ASSESSING THE HISTORICAL DEVELOPMENT OF PUBLIC PRIVATE PARTNERSHIP (PPP) TO ENHANCE THE LEGAL FRAMEWORK IN THE LIFE CYCLE OF PPP PROJECTS IN NIGERIA*

Abstract
Nigeria has, over the years, instituted policies on Public Private Partnerships (PPP) to close its public infrastructure stock so that it could compete with its peers in the comity nations. However, the efforts has not yielded any significant positive result in spite of the rich historical development of PPP in Nigeria and the deliberate policy of government to ensure that PPP projects follow regular stages in its standard or universally accepted life cycle. Using doctrinal methodology, the study traces the historical evolution of PPP and its life cycle in Nigeria with a view to identifying implementation weaknesses that militate against successful project delivery. The paper consequently found significant gap in PPP conceptualization stage, as there is no regulation that list out the critical success factors for PPP project delivery and the mechanism for their periodic review. It therefore recommends that the National Policy on PPP should contain a mechanism that identifies, considers and periodically reviews critical success factors for the successful implementation of PPP projects in Nigeria.

Keywords: PPP; Origin of PPP; Life Cycle; Legal Framework; Critical Success Factors

1. Introduction

The debut of Public Private Partnerships (PPP) in Nigeria was necessitated by the efforts of the Federal Government to close the nation's infrastructure deficit and bring it at par with the infrastructure stock of its peers in the comity of nations. Such peers include countries in the BRICKS, i.e. Brazil, Russia, India, China and South Africa. Within a span of two decades therefore, there had been an upsurge in the process of developing infrastructure by all tiers of government on the basis of private sector funding. As at July 2019, the Infrastructure Concession Regulatory Commission (ICRC), the agency saddled with the regulation of PPPs in Nigeria, reported that there were 69 post-contract and 139 pre-contract PPP projects.[1] The upsurge in PPP in Nigeria followed same trend of National governments in both the developed and developing countries. Countries in Europe[2], Australia, Africa[3], South America, Asia, the Middle East and others having significant infrastructure challenges had, for more than two decades, developed interest in leveraging on private capital to either increase or modernize their National infrastructure stock.[4] These laudable intentions of government as well as its aggressive policy formulation and implementation strategies have not yielded the desired results. For more than two decades now, success rate of infrastructure development under the PPP has been less than ten percent,[5] and even where it succeeded, the operations and maintenance of the infrastructure had fallen below the aspirations of parties. It is therefore important to look critically at the historical development of PPP and the different stages in its life cycle to be able to appreciate and understand those factors that could strengthen the conceptualization and implementation of PPP in Nigeria.

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[1] Chidi C K Izuwa, *Infrastructure Funding and Financing in Nigeria, Islamic Finance: Sukuk & The Future* (Being a Paper a Presentation of the ICRC made at the 2019 NBA Conference on 26th August 2019); See also <www.ppp.icrc.gov.ng> accessed 24 July 2019.

[2] E. Engel and R. D. Fischer and A. Galetovic, *The Economics of Public-Private Partnerships: A Basic Guide* (Cambridge University Press 2014), 23. The authors quoted data from the HM Treasury Workbook that as of March 2011, 698 projects had reached financial close with 630 projects in operation in the United Kingdom.

[3] Ernst & Young Global Limited, *Planning to Deliver: Addressing Africa's Infrastructure Deficit,* <https://www.ey.com/Publication/vwLUAssets/EY_-_Planning_to_deliver/$FILE/EY-Dynamics-Issue8-v8-planning.pgf> accessed 24 July 2019. The publication quoted a research from the World Bank Group that only one third of Africans are within two kilometers of an all-season road.

[4] Ibid. Ernst & Young found that in 2012, there were over 800 active infrastructure projects with a combined value in excess of $700 Billion. Using World Bank analysis, it could be assumed that one third of these capital outlay were on PPP projects.

[5] See the analysis under the National Implementation Plan of Vision 20:2020 (n. 33).

