

---

# **ROAD CONCESSION IN NIGERIA: KEY CONSIDERATIONS FOR PRIVATE INVESTMENT**

Detail Commercial Solicitors

---

[www.detailsolicitors.com](http://www.detailsolicitors.com)

Detail

## BACKGROUND

Nigeria currently has a huge infrastructure deficit, with an estimate of about US\$3 Trillion (which is six times its current GDP) required over a period of thirty years to bridge this gap.<sup>1</sup> A key infrastructure deficit in Nigeria is in road infrastructure.

Road transport is the most used form of transportation in Nigeria accounting for over 90% of passengers and cargo movements in the country. The Infrastructure Concession Regulation Commission (“**ICRC**”) reported in 2017 that Nigeria operates about 195,000 km of road network, with only about 60,000 km of paved roads, with a large proportion of the paved roads in bad conditions.<sup>2</sup> Benchmarking Nigeria to emerging economies like Brazil and South Africa, Nigeria requires 1,380,964 km and 547,014 km of roads to catch up with the road networks of Brazil and South Africa respectively.<sup>3</sup>

Reliable infrastructure provides a solid foundation for the development and growth of a country’s economy. The lack of proper road infrastructure in Nigeria hinders the free movement of goods and persons in Nigeria, which is crucial and vital for the operation of a market economy.<sup>4</sup>

1. [https://www.moody's.com/research/Moodys-Significant-financing-from-private-sector-and-multilaterals-needed-to--PBC\\_1253651](https://www.moody's.com/research/Moodys-Significant-financing-from-private-sector-and-multilaterals-needed-to--PBC_1253651)

PBC\_1253651#:~:text=%22Nigeria%20currently%20has%20a%20significant%20infrastructure%20deficit%20and,by%20the%20coronavirus%20pandemic%20and%20low%20oil%20prices.%22

<https://www.bloomberg.com/news/articles/2021-02-12/nigeria-approves-creation-of-2-4-billion-infrastructure-firm-kl291fjc>

2. <https://www.icrc.gov.ng/135000km-road-network-nigeria-un-tarred-icrc/>

3. <https://businessday.ng/transport/article/why-nigeria-should-develop-other-transport-modes/>

4. <https://ukdiss.com/examples/socio-economic-impacts-of-pot-holes.php>

In addition, the road network also serves as connection points for sea, dry ports and airports, which are seriously affected if there is no proper road infrastructure to cater for goods going to and from such ports and airports.<sup>5</sup> In 2020, the Seaport Terminal Operators Association estimated that the congestion in the Lagos port area costs the country \$55m a day in lost economic activity, which comes to almost US\$20 billion in a year.<sup>6</sup>

The current state of the Nigerian economy and the dwindling government revenue has resulted in limited funding for infrastructure in Nigeria. In 2020, 2021 and 2022, the Nigerian government only allocated about 23.32%,<sup>7</sup> 30.36%<sup>8</sup> and 31.92%<sup>9</sup> of the approved budgets respectively to capital spending. To go further, in 2020, 2021 and 2022, only about 3.24%,<sup>10</sup> 2.94%<sup>11</sup> and 2.74%<sup>12</sup> of the approved budgets were allocated to the Federal Ministry of Works and Housing (“**FMWH**”), the government ministry responsible for road infrastructure among other functions. Therefore, the concession of appropriate infrastructure to private sector partners would be a potentially more viable solution to raise the necessary capital needed for the development of infrastructure in Nigeria, and the Nigerian government appears to have veered in this direction.

5. *ibid*

6. <https://www.ft.com/content/a807f714-7542-4464-b359-b9bb35bdda10>.

