Making Public-Private Partnerships work in Nigeria

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Summary

Nigeria's huge infrastructure deficit remains a major obstacle to improved living standards, enterprise development and sustained economic growth. Among many other financing models, Public-Private Partnerships (PPPs) present a preferred option for long term infrastructure provision and development adopted by many countries. Over the past decade, Nigeria has experienced poor execution of PPP projects caused by fundamental bottlenecks such as lack of strategic direction for infrastructure, weak political will, political interests/interference, lack of transparency and weak legal and regulatory frameworks amongst others. This Policy Brief delves into special cases and experiences of PPPs while reviewing critical challenges and proffering solutions to making PPPs work in Nigeria. Overall, the Brief recommends the review of the National Integrated Infrastructure Master Plan (NIIMP), enactment of PPP legislation and implementation support policies to de-risk execution of PPPs in Nigeria.

Introduction

According to the National Integrated Infrastructure Master Plan (NIIMP) approved in 2015, Nigeria requires a total investment of US$3 trillion over the next 30 years to build and maintain infrastructure across the country. This stands at US$100 billion (N38 trillion)1 annually, which is almost three times larger than the combined overall budget expenditure of both the federal and state governments. With such a huge deficit, it is no doubt that Nigeria needs alternative and innovative methods of financing infrastructure development. Public-Private Partnerships (PPPs) are one of such models, which have been explored by many countries across the world.

Nigeria's economic crisis of 2016, which resulted in lower federal and state government revenues, points to the obvious that the government alone cannot fund the country's infrastructure deficit. More than ever is the need to explore private capital. Interestingly, the Nigerian government acknowledges the importance and potentials of PPPs in delivering specific infrastructure projects. For instance, in the recently released Economic Recovery & Growth Plan (ERGP), the government emphasized the use of PPPs to deliver critical projects, such as roads, rail, seaports and airports. In addition, the proposed Family Homes Fund by the government, which is designed to improve access to social housing, is expected to operate as a PPP to the tune of about N1 trillion.

While PPPs explore private capital in the provision of infrastructure and reduces the financial burden of the government in delivering such projects, one of the key features of PPPs lies in their ability to relieve the government of any major cost associated with financing projects. By way of illustration, the Murtala Mohammed Airport (MMA2) Airport Concession signed under a “Build, Operate and Transfer” (BOT) model between the Federal Government and Bi-Courtney Limited (BCL) falls into this category.

While PPP model is not new to Nigeria, the challenges facing PPPs are huge, namely policy, legal, institutional and regulatory bottlenecks. In this Policy Brief, we will discuss the policy and legislative challenges facing PPPs in Nigeria as well as propose recommendations to address these challenges.

PPP in Nigeria: How far have we gone?

At both federal and state levels, Nigeria has had few experiences relating to PPP-based projects. Some of the notable projects include: the concession of Nigeria's ports with an estimated investment of $2 billion, the Murtala Mohammed Airport (MMA2) concession with an expected investment of about N38 billion, the Lagos-Ibadan Expressway concession with a total cost of about N167 billion, the Lekki-Epe Expressway Concession valued at about US$450 million and the recent concession of Rail Lines to General Electric, worth over $2.2 billion. In what follows, we review the terms and challenges of the project.

I. The Nigerian ports used to be one of the most expensive in ports in the world to do business. Port tariffs were increased frequently while service levels remained the same and inefficiency increased. The Federal Government concessioned cargo handling operations to 25 terminals operators for 15-25 years and they have invested an estimated $2 billion in modernising and upgrading their various terminals as well as on manpower development. This has resulted in a reduction in ship waiting time while vessel turnaround time has also improved significantly based on cargo type.

II. The Lagos-Ibadan Expressway project was awarded to Bi-Courtney Limited under a 'Design, Build, Operate and Transfer (DBOT) arrangement' for a concession period of 25 years. The contract covered the expansion and rehabilitation of the road, which will be funded by Bi-Courtney Limited. This company was expected to invest 89 billion and recoup its investment through toll collection subject to regulatory assistance by the Federal Government. Despite the promising nature of this project at the time, it could not sail through owing to undue political interference, lack of transparency in the bidding process, weak management of stakeholders' interests, capacity constraints of the contractor, etc.