At the outset, it is important to know what PPP is. Like many concepts, Public Private Partnership (PPP) defies a universally accepted definition.[6] This may not be surprising as its scope and content[7] has significantly changed during its historical evolution. Consequently, slight differences are noticeable from epoch to epoch, from jurisdiction to jurisdiction, and even among bilateral, multilateral and financial development institutions. The observation of the World Bank was therefore apt that an increasing number of countries are enshrining and tailoring the definition of PPPs in their legislation to their institutional and legal peculiarities.[8] For our purposes however, PPP is a long-term contractual arrangement between a public authority and private entity for the delivery of public infrastructure and services on the basis of shared resources, risks and rewards.[9] This definition is consistent with that of the World Bank that defined PPP as a long-term contract between a private party and a government entity to provide a public asset or service, to ensure that the private party bears significant risk and management responsibility, and to link remuneration to performance.[10]

This paper is therefore divided into four parts. The first part is the introduction, which also discusses the meaning of PPP. The second part traces the historical development of PPP from the roman ages to contemporary Nigeria where the ICRC has made significant stride in the PPP policy formulation and practice. The third part is a discussion on the different stages of the PPP life cycle, while the fourth part is the conclusion.

2. Historical Development of PPP in Nigeria

In discussing the historical development of PPP in Nigeria, especially if its genesis is to trace from the Roman era where it first debuted, it is necessary for the paper to consider the concept in its expansive mode that includes parameters, which are not in modern times, considered as traditional PPPs. Thus, PPP in this section refers to the broader term, private sector participation. This section looks at the historical development of PPP under three aspects, namely, the origin of PPP, its evolution in Nigeria and its development after the promulgation of the Infrastructure Concession Regulatory Commission Act of 2005. In addition, the section looks at the present status of PPP practice in Nigeria.

Origin of PPP in Brief

The genesis of the PPP concept is appreciated from four different epochs. In the first epoch, private sector participation in public infrastructure delivery could be traced as far back as the Roman Empire when it developed a system for the provision of grains to the inhabitants of Rome.[11] The system was based on a long-term partnership with private ship owners, based on shared risks, for the transportation of grains. The system of shared risks determines whether or not a particular transaction is a PPP. The second stage was during medieval statehoods in the middle ages, especially between 800 AD up to the 15th Century. The concept of concessions begun to emerge when, through a system known as *concessio*, the state granted exclusive economic rights to entrepreneurs in exchange for political support. For instance, during the reign of King Louis VI of France, Parisians were given the concession for the transportation of goods in 1170.[12] Such exclusive rights were expanded to include building of bridges and roads that allowed investors to collect tolls.

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[6] African Development Bank Group, *Evaluation of the Bank's Utilization of the Public Private Partnership Mechanism (2006 – 2016): Inception Report Volume 1, Main Report* [03 April 2017], 9. <http://idev.afdb.org/sites/default/files/documents/files/PPP-Inception%20Report%20Vol%201%20Main %20Report.pdf> accessed 04 January 2020.

[7] The problem of definition will manifest if it is defined from its delivery mode, for instance, the additional scope of design in DBOT will change the definition of a BOT in PPPs. So also are concessions, Affermage, amortization, etc.

[8] PPP Legal Research Centre: World Bank, *What are Public Private Partnerships?* 1 <https://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships> accessed 03 January 2020.

[9] Faruk Sani, 'The Legal Concept of Public Private Partnership and its Limited Scope in Nigeria' *International Journal of Research and Innovation in Social Science* ISSN No. 2454-6186; DOI 10.47772 *(IJRISS)* (2021)(v)(ix) 825 – 833 @ 831 <https://www.rsisinternational.org/journals/ijriss/Digital-Library/volume-5-issue-9/825-833.pdf> accessed 01 November 2021.

[10] PPP Legal Research Centre: World Bank, *What are Public Private Partnerships?* (n. 6), 1.

[11] J. Leitao and E. de Morais Sarmento and J. Aleluia, *The Handbook on Pubic-Private Partnerships in Developing and Emerging Economies: Perspectives of Public Policy, Entrepreneurship and Poverty* (Emerald Publishing Limited, 2018), 7; <https://www.academia.edu/36179545/The_Emerald _Handbook_of_Public_Private_Partnerships_in_Developing_and_Emerging_Economies_Perspectives_ on_Public_Policy_Entrepreneurship_and_Poverty> Accessed 6 August 2019.

[12] Ibid, 8.

The third epoch was between the 16th Century up to the end of 19th Century when the private sector took the lead in the development of turnpikes, canals, railways and other transportation infrastructure. In the United States, for instance, roads and bridges were privately owned but required government charters[13] and their tolling commenced between 1789 and 1900.[14] Over 2,000 private companies operated turnpikes in Ohio, New York, Michigan and Albany.[15] This period, observably, featured active cooperation between the public and private sectors on transportation infrastructure.

