

**SUPREME MANAGEMENT TRAINING AND
CONSULTANCY PUBLIC –PRIVATE PARTNERSHIP
TRAINING EVENT IBADAN, OYO STATE, 2009**

**Creating an Enabling Environment For PPP:
Legislative, Institutional and Regulatory
Conditions**



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COMMERCIAL SOLICITORS

Dolapo Kukoyi, Associate Partner.

OUTLINE

- **Refresher (Simple Definition of PPPs and Why PPPs)**

- **Creating an enabling environment for PPPs**
 - **Legislative Framework**
 - **Regulatory Framework**
 - **Institutional Imperatives**

- **Way Forward for Successful PPPs**



REFRESHER

- What is a PPP?

A contractual Arrangement between a government Agency and a private sector entity that allows for greater private sector participation in the delivery of Infrastructure Projects.



REFRESHER

■ Why PPPs?

- Infrastructure deficit
- Spreads costs over the useful life of the asset
- Risks are allocated to those best able to handle them
- Future Funds are not tied up in servicing debts
- Increases Government's capacity to invest
- Greater budget transparency
- Infrastructure is delivered when it is needed
- Encourages customer service orientation with respect to public services
- PPPs if properly done should minimize corruption



What is an Enabling Environment?



What is an Enabling Environment?

Stage One

- Establish policy & legislative framework
- Initiate central PPP policy unit to guide implementation
- Develop deal structures
- Get transactions right & develop public sector comparator model
- Begin to build marketplace
- Apply early lessons from transport to other sectors

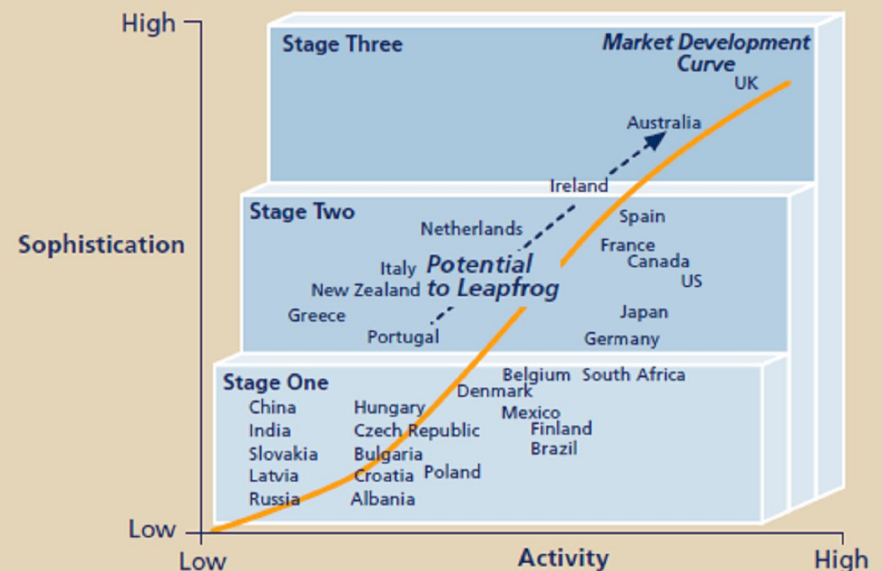
Stage Two

- Establish dedicated PPP units in agencies
- Begin developing new hybrid delivery models
- Expand and help shape PPP marketplace
- Leverage new sources of funds from capital markets
- Use PPPs to drive service innovation
- PPP market gains depth—use is expanded to multiple projects & sectors

Stage Three

- Refine new innovative models
- More creative, flexible approaches applied to roles of public & private sector
- Use of more sophisticated risk models
- Greater focus on total lifecycle of project
- Sophisticated infrastructure market with pension funds & private equity funds
- Public sector learns from private partner methods as competition changes the way government operations function
- Underutilized assets leveraged into financial assets
- Organizational & skill set changes in government implemented to support greater role of PPPs

Figure 2. PPP Market Maturity Curve



Source: Deloitte Research: Closing the Infrastructure Gap 2007



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What is an Enabling Environment?

Quick Case Study

What Major Steps were taken by the UK?

How would you apply such steps in the Nigerian Context?



LEGAL FRAMEWORK

Features of PPP Friendly Legislation

- Flexibility
- Awards contracts based on the best value and not necessarily the lowest price.
- Allows a mix of public and private investment
- Allows long term leases of existing government assets.
- Avoids retrogressive provisions.



IS THERE A LEGAL FRAMEWORK IN NIGERIA?