7. <https://yourbudgit.com/wp-content/uploads/2020/03/2020-Budget-Analysis.pdf>

8. Appropriation Act 2021.

9. Appropriation Act 2022

10. <https://yourbudgit.com/wp-content/uploads/2020/03/2020-Budget-Analysis.pdf>

11. Appropriation Act 2021.

12. Appropriation Act 2022.



### ***Efforts/incentives by the Government (at the federal and state level) with respect to Road Infrastructure Development and Concession Activities.***

In its bid to promote the construction of roads, the Federal Government of Nigeria (“FG”) in 2021, proposed a concession arrangement tagged Highway Development and Management Initiative (“**HDMI**”).<sup>13</sup> HDMI is developed by the FMWH in collaboration with the ICRC, and the main objective of the initiative is to attract expertise and sustainable investment in the development of road infrastructure, maximize the use of assets along the Right of Way and develop other highway furniture.

There are two main categories under the HDMI: (i) the Value-Added Concession initiative (“VAC”); and (ii) the Unbundled Assets Approvals Initiative. The FG intends to concession 12 highway routes under phase one of VAC, and it was recently reported that the FG, through the FMWH, has concluded the evaluation of the proposals

13. <https://www.icrc.gov.ng/fg-to-concession-12-highways-to-private-sectors/>



submitted by 18 bidders for the concession of the 12 highways in Nigeria.<sup>14</sup> The project is now at the Due Diligence Stage and will be followed by Negotiation of Technical and Financial Parameters. It is important to note that the construction and maintenance of 9 of the 12 proposed highway corridors have now been approved, under the regulatory guidance of the ICRC.<sup>15</sup>

At the state level, the state governments have been making commitments which indicate their intention to improve the road networks in Nigeria. The Oyo State Government formulated the Oyo State Government Rehabilitation and Reconstruction Programme, seeking to contribute to economic recovery by improving road access and connectivity, providing local employment opportunities, building skills among the involved workers and contractors and strengthening local capacities in the use of employment-intensive local resource-based (LRB) road construction and maintenance approaches.<sup>16</sup>

14. <https://businessday.ng/business-economy/article/highway-concession-fg-finalises-evaluation-of-18-firms-bids/>

15. <https://sunnewsonline.com/hdmi-fec-approves-1374km-roads-across-9-corridors-to-generate-n11-54trn-icrc/>

16. <https://oyostate.gov.ng/infrastructure-development/>

In addition, several other states;<sup>17</sup> Adamawa, Enugu, Osun, Niger and Imo have participated in the Rural Access and Mobility Project (RAMP 2),<sup>18</sup> a World Bank assisted project in collaboration with the Federal Ministry of Agriculture and Rural Development and supported by the French Development Agency, to promote road networks in rural areas.<sup>19</sup> The Lagos State government has also shown deliberate efforts to improve the internal road network in the state, and a number of road projects to rehabilitate and construct new roads have been commenced by the government. In 2020, the Governor of Lagos State flagged the construction of 377 roads and power projects, which will lead to the construction of 250 roads. In the same vein, the Governor of Lagos State recently flagged the construction of the Ijota-Opebi Link bridge.

In 2019, the FG introduced the Road Development and Refurbishment Investment Tax Credit Scheme<sup>21</sup> to encourage private-public participation in the construction and maintenance of key road infrastructure in Nigeria which enables the Nigerian Government to leverage

private sector capital and efficiency for the construction, repair, and maintenance of critical road infrastructure in key economic areas in Nigeria.

As of May 2022, the Federal Executive Council (“**FEC**”) has reported approved N169.7 Billion in private sector investments under the Tax Credit Programme for road infrastructure.<sup>22</sup> Some companies have taken advantage of this programme for instance, the FEC has approved the award of a contract to Dangote Industries Limited for the construction of five roads totalling 274.9 kilometres at the local cost of about N309.9 Billion, which will be net off Dangote’s tax liabilities.<sup>23</sup> The telecommunication giant MTN Nigeria Plc also has plans to take advantage of the scheme to

17. <https://www.ittransport.co.uk/projects/development-of-state-policy-framework-for-rural-roads-management-finance-in-adamawa-enugu-imo-niger-and-osun-under-the-second-rural-access-and-mobility-project-ramp-2/>

18. <https://projects.worldbank.org/en/projects-operations/project-detail/PO95003>