However, the private sector forayed into water and electricity distribution infrastructure in the latter part of 19th Century as a result of industrial revolution and urban population growth. In 1777, concession for water capture was given in France while the construction and operation of the Suez Canal was granted in 1854.[16] The Suez Canal project was managed by the private sector until it was nationalized in the 1950s.[17] Spain embarked on its motorways programme in 1960, which was financed by the private sector due to the inadequacy of its national budget to meet its infrastructure demands. Though the public sector strengthened its hold on public infrastructure delivery in the 20th century due to spirits of nationalization, realities of world wars and effects of the great depression, the modern concept of PPP began with the approach of the New Public Management (NPM) in the 1980s that underpinned infrastructure delivery and services on three elements, namely: deregulation, privatization and marketization.[18] It was based on the NPM approach that the UK privatized its commercial concerns in the early 80s[19] and developed infrastructure funding through PFI in 1992, while the US facilitated independent power projects in 1980 and China radically pursued its policy of private enterprise during the leadership of Deng Xiaoping.

It can be surmised that partnerships with the private sector from the Roman era up to the middle of the 19th Century, was essentially on the transportation infrastructure and being supported by rivers, roads, canals, the postal system, and Alexander Hamilton's financial system.[20] The second period between the middle of the 19th Century to the middle of the 20th Century dug deeper into telecommunication, energy and municipal infrastructure, being characterized by railroads, telegraph, telephone, electricity, natural gas, local banks, and national and international stock exchanges. In the third period, i.e. from the middle of the 20th century to the present day, partnerships had expanded into financial system and information and Communication (ICT) infrastructure to include highways, the Internet and interstate banking. These partnerships had, undoubtedly, unleashed the economic abundance we found in many cities of the world and in different continents.[21]

The PPP Evolution in Nigeria

The evolution of PPP in Nigeria was also informed by the New Public Management (NPM) approach of the 1980s, which premised public infrastructure efficiency on deregulation, privatization and marketization. As part of the macroeconomic reform influenced by the World Bank and IMF, the Federal Government constituted the Technical Committee on Commercialization and Privatization (TCPC)[22] pursuant to the Privatization and Commercialization Act,[23] whose objective was to pursue and implement the concept of private participation in public infrastructure through privatization and commercialization. Specifically, the committee was to privatize or commercialize enterprises of the Federal Government, which by 1986, had surged to over 100 as a result of the Public Enterprises Promotion Decree of 1972. While privatization referred to complete or partial divesture of government interests in a public enterprise, the essence of

[13]William R. Childs, *How Public and Private Enterprise have Built American Infrastructure*, 2 <https://origins.osu.edu/article/how-public-and-private-enterprise-have-built-american-infrastructure> Accessed on 01 April 2020.
[14] See further http://en.wikipedia.org/wiki/Toll_roads_in_the_United_States. Accessed 22 March 2020.
[15] Ibid (n. 160), 2.
[16] Ibid, (n. 158), 8.
[17] Josiah Nyagwachi and John Smallwood, 'South African Public Private Partnerships (PPP) Projects' [2015](1)(2), *Journal of Construction*, 225.
[18] Ibid, (n. 158), 7.
[19] In fact, the programme started with 'the Right to Buy' Council houses in 1981, but revved up in 1983 after the reelection of the Conservative Party.
[20] Ibid, (n. 160). The three elements of Hamilton's financial system were the establishment of a national bank, assumption of state debts and imposition of protective tariffs.
[21] UNCTAD, *Bridging Gaps or Widening Divides: Infrastructure Development and Structural Transformation in Trade and Development Report 2018: Power Platforms and the Free Trade Delusion*, 103.
[22] D O Adeyemo and Adeleke Salami, 'A Review of Privatization and Public Enterprises Reform in Nigeria', *Contemporary Management Research Journal*, [2008] (12) (4) 409.
[23] No. 25 of 1988.

commercialization was to restructure a public enterprise for profitability and efficiency.[24]

During its existence between 1988 and 1999, the committee laid the foundation that enabled Nigeria not only to pursue a private sector-led national economic system but for the emergence of Bureau for Public Enterprises (BPE). The fundamental policies of both TCPC and BPE were hinged on Structural Adjustment Programme (SAP) and Vision 2010, which were influenced by the NPM approach and urged by IMF.[25] The TCPC, upon its inauguration in 1988, concentrated majorly on the commercialization of enterprises owned by the Federal Government. Hence, the Nigerian Railways Corporation, the National Electric Power Authority (NEPA), the Nigerian Telecommunication (NITEL), the Postal Services and the Nigerian Ports Authority were restructured to run as proper commercial concerns.[26] The BPE after taking over from TCPC in 1999 however vigorously pursued the privatization of public enterprises that included hotels, vehicles assembling plants, the national carrier, the national shipping line, fertilizer companies, petroleum retail companies, steel rolling mills, sugar companies, newspaper companies and cement companies. The perception and support of the general public was a mixed bag.[27]

