PPPs Key to Our Desired Infrastructure Development

MAY AGBAMUCHE-MBU

LEGAL EAGLE

may.mbu@thisdaylive.com

A few weeks ago President Muhammadu Buhari was in Nairobi Kenya to attend the Tokyo International Conference on African Development, 'TICAD 6' along with a good number of African Presidents, Ministers and the Japanese President Shinzo Abe who was the co-convener. TICAD was launched in 1993 by the Government of Japan, to promote Africa's development, peace and security, through the strengthening of relations by way of multilateral cooperation and partnerships. There are five co-organisers of TICAD, the Government of Japan, The African Union Commission (AUC), The World Bank and the United Nations Development Programme (UNDP). TICAD has always emphasised the importance of 'ownership' and 'partnership'. The government of Japan is assisting Japanese companies to invest more in Africa, it intends to spend $30 billion in the next three years on infrastructural projects such as roads, energy, ports, hospitals and training institutions. This therefore is a wake-up call for African countries especially Nigeria to get its house in order to attract this much needed funding.

On any cursory look at our country's needs, infrastructure comes up high on the list. The current Administration has indicated that according to the National Integrated Infrastructure Master Plan (NIIMP) - Nigeria's national roadmap for building world class infrastructure that will guarantee sustainable economic growth and development in the future - Nigeria will require $3 trillion over the next 30 years to achieve an ideal global benchmark of a core infrastructure that is 70% of Nigeria's GDP. Where therefore will the revenue for infrastructure come from? Clearly the Government alone cannot sustain such a huge investment. Public Private Partnerships (PPPs) between government at various levels and private sector entities have now become a viable option for generating these much needed funds and are looking more and more attractive as well as becoming an increasingly veritable source of economic activity for Private operators. Anyone who has had to travel in and out of the Murtala Mohammed International airport will attest to the fact that it is indeed a major national disgrace as it stands today. Compare it for example with the Charles de Gaulle airport in Paris which in the last five years has been undergoing nonstop expansion to cater for the ever increasing volume of air traffic with its ever increasing size of jumbo planes. This necessary and equally forward thinking development can also be seen in a good number of other world class airports.

We all acknowledge the infrastructural gaps in the country, the Director-General, Infrastructure Concession Regulatory Commission (ICRC) Mr. Aminu Diko has been quoted as saying that 'in the next five years, just on transport alone (excluding aviation) the government will require at least $11 billion and another $5 billion is required in Aviation to bridge the infrastructure gap. This is a large sum of money that government obviously does not have. So we are left to look at other sources and PPP is one of those sources. If you look at our airports in the country they need improvement and this can be done through PPPs. Whether it is operating and managing them or expanding them.'

The term PPP has been described as 'a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance' (World Bank PPP Knowledge Lab). The need for modern infrastructure and government's limited financial resources for its construction and maintenance underscores the use of PPPs in developing countries.

Essentially with PPP arrangements the Public sector usually determines the services it requires and provides specific benchmarks. Furthermore, the private sector bears the risk of determining the particular assets that will be required for the project and takes charge of managing and operating the assets. The private sector bears the financial burden of the project unless the public sector takes equity with a Special Purpose Vehicle (SPV). Finally, the public sector transfers control of the asset to the private sector, it only reverts to the public sector if there is no extension of the concession period.

Various forms of concession models for PPPs exist the most popular model is the Build, Operate, Transfer (BOT). Others include Build, Operate, Own (BOO), Design, Build, Operate (DBO) Joint Ventures (JV), and various forms of public-private cooperation. There are also Build, Lease, and Transfer (BLT), Build, Own, Operate, Remove (BOOR) and various leasing, contracting out and other concessionary agreements.

To drive economic development it is crucial for the government to review the legal framework for PPPs. The relevant laws applicable to PPPs are the Infrastructure Regulatory Commission Establishment Act 2005, the Federal Highways Act, the Companies Income Tax Act, National Inland Waterways Authority Act, the Nigerian Investment Promotion Commission Act, all of 2004, CBN Regulations and Policies, Public Enterprises (Privatisation and Commercialisation) Act 1999 and the Public Procurement Act 2007.

The Infrastructure Concession Regulatory Commission Act 2005 is the principal statute dealing with PPPs in Nigeria. The Act states that it is an Act 'to provide for private sector participation in the development financing, construction, operation or maintenance of federal infrastructure or development projects (by whatever name called) through concessions and contractual arrangements.' Section 36 defines Concessions as 'a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure or 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 services.'