19. <https://www.vanguardngr.com/2017/05/efficient-rural-access-mobility-project/>

21. Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme Order 2019 No. : 007 of 2019

22. <https://businessday.ng/news/article/fg-approves-n169-7bn-private-sector-investments-in-road-infrastructure/>

23. <https://businessday.ng/news/article/fec-approves-n309bn-road-contracts-to-dangote/>

take advantage of the scheme to lower its tax exposure.<sup>24</sup> In a recent inaugural service for completed projects in Ogun State, “President Buhari noted that the FG would deploy tax credit as championed by Dangote Group, Globacom Nigeria, Lafarge Africa PLC, Nigerian National Petroleum Corporation (NNPC) Limited, among other companies, to construct and reconstruct Federal roads in Ogun state and across the country.<sup>25</sup>

## **TYPICAL CONCESSIONS IN NIGERIA AND GENERAL PROCEDURE**

A concession gives a concessionaire the long term right to develop and utilise assets conferred on the concessionaire, including the responsibility for development, finance maintenance and operations. The asset ownership typically remains with the relevant authority and the asset reverts to the authority at the end of the concession period. They are various ways to structure a concession arrangement, and the structure used will depend on what the relevant authority wishes to achieve and negotiations with the concessionaire. Some examples of typically used models of concessions are:

a). **Build Operate Transfer (BOT) Type Concession:** This is typically used for new or greenfield projects, although it may also involve the rehabilitation of roads. Here the concessionaire finances the initial construction, upgrading or major rehabilitation of the road, as well as the operation and maintenance of the road for a period of time before the management of the road is handed back to the government/authority. Revenue generated by the concessionaire from the operation of the road is usually applied towards covering operating costs, maintenance of the

24. <https://businessday.ng/news/article/buhari-approves-4-roads-for-reconstruction-in-ogun-under-tax-credit-scheme/>