The BPE had a turning point between 2002 and 2004 when it embarked upon a new model of private sector participation, the concessions, which it used in respect of the MM2 terminal and the 25 NPA terminals.[28] In addition, it superintended, guided, supervised and advised on many funding and management arrangements of the MDAs. The citizenry found the concession and the other funding models less controversial since they did not involve complete divestiture. The successful execution of the agreements and the observed weaknesses in the enabling legislations of MDAs culminated in the establishment of proper legal frameworks in Nigeria.

The first PPP legal framework[29] in Nigeria was the Lagos State Roads, Bridges and Highways Infrastructure (Private Sector Participation) Development Edict, 2004. It was later streamlined as Lagos State Roads (Private Sector Participation) Authority Edict, 2007, which was subsequently repealed by the Lagos State (Public Private Partnerships) Law of 2011, the extant PPP legislation in Lagos State. The second and most important PPP legal framework in Nigeria was the Infrastructure Concession Regulatory Commission Act. It was enacted in 2005 to, on one hand, enable for the participation of the private sector in the financing and construction of Federal Government's infrastructure, and on the other hand, the establishment of a commission, the Infrastructure Concession Regulatory Commission (ICRC), to regulate and supervise executed contracts.[30] The ICRC Act was meant to provide requisite certainty and confidence for MDAs to pursue PPP projects.

The PPP Post 2005 Development

Following the promulgation of ICRC Act in 2005, Late President Umaru Musa Yar'Adua GCFR inaugurated its board on 27th November 2008, with Engr. Mansur Ahmed as its pioneer Director General.[31] To underscore the importance of the PPP concept to the Federal Government, a former head of the national government, Chief Ernest Shonekan, was made the Chairman of the Board. The Board moved quickly to establish acceptable PPP institutional and procedural frameworks in line with the ICRC Act and, where necessary, global best practices. As at 2012, it established three departments,[32] instituted PPP procedure, developed a PPP project pipeline, ensured that all MDAs have PPP desk offices and encouraged state governments including the FCT Administration to establish PPP units.

The most important achievement of the ICRC during this period was to develop and raise awareness in the PPP process. It issued the PPP National Policy, which consisted of guidelines on the conceptualization,

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[24] C S Chukwuma and W O Odiwo and AA Kifordu, 'The Impact of Privatization and Commercialization in Nigeria', [September 2016] (3) (9), *International research Journal of Management, IT and Social Sciences, (IRJMS)* 91-102, 93 <http://ijcu.us/online/journalindex.php/irjmis> Accessed 02 April 2020.
[25] Ibid, 98.
[26] Ibid, 98.
[27] Ibid, 98.
[28] F. Onuobia and O. J. Okoro, 'Nigeria', in Wereck B. and Saadi M. (eds), *Public Private Partnership Law Review* (4th Ed., Tom Barnes 2018), 181 <https://www.gelias.com/Newsletter_April%202018.pdf>. Accessed 04 October 2019.
[29] Ibid, 178.
[30] See the Explanatory Note to ICRC Act.
[31] Infrastructure Concession Regulatory Commission, *History* (2020) 1, <https://www.icrc.gov.ng/about-icrc/> Accessed 11th January 2021.
[32] The 3 departments were (1) PPP Resource; (2) Contract Compliance; and (3) Support Services. See the ICRC website at <www.icrc.gov.ng>.

procurement and implementation of PPP projects.[33] It also clarified the roles and responsibilities of MDAs in PPP procurements.[34] This gave MDAs the impetus to generate many PPP projects. However, the efforts and processes did not, unfortunately, result in prompt and successful conclusion of post-2005 transactions of identified PPP projects.[35] The Commission recognized legacy projects and cooperated with BPE in effectively concluding and supervising existing PPP projects. In addition, based on its robust template and in line with existing national policies, it developed and pursued new PPP projects in the agriculture, water and transportation sectors.[36] It also assisted MDAs to restructure and conclude their outstanding PPP projects.[37]