Section 2 of the Act states that (1) Every federal government ministry, agency, corporation or body shall prioritise its infrastructure projects and such priority projects may be qualified for concession under this Act. (2) The projects mentioned in subsection (1) of this section shall be submitted to the Federal Executive Council for approval on the recommendation of the relevant sector, ministry or agency prior to entering into any contract under Section 1 of this Act.

Section 2 (3) provides that for any private investor 'entering into any contract or granting any concession under section 1 of this Act, the federal government ministry, agency, corporation or body shall ensure that the project proponent possesses the financial capacity, relevant expertise and experience in undertaking such infrastructure development or maintenance.'

Notably, the Act prohibits the arbitrary suspension and cancellation of concession agreements by government and empowers the commission to act as mediator in disputes arising from PPP projects.

The Act also establishes the Infrastructure Concession Regulatory Commission (ICRC) to exercise oversight functions over the implementation of PPPs in Nigeria. The Act empowers the Commission to retain concession agreements and monitor compliance with the terms and conditions of agreements, ensure effective execution of such agreements and compliance with the Act. The commission is to monitor the implementation of projects according to global best practice.

The Commission is therefore mandated to manage the entire PPP process and build the capacity of MDAs to handle such arrangements in the future. Yet, in spite of the innovativeness introduced by the ICRC Act, there are a few areas of the law that need to be reassessed and amended to promote the participation of private investors in the PPP process.

Firstly and foremost, the Act fails to provide a detailed set of regulations for the PPP project approval process and the procedure for the grant of a Concession under the Act. Secondly, the powers granted to the commission are limited to keeping the signed concession agreements and monitoring their implementation whereas its powers could be gainfully expanded to include overseeing the evaluation and tendering process for PPP projects. The Act could also be amended to grant the Commission enforcement powers.

Our health sector is yet another area that needs to be highlighted, especially in the fields of cardiology, orthopaedics, renal dialysis (kidney), and oncology(cancer). Government should devise a strategy to address our infrastructural deficits in these areas by following the example of other African countries such as Kenya where last year the First Lady Margaret Kenyatta launched a Public Private Partnership initiative to boost screening, treatment and management of breast cancer during the 9th 'Stop Cervical, Breast and Prostate Cancer in Africa' Conference in Nairobi. Mrs Kenyatta explained that the launch was imperative due to the rising number of cases of breast cancer in the country, where it kills about 2000 women in the country annually. She therefore emphasised the need for investment in infrastructure, research and personnel to help contain the cancer and on this Kenya's Ministry of Health is currently working with Roche Industries, a British pharmaceutical company. According to Kenyatta 'we are committed to expanding access to prevention and treatment services for women with breast cancer. A partnership between government and industry is critical to ensure diagnostic services and medicine, are available to patients at an affordable cost. The partnership involves organising breast cancer awareness programmes, upgrading diagnostic equipment and training more oncologists as part of the initiative.' Cabinet Secretary for Health, Cleopa Mailu, said the initiative will necessitate a significant reduction in the cost of drugs for treating breast cancer patients. Both the Ministry of Health and Roche Industries have settled on a formula of ensuring all breast cancer patients in the country access quality medicine at minimal cost in public health facilities,' Mailu remarked.

There is a National Policy on Public Private Partnerships which was introduced by the Yar' Adua government in 2009 to ensure the 'emergence of a robust, and competitive environment conducive to private sector investment and, therefore, facilitate the rapid and qualitative expansion of infrastructure services in Nigeria.' It aims to provide a framework for PPPs to leverage on private investment to close infrastructural gaps in the country and guide the Infrastructure Concession Regulatory Commission in the transfer of obligations to private sector participants. Government's key economic objectives for Public Private Partnerships are as follows:

"To accelerate investment in new infrastructure and ensure that existing infrastructure is upgraded to a satisfactory standard that meets the needs and aspirations of the public;

To ensure that all investment projects provide value for money and that the costs to government are affordable;

To improve the availability, quality and efficiency of power, water, transport and other public services in order to increase economic growth, productivity, competitiveness, and access to markets; to increase the capacity and diversity of the private sector by providing opportunities for Nigerian and international investors and contractors in the provision of public infrastructure, encouraging efficiency, innovation, and flexibility;

To ensure that infrastructure projects are planned, prioritised, and managed to maximise economic returns and are delivered in a timely, efficient, and cost effective manner;

To manage the fiscal risks created under PPP contracts within the Government's overall financial and budgetary framework;

To utilise federal and state assets efficiently for the benefit of all users of public services."