5/8/2009

Dolapo Kukoyi, Associate Partner,



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Here is the catch:

- **Infrastructure Concession Regulatory Commission Act 2005**
- **Public Procurement Act 2007**
- **Public Entp. (Privatization & Commercialization) Act 1999**
- **Utilities Charges Commission Act 1992**
- **Land Vesting Title Act**
- **National Inland Waterways Authority Act**
- **Highways Act 1971**
- **The Lagos State Roads, Bridges and Highway Infrastructure Law 2005.**
- **Federal Roads Maintenance Agency Act**



Infrastructure Concession Regulatory Commission Act 2005

Is the ICRC Act meant for only
Concessions or all forms of Public
Private Partnerships?



Infrastructure Concession Regulatory Commission Act 2005

- o S 36 defines Concessions:

"Concession" means a contractual arrangement whereby the project proponent 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 services.



ICRC Act – Short title

“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**”



Public Procurement Act 2007

- “This Act establishes the National Council on Public Procurement and the Bureau of Public Procurement to “monitor and oversee” public procurement and to “regulate and set standards” for public procurement in Nigeria.
- “No objection certificate” required before Fed. Exec. Council approval.



Public Procurement Act 2007

- Is a Public Private Partnership a “Procurement” within the Procurement Act 2007?

- TWO SCHOOLS:

1ST School: **It is a NOT a Procurement.**

2ND School: **It is a Procurement.**



Arguments and Counters



1st School: “Procurement” is about “purchases” and in most PPP’s Govt is buying nothing.

2nd School: In PPP’s Government trades an Asset and buys the provision of a PSO (public service obligation).

1st School: Procurement seeks the lowest bidder and PPP’s usually take the highest bid.

2nd School: PPP calculates Value for Money (VFM) which is the same principle.



Debate continues



1st School:

The Act's scope is "goods", "works" and "services" it does not cover PPP

2nd School:

- a) PPP's arguably fall under "works" in the Act.
- b) Management Concessions are "services"
- c) Act deals with with "Disposal of Public Property" - Section 55 Part X. Section 53(2) states that in such cases the disposing entity shall be treated as the procuring entity for purposes of this Act.



Which way would you go?

When an area is gray you may decide to be:

Cautious & complaint

or

Debatative & Combative



Fiscal Responsibility Act 2007

- To strengthen fiscal policy design and implementation.
- Major gain is the citizen's legal right to challenge budgetary lapses. Countries like Mexico & Ecuador have used a similar law to reduce ineptitude in Govt spending.



Public Entp. (Privatization & Commercialization) Act 1999

- Set up the Bureau of Public Enterprise (BPE) with powers to privatize listed Federal Government
- BPE have used Concessions: E.G Port Concessions.
- BPE's power limited to entities approved in the Schedule to the BPE Act?
- Would Roads and Rail lines fall under the BPE?

Utilities Charges Commission Act 1992

- Established a Utilities Charges Commission that regulates prices on certain utilities.
- Regulates Price fixing between the Concessionaire and the Government agency in certain instances:
- Nepa, Nitel, NNPC, Nigerian Airways, Nigerian Railway Corporation, Ferry Services Organizations, Nigerian Ports Authority, Road Transport Organizations, Nipost and such others as Commission determines from time to time.



Land Vesting Title Act 1975

- All land reclaimed from Inland Waterways is the property of the Federal Government.
- Therefore this Act clearly prohibits a State or Local Government from purporting to grant a Concessionaire ownership of land reclaimed from the Lagoon in the course of the project.



The Act is in dispute?



Oba Yekini Adeniyi Elegushi & Ors v Attorney General of the Federation and others. 2000 case.

– Fed High Court. (FHC/L/CS/669/95)

Challenged the validity of the Land Vesting Title Act.



National Inland Waterways Authority Act 1996

- Inland Waterways are vested in the Federal Government – National Inland Waterways Authority. (NIWA)
- reclaiming land from any Lagoon requires written consent of the NIWA.
- If Project relates to a bridge or a motorway over an inland waterway, the National Inland Waterway should be on your radar.



Federal Highways Act 1971

- Section 2 of the Federal Highways Act empowers the Minister for Transportation to build Toll gates, operate and collect Tolls on Federal Highways .

Can the Minister delegate this power to a private company?



Lagos State Roads, Bridges and Highway Infrastructure Law 2005.

- Enacted by the Lagos State as the legal framework for Concession on Roads in Lagos State.
- It is the framework for the Lekki–Epe Corridor Road PPP.
- Limited to Roads and currently the only State PPP law in Nigeria.