The Present Status of PPP in Nigeria

The PPP concept has turned a corner in Nigeria. Like other modern economies, Nigeria has been successful in establishing legal, institutional and policy frameworks for successful implementation of PPP.[38] It has created sufficient awareness among both players and citizenry[39] that, due to the inadequacy of national and sub-national budgets, PPP is a possible viable option for the provision of public infrastructure and services. The Federal Government has developed national policies, which to a large extent, provided clarity on the role of the private sector and the expectations of government on private investment in public infrastructure. The National Integrated Infrastructure Master Plan,[40] the Economic Recovery and Growth Plan[41] and the Tax Credit Scheme[42] are extant policies that strengthen the PPP concept in Nigeria. The judicial system has also risen to the occasion. The few cases that came for judicial interpretation[43] or alternative dispute resolution[44] had brought the PPP system within the mainstream of the Nigerian judicial system, and hence were resolved to the satisfaction of parties. For instance, in *FAAN v Bi-Courtney Limited & Anor.*,[45] the Court of Appeal was faced with whether FAAN was a necessary party in a suit it instituted against the Attorney General of the Federation in respect of alleged breaches arising from the concession agreement in which FAAN was the grantor.

The concessionaire of MM2 Terminal, Bi-Courtney Limited, instituted the action against the Federal Government without the knowledge of FAAN, and thereafter, obtained judgment on 3rd March 2009. On becoming aware of the judgment, FAAN applied to appeal out of time as an interested party. The court clarified the issue of an interested party that a party to a concession agreement has a right of appeal with the leave of the court, provided however that where good reasons do not exist, the application will be refused. In a similar effort, the Court of Appeal after considering extant judicial authorities, the provision of the

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33 Infrastructure Concession Regulatory Commission, *The National Policy on Public Private Partnership* [July 2009] 7 <https://estateintel.com/app/uploads/2016/05/National-Policy-on-Public-Private-Partnership.pdf> Accessed 09 April 2020.

34 Ibid.

35 This prompted the commission to tweak its processes by discontinuing OBC and FBC during the pre-contract PPP phase so as to make room for more participation at the development phase. See the keynote address of the Director General, Chidi Izuwah, delivered at the Fourth Quarter 2017 PPP Consultative Forum on 6th December 2017. <https://www.icrc.gov.ng/icrc-committed-ppp-success-nigeria/> Accessed 10 April 2020.

36 Infrastructure Concession Regulatory Commission, *Governance Structure* (2020) 3, <https://www.icrc.gov.ng/about-icrc/> Accessed 11 January 2021.

37 Infrastructure Concession Regulatory Commission, *Milestones* (2020) 5, <https://www.icrc.gov.ng/about-icrc/> Accessed 11th January 2021.

38 Olufemi Soyeju, 'Legal Framework for Public Private Partnerships in Nigeria', *De Jure Law Journal (Pretoria)* [2013] (3) (46) 127. <http://www.csielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602013000300010> Accessed 12 January 2021.

39 In 2017, ICRC created and launched the ICRC PPP Contracts Disclosire Portal, which earned Nigeria a top class in the '2017 year in review' ranking of the World Bank Group PPP blogs. See F. Onuobia and O. J. Okoro, 'Nigeria', in Wereck B. and Saadi M. (eds), *Public Private Partnership Law Review* (4th Ed., Tom Barnes 2018), 179 <https://www.gelias.com/Newsletter_April%202018.pdf>. Accessed 04 October 2019.

40 Nigeria Integrated Infrastructure Master Plan 2014 <https://www.niimp.gov.ng/?page_id=991> accessed on 23 September 2019.

41 Economic Recovery and Growth Plan (ERGP) 2017-2020 of 2017 <https://yourbudgit.com/wp-content/uploads/2017/03/Economic-Recovery-Growth-Plan-2017-2020.pdf> accessed on 16 October 2019.

42 Road Infrastructure Development and Refurbishment Investment Tax Credit Order, No. 007 of 2019 <https://pwcnigeria.typepad.com/files/executive-order-no-007-of-2019.pdf> accessed on 23 September 2019.

43 *Maevis Limited v Sita Telecommunications Nigeria Limited & Anor* (FHC Lagos, 17 June 2013). The Federal High Court sitting in Lagos, upheld the right of a private party to a PPP Agreement to enjoy its contractual benefits without intrusion from third parties; *FAAN v Bi-Courtney Limited & Anor*. (2011) LPELR-19742 (CA); *AGF v Bi-Courtney Limited* (2014) LPELR-22968 (CA); *Clement Abayomi Tunji v Lekki Concession Company Limited* (2016) LPELR-40564 (CA).

44 The intervention of ICRC in the dispute between FAAN and Bi-Courtney on the MM2 Terminal concession has been reassuring.

45 (2011) LPELR-19742 (CA).