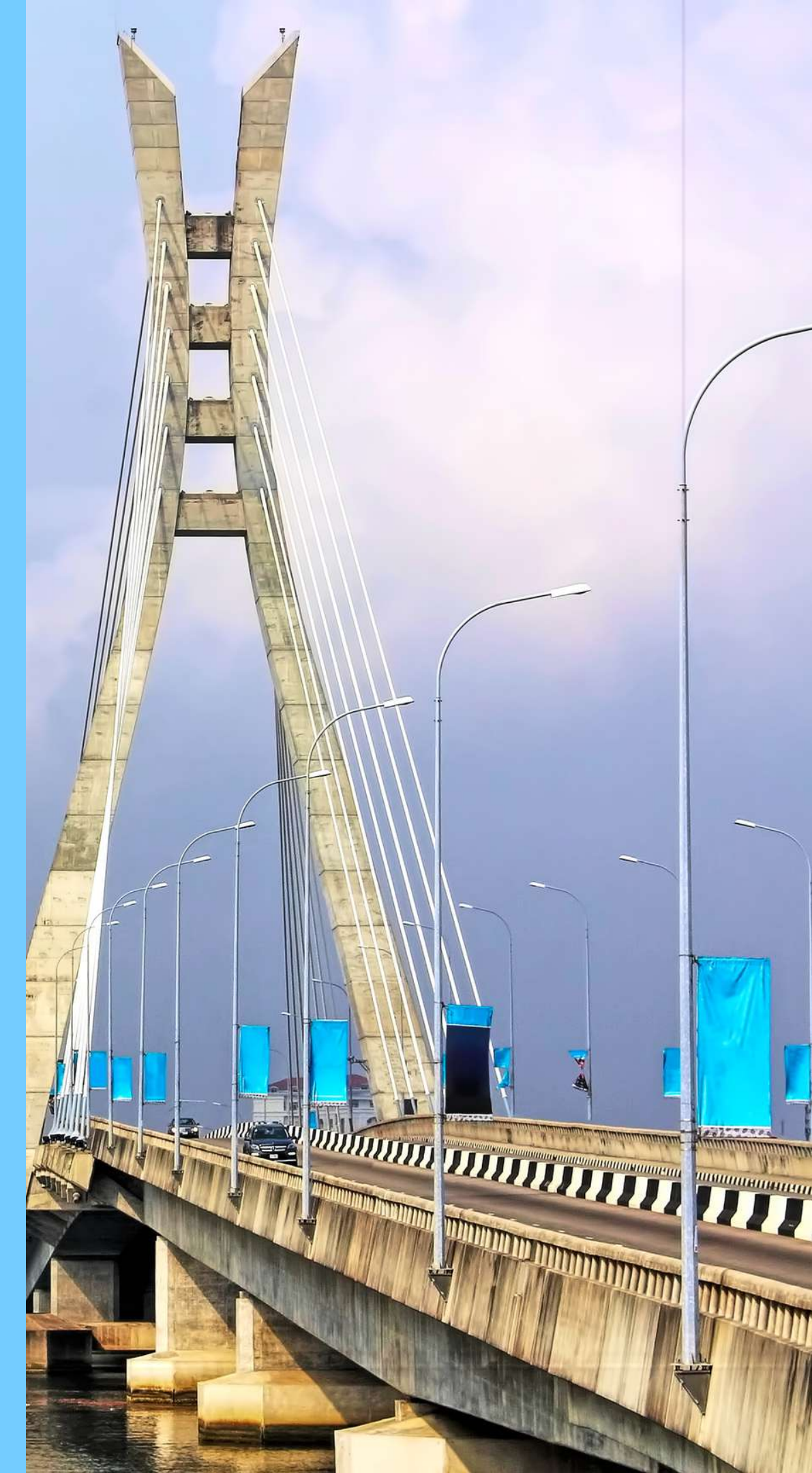
25. *ibid*



road for a period of time before the management of the road is handed back to the government/authority. Revenue generated by the concessionaire from the operation of the road is usually applied towards covering operating costs, maintenance of the road, financial costs of repayment of debt principal (used in facilitating the initial construction), and a rate of return for equity. The concessionaire assumes a lot of risk in this type of concession, as such appropriate allocation of risk is very important. The concessionaire may require some form of guarantee from the government/authority to ensure that the concessionaire is not completely exposed to market or political forces.

**b). Design-Build-Operate (DBO) Type Concession:** In this type of concession the government/authority is primarily responsible for financing the construction, upgrading or major rehabilitation of the road. The concessionaire designs, builds, operates and maintains the road to meet certain agreed outputs. The concessionaire takes no or minimal risk on capital, as the concessionaire will typically be paid for the design and the construction (payable in instalments or based on certain milestones), and also operating fees for the operating period.

**c). Hybrid of BOT and DBO Type Concession:** A concession model may also be a combination of both concession types, and this is typically used in Nigeria. The concessionaire and the authority could both be responsible for raising of the finance, or the finance raised by the concessionaire would be backed by government guarantees, while the concessionaire would be responsible for the construction of the road. The government could also be responsible for both the financing and construction of the road. Regardless of the model of financing or construction, the concessionaire would still typically be fully responsible for the operation and maintenance of the road, usually from revenue generated from the operation of the road





(e.g. through the operation of toll gates). The concession agreement may also have provisions to enable the authority to step into the shoes of the concessionaire if the project is no longer viable allowing the concessionaire to recoup its investment.

## **KEY CONSIDERATIONS IN A ROAD CONCESSION ARRANGEMENT**

It has been reported that Nigeria has lost over US\$5.7 Billion to unfavourable concessions (note that this is not limited to road concessions)<sup>26</sup> As such, it is important to identify key factors that should be considered when undertaking concessions, both from the government and private sector perspectives, in order to ensure more bankable and successful concession arrangements.