Federal Roads Maintenance Agency Act 2002

- Established FERMA
- Section 8(a) and (b) that:

“FERMA shall enter into road concession contracts for the purpose of executing relevant projects as well as set guidelines for the working of concession contracts”



Constitutional Limits

Exclusive	Concurrent	Residual
Federal Roads Maritime Aviation Mines & Minerals Railways Nuclear Energy	Electric Power Industrial, Commercial & Agric Dev. Education	Urban planning Transportation State Roads Water Housing Health



How do we resolve vacuums in Enabling Laws

OPTIONS

1. **Contract becomes the Law**

2. **Pass a new law**

- **Lagos State Highways Roads & Bridges Law was passed specifically for the Lekki Road Concession and a Board was established by the Law.**



REGULATORY FRAMEWORK

Regulation: To govern or direct according to a set of rules describing detailed procedure for market participants - Blacks Law Dictionary (2001)



REGULATORY FRAMEWORK

PREDICTABILITY IS KEY!!!!!!

- Need for Investment
- Capital is scarce
- Investors therefore need to be confident that they have correctly assessed the market risk and the likelihood of a fair return
- A Strong and Effective Regulator can make this possible



Keys to Effective Regulation

- **Effective Regulation begins with a Sound Regulatory Framework**
- **Alternative/Additional Rules**
- **Independence is KEY**
- **Autonomy**
- **Accountability**
- **Transparency and Openness**
- **Tested and Trusted Dispute Resolution Procedure**
- **Mission Statement and Clear Priorities**
- **Capacity Building**
- **Sensitivity to local context, norms and expectations**



Benefits of Effective Regulation

- **Attraction and retention of Capital**
- **Efficient utilization of economic resources**
- **Fair, just and reasonable allocation of costs to the consumers**
- **Stable and predictable prices**
- **Safe and reliable standards of service**



REGULATORY FRAMEWORK

A NIGERIAN CASE IN POINT THE ICRC



THE ICRC MANDATE

- **To develop guidelines, policies and procurement processes for PPPs**
- **To work closely with MDAs to identify PPP Projects**
- **To work closely with states developing their own pilot projects and PPP Policies to ensure consistency, best practice and a coordinated approach**
- **Act as a national resource centre of expertise for PPPs in Nigeria**
- **Act as an interface with the private sector to promote communication on national policies and programmes**
- **Monitor effectiveness of Government policies and processes and provide independent advice to FEC**
- **Contracting Monitoring Unit**

Highlights of ICRC Act

- Regulatory Commission to: **regulate**, **monitor** and **supervise** the contracts on infrastructure or development projects
- Grants any Federal Government Agency the right to grant concessions and **enter into similar contracts** - Section 1.



Highlights of ICRC Act

Provides in Sections 2-14 for inter alia:

- **Bidding rules**
- **Special Concession Account**
- **No Arbitrary variation or cancellation of agreements**
- **No Guarantees by Federal Agency without FEC approval**



Other Regulators ?

- DMO
- SEC
- NSE
- BPE
- BPP
- FEC

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Infrastructure Concession Commission	All PPP's by Federal Govt, its ministries and agencies.
Debt Management Office	<ul style="list-style-type: none"> ■ State or FGN loans, guarantees, Bonds ■ PPP's with Govt cash contribution
Securities & Exchange Comm.	Bonds; Shares of PLC'S; PPP with Trusteeship or corporate restructuring
Bureau of Public Procurement	All Federal Government procurement as defined in the Act above N50 million naira
Federal Executive Council	All Federal Government contracts above 50 Million Naira need FEC approval.
Bureau of Public Entp.	All entities listed in the BPE Act

BREAKOUT SESSION

Case Study – Indian Central Electricity
Regulatory Commission.

Do a Comparative Analysis of the Case Study
and the ICRC

Based on your analysis, what
recommendations would you make to the
ICRC



Expectations & Hopes

- ICRCA guidelines would be a major key to a robust legal framework
- Subject matter specific PPP regulations and state laws may follow
- Case Law may expand perspectives
- Experiential knowledge will grow with more PPP's coming on stream
- Local Banks will do more long term infrastructure lending
- Some pending Legislations may add fillip



INSTITUTIONAL IMPERATIVES

LETS GO BACK TO THE MATURITY CURVE



INSTITUTIONAL IMPERATIVES

- Get the Initial Structure Right
 - Enabling Laws
 - Central PPP Policy and Office,
 - Deal Structures
 - Procurement Process
 - Capacity Building
- Enable the same structure in the MDAs, States and Local Government