III. The Lekki Toll-Road Concession represents yet another major project under PPP model. The project is a 30-year concession agreement between the Lagos State Government and Lekki Concession Company (LCC). Though awarded under a 'Design, Build, Finance and Operate scheme,' the project costs about US$450 million and entails the expansion and upgrade of Eti-Osa Lekki-Epe expressway, the construction of the Falomo Bridge Ramp and the construction of a 20 km Coastal Road including an option to develop the Southern bypass. Under this model, LCC is expected to recoup its investment through charging of tolls, advertising fees, and duct leases amongst other means. However, issues of lack of transparency, resistance of toll collection from citizens, court cases and political interest have affected the smooth operation of the project.

IV. Murtala Mohammed Airport (MMA2) Airport concession is a contract agreement between the Federal Government and Bi-Courtney Limited (BCL). The domestic terminal of the airport was awarded to Bi-Courtney Limited in 2003 on a 'Design, Build, Operate and Transfer (DBOT) arrangement.' Despite this project being the first DBOT arrangement in the aviation industry in Nigeria, it has been bedeviled by lack of transparency, violation of contractual terms, labor protests, court cases, etc.

Challenges facing PPPs in Nigeria

A review of the earlier cited cases discloses several factors impeding the successful execution of PPPs in Nigeria namely such as legal and regulatory challenges, undue political interference, lack of transparency, lack of proper management of stakeholders' interest and lack of proper contractual framework. Even in the case of the successful ports concessions, the enabling legislation governing the port sector at the time, the Ports Act of 1999, did not allow for concessioning the port assets, therefore lease agreements, drafted with terms typical of concession agreements (which were allowed by the Act), were signed with the terminal operators. In what follows, we examined challenges of PPPs in Nigeria under two categories-Policy and legal, and processes/governance.

Policy and Legal hurdles

The absence of a clear infrastructure roadmap

PPPs thrive on trust and one measure to enhance investor's confidence is to develop a clear and coordinated policy direction for infrastructure development in Nigeria. As it stands, Nigeria's overall plan on infrastructure, which is littered in different isolated and often unrelated policy documents, remains unclear. This, therefore, limits investor's confidence, given the capital intensive and high-risk nature of infrastructure investment. The fate of the National Integrated Infrastructure Master Plan (NIIMP) with respect to the current administration's willingness to review and implement this plan remains bleak. This situation emphasizes the lack of clear strategic direction regarding infrastructure investment in Nigeria.

The absence of 'sound' policy, regulatory and legal framework for PPPs

Nigeria has a National PPP Policy (NP4). The policy document sets out government's commitment towards PPPs, the PPP policy objectives as well as the institutional structure and processes for managing PPPs in Nigeria. While Nigeria seems to have taken a leap of faith in formulating the NP4 and establishing the Infrastructure Concession and Regulatory Commission (ICRC), there is currently no holistic legislation guiding PPPs in Nigeria. Given Nigeria's volatile political environment characterized by policy inconsistency where new administrations could discontinue projects approved by its predecessors, PPP legislation becomes vital in establishing the legal framework for a successful PPP program.

While the closest PPP legislation in Nigeria is the Act that establishes the ICRC, a review of this Act shows that it is vague and contradicts provisions of the Bureau for Public Enterprises and the Bureau of Public Procurement legislations regarding jurisdictions and definition of terms2. More specifically, the Act focuses on concession contracts to the neglect of other PPP options. Even then, 'concession' is not defined in any useful way. It is broadly defined that any contract related to infrastructure can be designated a concession. Infrastructure is not also defined. While the Act does not make provision for unsolicited bids or inherited legacy PPP projects, it shows lack of clarity on the Commission's role as facilitator, as well as regulator of PPPs in Nigeria. The ICRC Act does not have the regulatory and enforcement provisions required to ensure the delivery of ICRC's mandate. For instance, the Commission lacks the power to summon parties in a PPP contract to obtain information or intervene in runaway transactions. The statutory functions of the Commission are restricted in most cases.

All in all, the Act is also at variance with certain provisions in the United Nations Commission on International Trade Law (UNCITRAL) Model Legislative Provisions on Privately Financed Infrastructure Projects (the UNCITRAL Model) that guides countries in drafting such legislations. These lapses largely undermine the efficient policy and legal environment for PPP in Nigeria.

PPP Complex Process

Nigeria's PPP process is complex and often characterized by undue government interference. As revealed in the PPP projects (earlier reviewed), the challenges of lack of transparency in the bidding process coupled with violation of contractual terms are inimical to the success of PPPs in Nigeria.