Labour Act and the relevant common law principles in the case of *Clement Abayomi Tunji v Lekki Concession Company Limited,*[46] set aside the dismissal of the plaintiff for lack of reasonable notice.
The ICRC has not rested on its oars, a it presently proposed an amendment of the ICRC Act, which could see to the reinvigoration of the PPP process. The amendment hopes to achieve a change of name, a more all-encompassing definition of PPP, clarification on the supervisory role of the ICRC, the capacity of MDAs to initiate, develop and implement projects[47] and standardize every aspect of the PPP project life cycle.

3. The PPP Project Life Cycle

The life cycle of a PPP begins with a conceptualization of project and ends with its maturity at the agreed date of termination. In between the two stages are the most critical stages of procuring a competent private entity as well as effective implementation of the project. The four stages, conceptualization, procurement, implementation and maturity,[48] complete the life cycle of any PPP project as provided under the Nigeria's National Policy on PPP.[49] The paper describes the processes under each cycle.

Project Conceptualization

The conceptualization of a PPP project begins with its identification or selection as a potential PPP project under a nation's strategic infrastructure plan. In a country where such plan is non-existent, the public authority selects a project or appraises an unsolicited project as a potential PPP project. After identification, the next stage is the pre-feasibility study, which sets out the preliminary thoughts regarding the proposed project. It is to determine the basic technical and financial fundamentals[50] such as site selection, concept design, expected revenue streams, projected mode of financing and possible forms of implementation. The pre-feasibility study can be undertaken as an independent piece of work or as an integral part of the project development process. Either way, it is a vital study that determines whether or not an Outline Business Case (OBC), which is significantly more costly, should be undertaken.[51]

The next stage after the pre-feasibility study is the OBC or feasibility study, which strives to establish the project fundamentals in their minutest details. It would provide an economic valuation, financial analysis, technical analysis, legal assessment and a comprehensive risk matrix of the proposed project. It would identify and assess the role, support and capability of various project drivers. It would determine whether the proposal should be formally or informally solicited, whether it should be a continuation, a renewal or supplemental, and whether it could be unsolicited. It is for these purposes and depending on agreed responsibilities that consultants are engaged at this stage by both the public authority and interested private entities. These consultants include transaction advisers, financial consultants, legal practitioners, engineering consultants, etc., which are employed either independently or as a single consortium. Thereafter is the project selection stage where the public authority has three choices, namely, to do nothing or to require additional information or to proceed to the next stage.[52] These processes align perfectly with those stipulated in Nigeria.[53] They begin with identification of need, appraisal of technical solutions, preparation of cost benefit analysis, an environmental impact assessment study, value for money and affordability testing, and a financial analysis of the proposed project. They also require a confirmation of budget allocation for the project and an approval of the Outline Business Case before the project procurement process is commenced.[54] These safeguards are, to a large extent, the Critical Success Factors (CSFs) that ensure the bankability and successful delivery of projects. It must be observed that the National Policy did not expressly provide either a listing of the CSFs or a mechanism that ensures the identification and periodic review of these CSFs. This failure might have contributed to the dismal performance of PPP, which the Nigeria's

[46] (2016) LPELR-40564 (CA).
[47] F. Onuobia and O. J. Okoro, 'Nigeria', in Wereck B. and Saadi M. (eds), *Public Private Partnership Law Review* (4th Ed., Tom Barnes 2018), 179 <https://www.gelias.com/Newsletter_April%202018.pdf>. Accessed 04 October 2019.
[48] George Nwangwu, *Public Private Partnerships in Nigeria: Managing Risks and Identifying Opportunities* (Palgrave Macmillan 2016), 65.
[49] Infrastructure Concession Regulatory Commission, *The National Policy on Public Private Partnership* [July 2009], 14; <https://estateintel.com/app/uploads/2016/05/National-Policy-on-Public-Private-Partnership.pdf> Accessed 09 April 2020.
[50] Jeffery Delmon, *PPP Projects in Infrastructure: An Essential Guide for Policy Makers*, p. 77.
[51] Ibid, *The National Policy on PPP*, 48.
[52] Ibid, 68.
[53] Infrastructure Concession Regulatory Commission, *The National Policy on Public Private Partnership* [July 2009], 55 <https://estateintel.com/app/uploads/2016/05/National-Policy-on-Public-Private-Partnership.pdf> Accessed 09 April 2020.
[54] Ibid, *The National Policy on PPP*, 55.