ANCILLARY TOOLS

- Full Cycle Approach
- Innovative PPP Models
- Choosing the Right Delivery Model
- Building Government Capacity to Manage Innovative Partnerships



FULL CYCLE APPROACH

■ The Concept

Entails developing a holistic view of the Infrastructure project's entire life cycle



FULL CYCLE APPROACH

- Concept Phases
 - (a) the Policy & Planning Phase,
 - (b) Transaction Phase
 - (c) Concession and Construction Phase



FULL CYCLE APPROACH

Advantages

- Better buy in from all parties
- Provides a framework for evaluating solutions
- Ensures the interest of the Agency retaining ownership and ultimate responsibility for the asset
- Helps government understand long term implications of decisions taken during PPP projects



INNOVATIVE PPP MODELS

- Alliancing
- Bundling
- Integrator
- Incremental Partnerships
- Competitive Partnerships
- Joint Ventures

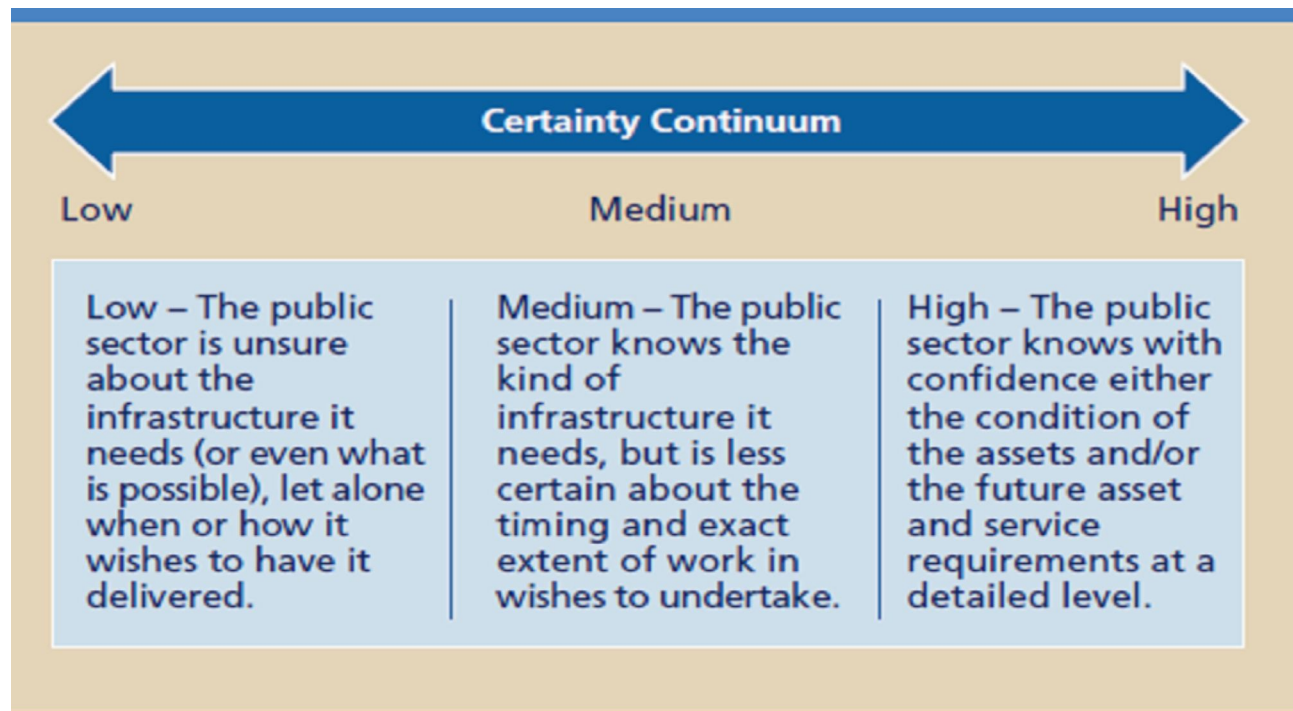


CHOOSING THE RIGHT DELIVERY MODELS – KEY QUESTIONS

- How confident are you now about the type of infrastructure and services that are needed over the next 10, 15, or 20 years?
- Possibility of a change in the needs and expectations of citizens over time.
- The likelihood of policy change?
- How easy is it to specify what will be needed?
- In which sector is the PPP approach going to be employed?



