since the Nigerian economy benefits maximally from such huge capital inflow, especially when coupled with effective management to ensure the safety, soundness and stability of the nation’s financial system; price stability in the domestic economy; protection of investors; and minimizes incidence of financial crimes associated with capital flows.

It is further hoped, that the ICRC amends the ICRC Act to make express provision for the principle of a Swiss challenge, thereby giving a legally binding force to this principle as it encourages transparency and an all-inclusive tendering process.