PUBLIC PRIVATE PARTNERSHIP (PPP) A SOLUTION TO AFRICA INFRASTRUCTURE DEVELOPMENT. {Legal perspective}

BY

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Being a paper presented at the Africa Association of Quantity Surveyours {AAQS} Webinar

On Tuesday, February 2nd, 2021.

WHAT IS PPP

- Public Private Partnership is a cooperation arrangement that normally or ordinarily involves a Public {e.g government agency, ministry etc} and Private entity coming to work together based on the need of the government to execute a project or provide a service to the general public of that country.
- PPP was actually designed to promote private investment in public infrastructures projects that could not be afforded exclusively by the state {especially in the areas of construction of roads, airports facilities, transportation, housing and other social related amenities}.
- In other word it helps the state or government free scarce funds to meet other social needs of the society by the private sector or entity taking over the responsibility of funding such projects on behalf of the state.

HISTORY OF PPP

- This model of contact or projects dates back as far as the 80’s and 90’s in the developed nations like the United States of America and the United Kingdom who started the practice and implementation of PPP. In the USA between 1986 to 2012 that it was reckoned to have been widely adopted and implemented for over 700 PPP projects that reached final closure {i.e award, execution and completion}.
- In the UK, it is reckoned to have started from the government of Prime Minister Mrs. Margaret Thatcher in the 80’s when the government embarked on extensive privatization program of publicly owned utilities, including telecoms, gas, electricity, water and waste: airports, railways etc. the aim was to boost design – build – finance – operate projects.
- In Latin America, Argentina was reckoned to be amongst the first nations to adopt and implement PPP and enacted a law regulating PPP IN 2000. Like it is with most PPP’s developing nations or under developed nations, the Argentinian PPP was designed to promote private investment in Public infrastructures that could not be afforded exclusively by the state. Especially in the areas of health, education, justice, transportation, construction of airport facilities, highways and investment in local security etc.

PPP IN AFRICA

- Africa is a continent rich in natural resources and boasts of a large young, ambitious and entrepreneurial minded population. But one thing that seem to have limited this entrepreneurial mindedness of Africans is lack of modern infrastructures that has become a major challenge to Africa’s economic development.
- In a recent study by the World bank, it reckoned that there are varying trends Africa’s infrastructure performance across key sectors of the economies and regions. Sub- Saharan Africa has seen a dramatic improvement in the quantity and quality of infrastructures, and the gains are broad based. Access to safe water is reckoned to have risen with about 77% of the population reckoned to have access to portable drinking water in 2015 from the about 51% it was in in 1990 statistics. However this has not been the case in the instance of power, roads etc.

PPP IMPERATIVE IN AFRICA

- Owing to the dearth of infrastructure funding, there is an increase in numbers of countries notably in the emerging markets and developing economies {EMDE}, turning to PPPs in order to tap locked private capital and Africa does not seem to be left out.
- Whilst PPPs may not entirely solve this problems, they can provide significant financing where viable projects are carried out.

- There is no doubt that Africa’s current state of infrastructures calls for a massive adoption of the PPP model to accelerate infrastructure delivery. Notwithstanding this realization it is unfortunate that PPPs in Sub – Saharan Africa remains a very small market, with only projects concentrated in only a few countries like South Africa, Nigeria, Kenya and Uganda.
- Since the seemingly advent of PPPs into Sub – Saharan Africa for the past 25 years or so only about 335 PPPs project have been closed in Africa and these 4 countries accounts for over 48% of such. Most of the PPPs though seemed to have been concentrated in the energy sector.

- Notwithstanding the advantage that PPPs project poses a lot of African countries seems to be shying away from it, either owing to previous bad experiences that can be attributed to the ill preparedness of the PPPs, incompetent sponsors that can be attributed to the poor awarding or concessioning process that is at times laden with politics and corruption by government officials.
- Notwithstanding there are ample PPP opportunities waiting to be realized on the African Continent for the benefit of stakeholders. The time for an infrastructure revolution in Africa is now.

What must African States government do to drive PPPs and make it worthwhile or successful.

- They need to enact laws that regulates the operation and execution of PPPs.
- They need to have proper legal documentations with clear terms specifying the terms of engagement taking into consideration the interest of the private sector or entity concerned.
- To set up a government agency with competent hands to regulate and supervise the execution and implementation of PPPs project..

LEGAL DOCUMENATTIONS OR CONTRACT.

- There is no standard or model of PPP agreement, thus each PPP agreement will be unique to project and parties involved. Notwithstanding there are some provisions that should be in the contract agreement as follows:
- **Payment** – the truth is that the reason why the private entity is involved in a PPP project is to make money and to be paid money, even if the project is going to be self generating or otherwise. So there needs to be a provision for payment. Payments can be both direct by the Public procuring entity to the private and also from the proceeds of the project. {in the few ones I have been involved it is either of the two}. The manner and mode of payment can differ depending on what is agreed. Because under the Infrastructure Concession Regulatory Commission {ICRC} Act, a law of the Federal republic of Nigeria , where payment is to come or flow directly from the government, such is by way of amortised payments. Depending on the nature of the project mobilsation payment of at least 10% of the project of the whole project should be sated to be paid. Section 62 and 64 of the Lagos State Procurement have such provisions.