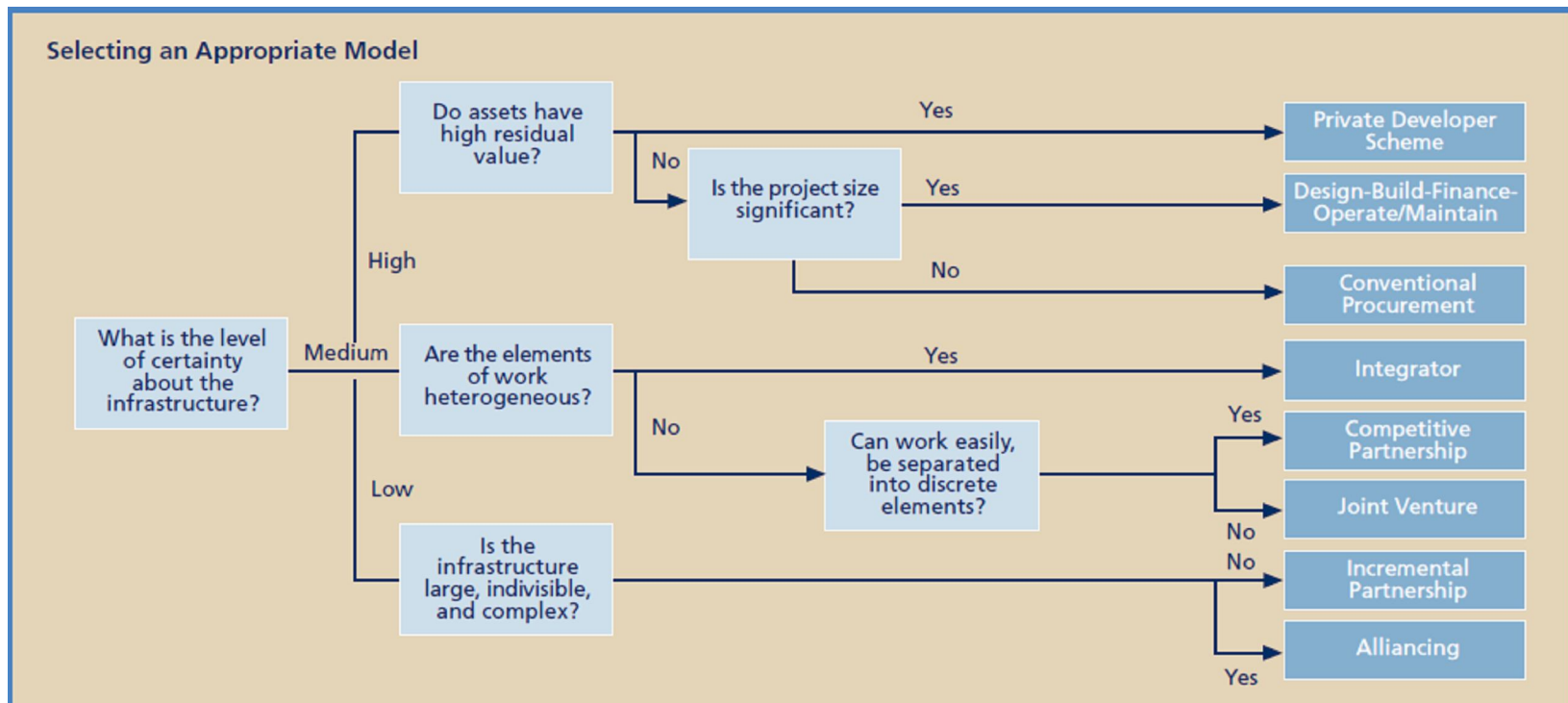
CHOOSING THE RIGHT DELIVERY MODEL



Source: Deloitte Research: Closing the Infrastructure Gap 2007



CHOOSING THE RIGHT DELIVERY MODEL



Source: Deloitte Research: Closing the Infrastructure Gap 2007



BUILDING GOVERNMENT CAPACITY

- Robust Legal and Regulatory Framework
- Strong understanding of PPP Models
- Building Government Human Capabilities (Managers, Skilled Negotiators, Contract Managers, Risk Analysts etc)



BREAK OUT SESSION

Look at the Case Study and using the Model on Page 51 – What Delivery Model would be most appropriate?



WAY FORWARD FOR SUCCESSFUL PPPS

- Sound policy and legal framework
- Effective risk allocation
- Innovative Models
- Well executed procurement process
- Strong project management
- Close attention to concession phase
- Stakeholder buy-in – KEY
- Government maintenance of monitoring and oversight functions
- Capacity Building
- Quick and effective dispute resolution process without disrupting delivery





QUESTIONS?

5/8/2009

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- THANKYOU
 - FOR
 - PARTICIPATING