Meanwhile, some specific challenges include:

• Lack of transparency and fairness in applying regulations has hindered the flow of local and foreign investment to address infrastructure deficits across various sectors.

• Lack of transparency in procurement and procurement adjudication processes leaves aggrieved developers with little recourse for alleged grievances. This further discourages interest of well-intentioned developers in future projects.

• Disregard for court orders and judgments by government agencies undermines the sanctity of contracts and the rule of law.

• Inefficient and expensive process of bidding and contract award increases total costs and reduces viability of the project.

• The absence of fair and commensurate redress for breach of contract due to obsolete legal provisions and the ineffectiveness of judicial processes results in unrecoverable losses for aggrieved parties.

• Weak understanding and enforcement of existing regulations.

PPP Success Story- Senegal's Urban Water Project

The Urban Water Project instituted in Senagal in 1996 is regarded by the World Bank as a model for Public-Private Partnership (PPP) in sub-Saharan Africa. The US$300 million project included an operation and maintenance contract of a water system for a period of 10 years. Operated by Sénégalaise des eaux (SDE), the terms of the PPP contract empowered the government to fine SDE if it fails to achieve the target of providing water that meets WHO quality standards. Within the 10-year period, water production in Senegal increased by 18 per cent with the addition of 81,000 new household connections and 400 standpipes. Major success factors for this PPP project included:

- Clearly defined roles, leaving little room for dispute
- Stakeholder ownership and consistent stakeholder engagement
- Flexibility in negotiations
- Strong political will
- Financial support from the World Bank
- Transparency in the bidding process
- Sectoral and Institutional reforms in the water sector to support accountability, reduce excessive interference by government and ensure accountability
- Provision of incentives to the private sector to ensure rural coverage

Policy Options for Enhancing PPPs in Nigeria

Review the NIIMP and demonstrate commitment to implement the plan

Nigeria needs to have a clear and coordinated policy direction for infrastructure development and demonstrate commitment to implement such plan. To serve this purpose, the National Integrated Infrastructure Master Plan (NIIMP) should be reviewed in line with current realities and future targets for infrastructure. Not only does this provide a sense of direction for the government in terms of spending priorities, it also enhances the confidence level of potential investors in future PPP arrangements.

As done in some countries, the master plan provides the basis upon which PPP projects are selected. Ideally, Nigeria's National PPP Policy should be situated on the country's infrastructure master plan, which defines the long-term commitment of the government to develop the country's infrastructure and identifies the required investments in infrastructure in line with the country's aspiration. In Ghana, for instance, the PPP policy states that a project to be executed by the government must be in a sector identified by the National Infrastructure Plan. Also, Senegal has a solid legal and regulatory framework that ensures strict adherence to the provision of the national infrastructure plan as a guide to PPP project execution. Nigeria could also adopt similar act.

Nigeria needs a PPP law and PPP specific legislations

Based on countries' experiences, although a PPP legislation is not necessary for successful PPPs, its relevance cannot be undermined due to the need to control the PPP structure within government and demonstrate government's commitment to PPPs. More specifically, a holistic PPP legislation at the federal level, in addition to states' PPP laws4, are inevitable for Nigeria owing to the inconsistencies in the policy environment as well as undue political interference in PPP initiatives. To achieve a holistic PPP legislation, several options are available: the ICRC Act must be reviewed and renamed to accommodate other forms of PPPs and to address the conflicting provisions and shortfalls specified in the previous section. Alternatively, a new PPP legislation should be enacted. Issues of transparency, violation of contractual terms and protection of investor's rights must be adequately covered in the proposed PPP legislation.

Nigeria could learn from countries such as Kenya, Tanzania and Senegal that have PPP legislations, which provide clear legal, institutional and regulatory basis for operationalizing PPPs. Other countries such as the Philippines and Indonesia also have special Build, Operate and Transfer (BOT) laws aimed at encouraging private sector involvement in the provision of infrastructure.

PPP Support Policies are required

Nigeria's harsh operating business environment (the higher inflation rate, foreign exchange risks) raises the risks component in PPPs in Nigeria. To address this challenge, the implementation of PPP support policies remains crucial and could incentivize private investors to partake in PPPs. The government should consider offering tax incentives, reducing foreign exchange risks and establishing a PPP facilitation fund to assist PPP investors willing to invest in critical economic sectors as done in Malaysia.

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