### **a) Feasibility Studies, Traffic Studies And Outline Business Case**

A key factor to ensuring success in a concession arrangement is the conduct of a feasibility study prior to undertaking such a project. A feasibility study provides an analysis of relevant factors instrumental to achieving a project. The complexity of the concession project will determine the structure of the feasibility report, or whether a pre-feasibility study will need to be conducted prior to undertaking a feasibility study for the project. The feasibility study is best carried out by the government prior to the concession of the project.

---

26. <https://www.vanguardngr.com/2021/03/nigeria-has-lost-5-7bn-to-shady-concessions-ppp-projects-reps/>



A road concession feasibility study should aim to produce analysis and information to:<sup>27</sup>

- establish the technical characteristics of the project;
- establish the social environmental, economic and financial characteristics of the project, based on its costs, demands and impacts;
- determine the extent of government support needed, Public-Private Partnership (“**PPP**”) modalities and project risks;
- prepare the business case for the project, which should provide a convincing and viable case to both the public and private sectors which will serve as a basis for the concession to the private partner;
- enable the preparation of a Request for Proposals that has sufficient data to enable the tenders to prepare competitive technical and financial bids; and

- provide data that allows the government to negotiate and sign a concession arrangement with confidence.

The contents for the feasibility study for a road concession project could be described under the following headings:<sup>28</sup>

- **Technical Evaluation:** This will include consideration of preliminary design, grounds surveys and demand forecast for the short, medium and long terms.
- **Social-Economic Cost-Benefit Analysis:** This will identify all social impacts and resettlement proposed mitigation and related costs.
- **Financial Analysis:** This will contain a financial model, with tested financial scenarios including levels of tariffs, tariff escalation rates, and debt/equity options.
- **Risk Assessment and Allocation:** This will analyse the possible risk which parties should take into account and how those risks should be allocated (“Key Risk Areas” below).

27. <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/5-31.pdf>

28. *ibid*

## b) Legal and Regulatory Framework

The legal and regulatory framework is critical for road concessions and any other type of PPP projects as they serve as the legal basis for government and private parties to enter into concessions and concession agreements. This provides a level of certainty to private parties as to the government's legal capacity to execute and enforce the terms of a concession.

The legal and regulatory framework for PPPs in Nigeria is a dual regime, with different laws regulating projects depending on the nature of the project. When the project is instituted by a FG ministry, department, or parastatal, it would be regulated by federal law, and where it is instituted by a state's governmental body, it would be regulated by the state law except where federal infrastructure is used in the project or there's an interface with federal infrastructure.

At the federal level, the ICRC is responsible for regulating the PPP regime for federal projects in Nigeria.<sup>29</sup> Some other relevant federal agencies include; the Bureau of Public Procurement, the Federal Road Maintenance Agency, and the Federal Ministry of Works.

The table below provides a breakdown of some relevant laws regulating the operation of road concessions in Nigeria, the applicable regulatory agency and a summary of the law:

29. Section 20(a),(b), (c), Infrastructure Concession Regulatory Commission 2005 Act (ICARA)



LAW	AGENCY/DEPARTMENT	SUMMARY
<b>Infrastructure Concession Regulatory Commission Act 2005 ("ICRC Act")</b>	Infrastructure Concession Regulatory Commission	The ICRC Act details the concession process for FG Ministries, Department or Agency and applies to investment and development projects relating to any infrastructure of any FG Ministry, Agency, Corporation or body. The ICRC is established under the ICRC Act.
<b>Public Procurement Act 2007 ("PPA")</b>	Bureau of Public Procurement ("BPP")	The PPA establishes the BPP and regulates the public procurement process. The PPA applies to all procurement of goods, works and services carried out by the FG and all procurement entities. It also covers all entities which derive at least 35% of the funds appropriated or proposed to be appropriated for any type of procurement described in this Act from the Federation share of the Consolidated Revenue Fund.
<b>Federal Highways Act Cap. F13, LFN 2004</b>	Ministry of Works	This vests the power of management and control of federal highways on the Minister responsible for federal highways in Nigeria, which is currently the Ministry of Works and Housing.
<b>Federal Road Maintenance Agency Act 2002 (as amended) ("FERMA Act")</b>	Federal Road Maintenance Agency ("FERMA")	The FERMA Act establishes the FERMA and gives it the power to ensure maintenance of all existing federal trunk roads or such other roads as may be declared as federal trunk roads by the National Assembly. This also includes the power to enter concession contracts for the purpose of executing projects.
<b>PPP laws of States</b>	Relevant PPP Office	PPPs in state projects are regulated by the relevant PPP laws of each state. The Lagos State Government in 2011, passed the Public Private Partnership Law 2011 into law. The law established the office of public private partnership and creates a legal framework for public private partnerships in Lagos State. Some other states which have taken steps to formulate PPP laws and policy include Bayelsa State, Edo State, Ekiti State, Benue State, Cross Rivers State, Abia State, Anambra State, Niger State, Bauchi State, Nasarawa State, Akwa Ibom State, Zamfara State, Sokoto State, and Kaduna.
<b>Fiscal Responsibility Act, 2007</b>	Fiscal Responsibility Commission/ Ministry of Finance	This ensures prudent management of resources used by FG ministries, departments and agencies.

### c) Legal Advisory on the Government Side

While it is important that private partners in the PPP arrangement ensure that the concession project is completed efficiently, the government has a large role to play in ensuring the success of a concession project. In order to ensure the success of concession projects, governments should endeavour to put the following in place:

- The government should conduct a comprehensive review of the structure, size and responsibilities of government ministries, departments and other entities in the infrastructure sector and if possible, establish special reform units reporting directly to top level ministers to spearhead reforms.<sup>30</sup> This is important as private partners can be bogged down by bureaucracy in government departments which can seriously affect delivery time and increase the cost of delivery of the concession project.
- The government should ensure that proposals are subjected to rigorous financial analysis to determine the sustainability of projects.<sup>31</sup>
- The government needs to ensure that there are robust legal and regulatory framework which regulates the concession project from inception till completion. The framework should include a mechanism for consultation with the private sector; dispute resolution between the government, private partners and users of the service; a mechanism to deter anti-competitiveness in the bidding process, and managing of the concession project.<sup>32</sup>
- The government should also ensure that commercial risks are properly mitigated and ensure not to assume onerous commercial risks.<sup>33</sup> Some risks which government should take into account in road concession arrangements are foreign exchange risk and demand/traffic risk.<sup>34</sup>

30. Developing Best Practices For Promoting Private Sector Investment In Infrastructure, Asian Development Bank <https://ppp.worldbank.org/public-private-partnership/library/adb-toolkit-best-practices-promoting-private-sector-investment-infrastructure-roads>

31. this is especially important in cases of unsolicited proposal from the private sector

32. Developing Best Practices For Promoting Private Sector Investment In Infrastructure, Asian Development Bank <https://ppp.worldbank.org/public-private-partnership/library/adb-toolkit-best-practices-promoting-private-sector-investment-infrastructure-roads>

33. ibid

34. ibid

#### d) Commercialisation or Monetisation of the Concession; Payment Mechanism Options/Models on How Concessionaires will be Paid

Given that the private sector is profit-driven, a key area for concessions of road is the mechanism for private sector partners to recoup their investment from the concession project in other to ensure viability of the project for all parties. The following are some payment mechanisms/models which governments/private partners can adopt:<sup>35</sup>

- **Direct Tolling:** this is where there is a direct link between the road users and the concessionaire. The concessionaire will recoup its investment by charging and collecting tolls from road users. The concessionaire might bear all the traffic risk or share same with the government.
- **Availability Payment:** The concessionaire receives a foreseeable and fixed income from the government or authority over a period of time, provided it meets certain output standards agreed upon by both parties. The government may decide to fund such payments by setting up an indirect tax on users of the road, or it can earmark a particular tax for payment of the concessionaire.
- **Indian Annuity:** This is a derivative of the availability payment. Under the concession agreement, there would be a viability gap payment following the construction and commissioning of the road, which will cover part of the construction cost. A periodic annuity payment to the concessionaire during the operation period of the contract which will cover the rest of the cost of construction and financing, as well as the cost of operation. Such annuity payments would be adjusted with deductions for failure to meet agreed output standards.