Furthermore, the National Policy seeks to adopt public private partnerships where it would result in better value and more affordable services. All procurement decisions are to be based on merit and all proposals are to be subjected to economic and financial cost - benefit analysis. According to the Policy directive 'value for money is a combination of the service outcome to be delivered by the private sector, together with the value of risks transferred to the private contractor and direct costs to government and users.' The key principles for determining if a specific procurement option is suitable for government are value for money, public interest, risk allocation and output requirements, competition, capacity to deliver and engaging with the market.

The World Bank has identified that the decision-making process for investment in infrastructure is particularly complex for policy makers because of the abundance of potential infrastructural projects that compete for the limited amount of capital resources. In regions where there is a dire need for infrastructural development and limited resources for these developments the World Bank believes that the importance of good decision making tools can enhance the investment/development process.

To this end they have designed an Infrastructure Prioritisation Framework (IPF)- an analytical decision making tool to be institutionalised by the policy makers and used to make infrastructural investment decisions.

The IPF has evolved through piloting programs in Vietnam and Panama where the World Bank has conducted extensive analysis to create the tool as it currently exists.

On the home front I read an excellent paper by Mr. Opuiyo Oforiokuma, Managing Director/CEO, ARM-Harith Infrastructure Fund titled Bridging Nigeria's Transport Infrastructure in which he stated that 'money is not the only thing required to make Nigerian PPPs an attractive option for the public sector and for the private investors partnering with them. Other key ingredients should include: putting the necessary legal, regulatory and institutional frameworks in place; transparent procurement processes; affordable tariff structures that enable investors to recoup costs and make a reasonable return; proper allocation of contractual risks between the public and private sector parties; government support where required (including guarantees, grants and other incentives); and the political will on the part of government to see the PPPs through to the end.'

He further noted that 'legal and regulatory frameworks underpinning PPPs are necessary for a number of reasons among which are that private investors will want to see enabling legislation in place that clearly defines and protects their rights as investors. They will also want to know that government respects the sanctity of PPP agreements executed between them, and that such agreements are legally enforceable. Regulation will need to clearly define the 'rules of the game'. Regulators will be expected to transparently, consistently, fairly, and apolitically apply those rules in a way that ensures long-term economic equilibrium between the interests of end users and private investors.'

With PPPs and most other Government projects one area I believe we must improve on that is fundamental in the process is communication. The Nigerian public is understandably generally sceptical of government's intentions and will need to be better informed and educated on projects, so if tolls for example are required they will have a better understanding of why. With Japan looking to invest in Africa I see no reason why we cannot get a good slice of these funds through well defined PPPs.

On this note I would like to say a final farewell to our THISDAY LAWYER readers, columnists and all those who sent in articles from all over world. I could never have accomplished the task before me without your support, which is most deeply appreciated.

I am forever grateful to the Lord for his Grace in the editorial role he thrusted upon me. To the formidable and indefatigable Nduka Obaigbena THISDAY Editor-in-Chief and Chairman, I owe much gratitude to for finding me worthy to be Editor of THISDAY LAWYER. To Mrs. Hairat Ade-Balogun former Attorney General of Lagos State and Life Bencher, I thank whole heartedly for her tireless support and encouragement: a truly phenomenal and graceful woman, mentor and role model who for almost 3 years, without fail, every Tuesday read THISDAY LAWYER and e-mailed a comprehensive review irrespective of where she was, home or abroad. To my family, especially my husband Patrick Mbu who was my able co-traveller and supported my busy schedule with patience and devotion, I am humbled and truly grateful. To Sandra Oke and Idowu Olofinmoyin, remarkable and brilliant young lawyers and THISDAY LAWYER columnists, we had a fabulous time on this legal beat, I am indeed fortunate and thankful to be working with you both. To the conscientious and dedicated staff of THISDAY in Lagos, Abuja and Kaduna and in particular my Team who come rain or shine gave their best, I respect and admire each and every one of you. Thank you again and again. I am honoured to have served the legal profession. Now I have been called upon by President Muhammadu Buhari to serve my country as an INEC National Commissioner, I am most humbled and move on with faith, so help me God.

May Agbamuche-Mbu has dropped the mic and left the building!