Minister of Works and Housing, Mr. Babatunde Fashola SAN, recently expressed at a public hearing in the National Assembly when he called for a comprehensive audit of all privatized assets.[55]

Project Procurement

This is the stage that concretizes the procurement method recommended in the OBC. The fundamental principle in PPP procurements is to ensure the procurement of a technically competent and financially capable private entity to deliver a public infrastructure that satisfies the aspirations of parties, the affordability tests and the value for money.[56] This can only be achieved in a transparent, level playing and competitive process. Any process short of these requirements may result in project failure. It should however be noted that the implementation of such process differ from jurisdiction to jurisdiction. While prequalification criteria restricting expression of interest to a particular category of people are stipulated in some countries, others invite specific investors to express interests. Both, if handled in a transparent manner, could result in the procurement of a technically competent and financially viable private entity that could deliver a desired public infrastructure. No process is sacrosanct as there are many types of tendering process. There are five types of tendering process in competitive procurements, namely: (1) Open, One-Staged Tender Process; (2) Open, Two-Staged Tender Process; (3) Restricted, Shortlisting tender process; (4) Negotiated, Shortlisting Tender Process; and (5) Dialogue or Interaction Tender Process.[57] In a single sourcing or unsolicited proposal however, there could be direct negotiation or Swiss Challenge[58] or even the Russian roulette-type clause[59] contract process. In line with the Procurement Manual of Bureau for Public Enterprises (BPP),[60] the Nigerian system stipulates a competitive and transparent procurement process with a clear audit trail for selection of bidders and evaluation of bids.[61]

In any case, the public authority begins the procurement process with invitation for bid based on the criteria laid down in the OBC. It creates sufficient opportunity for interested private entities to conduct due diligence through what is often referred to as data room. After due diligence, the prequalified private entities would bid, depending on what bidding process the rules of the procurement stipulated. Thereafter, the most technically competent and financially capable bid is chosen. It should be noted that as a result of the dynamism of PPPs, the evaluation requirement is to select the most responsive bid, rather than the lowest bid, as the preferred or winning bid.[62] The second most successful bid is referred to as a reserved bid. The reserved bid is usually called upon where negotiation with the preferred bidder breaks down irretrievably.[63]

There are two processes under the procurement stage which are critical to the private entity in deciding whether to make a bid or not, and if it makes a successful bid, whether to execute the main agreement or not. The first is the data room process where the private entity is given the opportunity to conduct due diligence, both physical and legal, on the project. The second is the negotiation of the main agreement with the public authority where the objectives, the deliverables, the financials, the obligations of parties and the events of termination are agreed and finalized.[64] Where parties are unable to agree, the public authority terminates discussion with the successful bidder and calls upon the reserved bidder for negotiation. If however there is agreement with the successful bidder, the Full Business Case (FBC) is finalized and the main agreement is executed, thereby setting the next stage of another crucial stage of the cycle, the Implementation stage.[65]

Project Implementation

This is the stage where the private entity begins to discharge its obligations under the main agreement. The first obligation is to satisfy the conditions precedent, which may include submission of a bid bond, creating a Special Purpose Company (SPC) or Special Purpose Vehicle (SPV), and execution of the construction contract. The appointment of Operation and Maintenance Contractor, if such services are to be outsourced by the SPC, could be delayed either at or immediately before the completion of construction of the asset or commencement of the service. Another milestone in the implementation of a PPP project is achieving financial close.[66] This entails

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[55] Adedayo Akinwale, 'Fashola Calls for Audit of All Privatized Government Assets' *Abuja, Thisday Newspaper of 26th October 2021*, 1 <https://www.thisdaylive.com/index.php/2021/10/26/fashola-calls-for-audit-of-all-privatised-govts-assets/> accessed 30 October 2021.

[56] Ibid, 'Part 1: Procurement Processes for PPP of the Federal Government', 3.

[57] APMG International, 'Main Types of PPP Tender Process' <https://ppp-certification.com/ppp-certification-guide/2-main-types-ppp-tender-processes> Accessed 02 April 2020.

[58] A right of first refusal that enables a project proponent to match the best bid received.

[59] A clause in an agreement denoting a 'take it or leave it' choice.

[60] Ibid, *The National Policy on PPP*, 'Part 1: Procurement Processes for PPP of Federal Government', 20.

[61] ibid, 14.

[62] Ibid, 5. The policy stipulates, 'most technically and economically comprehensive bid'.

[63] Ibid, 'Part 1: Procurement Processes for PPP of the Federal Government', p. 26.

[64] Ibid, 25.

[65] Ibid, 25.