- Performance guarantee provision ought to be provided especially to regulate the private entity.
- **Guarantee –** a guarantee provision should be part of the agreement. Notwithstanding the fact that MDA’s are not permitted to issue guarantees, letter of comfort or undertaking in any respect of any concession or PPP contracts without the approval of the Federal Executive Council in the instance of PPP project concesioned by the Federal Government and State Executive Council in the instant of PPP by the State.
- From experience in my relationship with Lagos State whilst acting as solicitors on a PPP project on behalf of a client, the Lagos State law appears to provide for outright prohibition of MDA’s issuing guarantee, letter of comfort or any undertaking. This is found in Section 17 of the Lagos State PPP Law.
- Considering Africa nations deficit in infrastructure and their weaknesses, it will be good if African government to incentivize private entities into PPP’s by providing guarantees and other fiscal incentives in the agreements.

- **DISTRIBUTION OF RISK**: the guiding principle behind the inclusion of such provision like this in PPPs agreement is that risks will be allocated to the party best able to manage it. Whilst the private entity may be completely responsible for the design, development, finance and eventual completion of the project and also its management for the time of the concession, the public entity should borne the risk of ownership, security {i.e from unnecessary attacks by the public in the case of a project where the government obtained the land for the project by forceful or government acquisition from the original owners or cancelled an existing contract to a party before concession to the existing new party.
- A provision can also be made in the agreement mandating the private entity to obtain insurance to cover the risk to be borne by the private under the PPP.

- A provision for adjustment and revision of the PPP contract or agreement should be expressly stated in the agreement as the government cannot under the guise of any law revise a PPP agreement except as provided by the agreement. Section 11 of the Nigerian ICRC Act that makes provision to this effect that ‘no agreement reached in respect of this Act shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the provision of this Act. Whilst I may not be too familiar with the laws as it obtains in other African countries, but in Nigeria there are constitutional guarantees against expropriation of assets. Where assets are expropriated, the Nigeria constitution mandates payment of adequate compensation to the affected party. Nigeria is also a signatory of the ICSID Treaty. All these helps to provide some level of comfort to the private entity intending to executing a PPP project.
- **OWNERSHIP of underlying assets**: - there is no doubt that the asset for the project is owned by the government but notwithstanding there is need for a provision to the effect that government is the owner. Being the owner the government will be responsible for the acquisition of such assets where it is not stated. The right granted to the private entity over the asset will depend on the project and the PPP model adopted. The ownership will invariably remain with the government or will be required to be re – assigned to the government at the expiration of the concession period. However during the pendency of the term of concession, the private entity may use such underlying asset as security for obtaining finance for the project with the consent of government.

- **OWNERSHIP OF THE UNDERLYING ASSET:** in every PPP transactions the asset for the project is owned by the government/MDA. Notwithstanding, there is need to have a provision to the effect that government is the owner. The right granted to the private entity will depend on the nature of the project and the PPP model adopted. Invariably ownership remains with the government or will be required to be re- assigned to the government/MDA at the expiration of the concession period. However, during the pendency of the term of concession, the private entity may use such underlying asset as security for obtaining finance for the project, though with the consent of the government.

- **Early Termination:** it is very important to have this stated in the agreement. This can be exercised by either party for default or force majeure and pandemic reasons. However, where early termination is as a result of default by a party, the defaulting party will be liable to pay compensation to the counterparty.
- The reasons why guarantee clause or provisions should be encouraged in PPPs contract/agreement is that the private enterprise participating in a PPP has the responsibility for financing a PPP project/venture so the government ought to provide guarantees that will assist in negotiations with lenders by the private entity. Most PPPs including the few that I have been involved have always been financed by syndicated loans sometimes involving international lenders. One of the major setback to the Lagos project was the none provision of guarantee for the PPP project.

ENACT LAWS THAT REGULATES

- Most African countries do not have enabling laws that regulates PPPs and even those that have, the laws are not properly drafted to ensure that both the public and the private entities involved are protected.
- When I was involved in the concsession of a Market in Lagos Nigeria called Tejuosho with my client in 2008/9 awarded to my client by Lagos State as a PPP project there was no proper regulatory law. What they had in existence was the Private Sector Participation Development Board Law of 2004.
- Owing to the absence of a proper regulatory law, we were at the dictates of the mercy of the government without any ground to stand on a lot of issues. I recall whilst the project was on going, the Lagos State House of Assembly wrote to my client that we need to appear before them for ratification. When we inquired from the ministry that we got the project we were told that it is now a requirement. I believe that it was after the experience of my client project and a few others that made the Lagos State government to enact the present Lagos State Public Private Partnership Law 2011.
- As of today in Nigeria, the Federal government and a few have enacted laws regulating PPPs. It is advisable for any private entity intending into entering going into a PPP project to study such PPP laws through their lawyers and understand them so as not to be taken unawares

PROPER GOVERNMENT REGULATORY AGENCY

- There is need for the government to have established a body or an agency to supervise the whole process of the PPP from its onset until completion. This body must be made of professionals who should be given free hand as much as possible without being burdened by constant government interference.
- At the Federal level in Nigeria we have the Infrastructure Concession Regulatory Commission and in Lagos State the Office of the Public Private Partnership and I believe a lot of other states in Nigeria would have such agency if they are interested in PPPs project and same should apply to other African nations as well. .

- Thank you.