[66] Ibid, Jeffrey Delmon, *PPP Projects in Infrastructure: An Essential Guide for Policy Makers*, p. 165.

raising the requisite equity as well as successful negotiation and execution of financing agreements with project lenders. This is the most critical obligation, as its success or otherwise determines the commencement of construction. There are also the monitoring and evaluation aspects of the project. This takes three forms, namely: superintendence of the PPP project through the twin committees of Project Steering Committee (PSC) and Project Delivery Committee (PDC); engineering supervision during the construction stage by resident engineers, supervising consultants and transaction advisers; and contract performance evaluation by the regulatory authorities. In Nigeria, while the first two aspects were listed in the National policy,[67] the third aspect is a statutory function of ICRC.[68] These structures enable the issuance of all necessary governmental and administrative approvals, licenses and permits to ensure effective commencement and execution of PPP projects. When the project is delivered, the next stage is the optimal operation and maintenance to ensure not only user satisfaction but also adequate revenue streams or waterfall of cash flows sufficient to guarantee repayments and return on investments. The adequacy of the revenue streams is the hallmark of the integrity of the Outline Business Case (OBC) and the viability of the PPP project.[69]

Project Maturity

At the bottom of the PPP life cycle is the maturity or transfer or handover of asset stage. The private entity is expected to return the asset to the public authority in pristine quality and functional condition, with normal wear and tear excepted. In most cases as earlier highlighted, PPP presupposes a reversionary interest to the public authority. Except in few occasions where the obligation of the private entity is to remove the infrastructure as in BOOR (Build-Own-Operate-and-Retain) or to retain the asset as in BOO (Build-Own-and-Operate), it would return the leased infrastructure as was given to it at commencement of the term, *status quo ante bellum*.[70] Thus, in circumstances where the private entity has an obligation to return the infrastructure to the public authority, its obligation includes a return of the infrastructure in functional condition to enable the public authority to either continue with such service or leases it out to another private entity to render such service.[71] The public authority must be careful to ensure that there is no asset stripping or a complete depreciation of key assets or a depletion of competent labour at maturity. Beyond the obligations for inspection and preparation for the handover, the public authority would require an analysis of future service delivery options, further procurement options and the recording of lessons learned to enable it take an appropriate decision after the contract closure.[72]

4. Conclusion

From the discussion of the debut of PPP in Nigeria, it is obvious that the Nigerian policy makers have not only been diligent in instituting the PPP policy, but has also shown that the life cycle being followed did not depart from what obtains in other jurisdictions with a better story of PPP success. Nonetheless, the paper observed that in the conceptualization of PPP projects in Nigeria, transaction advisers pay lip service to those few key areas of activity, known as Critical Success Factors (CSFs), in which favourable results in the implementation of PPP can be predicted with relative certainty. These critical success factors change from place to place and from time to time. Most importantly, the National Policy did not provide for any regulation or guideline to comprehensively identify, list out, and review from time to time, the fundamental criteria that ensure successful implementation of PPP projects. Neither the public authority nor the private entity appears to pay heed to contemporary critical factors that could enhance project delivery success. In the same vein, both the public sector workers and Transaction advisers do not exhibit requisite capacity and understanding in making appropriate recommendations on the economic viability of projects, the capacity of Special Purpose Vehicles (SPVs) to deliver and manage projects, the nature of support that the Government should give to the private sector, the relative ease of timely and sufficient financing of projects, and the enabling political and economic environment that attracts and sustains investment. It is therefore recommended that the National policy should be amended to ensure that transaction advisers identify critical success factors for every stage of the PPP life cycle, especially for those PPP projects under conceptualization. It is hoped that such identification of factors at the early stage will enhance the success rates of PPP project deliveries in Nigeria.

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[67] Ibid, *The National Policy on PPP,* 15.

[68] ICRC Act, section 20.

[69] Jumoke Jugan and Isabel Marques de Sa, *The Role and Importance of Independent Advisors in PPP Transactions, PPP Resources IP3's Public Private Partnership Information Series* (August 2006, World Bank) 6 <https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/ Role%20and%20Importance%20of%20Independent%20Advisors%20in%20PPP%20Transactions_0.pdf> Accessed 25 March 2020; National Policy on PPP, 'Part 1: Procurement Processes for PPP of the Federal Government', p. 27.

[70] World Bank, *Guidance on PPP Contractual Provisions* (2019 Edition), 153 <https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/ Guidance_on_PPP_Contractual_Provisions_EN_2019_edition.pdf> Accessed 14 April 2020.

[71] Ibid, 154.

[72] Ibid, *The National Policy on PPP,* 15.