35. Road PPPs and Payment Mechanisms for Roads PPPs by Victoria Rigby Delmon, with contributions from Sara Sigrist, Vol 1, Issue 4, PPP Insights December 2013.



- **Shadow Tolling:** the government pays the concessionaire based on the usage of the road and on the performance of the concessionaire. This is based on the principle of tolling, but here government pays for the usage of the road rather than end-users.

### e). Stakeholder Management

The concession of a project usually involves several stakeholders including; the government, lenders, investors, consortium, concessionaire, end-users, communities and utilities. While most parties can assert influence while negotiating the concession arrangement, the end-users and communities affected by the road construction are often neglected. Proper stakeholder management especially in relation to end-users and communities is important and if not managed appropriately could pose a risk to the completion and operation of the concession project.

Some important steps which can be taken to ensure proper stakeholder management for end-users and communities include:<sup>36</sup>

- identify and define all stakeholders (as much as possible) affected by the concession project;
- develop communication strategies and practices to foster good communication among the different stakeholders;
- ensure end-users of the road assets, businesses, community stakeholders and adjoining/connected states (where applicable) are engaged at all stages of the concession

36. <https://managingppp.github.org/report/construction-and-operations-routine-contract-management/stakeholder-management/>

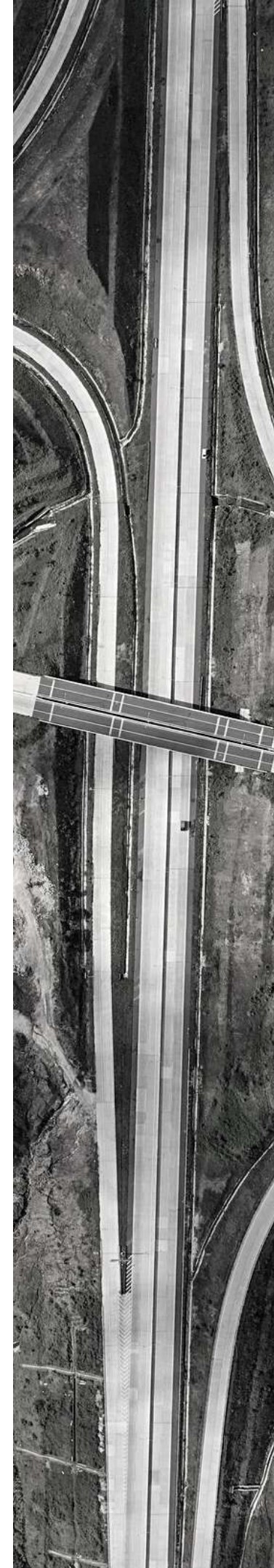


process and in the undertaking of the concession project to ensure viability and enhance the services;

- identify, consider and communicate with relevant community groups which might be affected by the concession project. Get feedback, and actions should be taken on such feedback and communicated accordingly; and
- designation of a government agency or a department within the relevant concession company with the responsibility for coordinating communication between other stakeholders, end-users and relevant communities affected.

#### f) Identifying Key Risk Areas and Proper Allocation

When negotiating a concession arrangement, the risk should ideally be allocated to the party which can better manage them. However, it is often the party with the less capable negotiator who bears the most risk. This also underscores the need for the government or authority to have capable and experienced advisors in order to get the best value for money on the project. The Supplementary Notes to the National Policy on Public Private Partnership provides that the Nigerian government will aim to optimise, rather than maximise would include:



- **Traffic Risk:**<sup>37</sup> depending on the structure of the concession, the demand for the road by citizens would be quite important, especially when the structure of the concession includes introducing a toll regime, for the generation of revenue. This risk is majorly influenced by the quality of traffic projections. The risk can be allocated to the concessionaire, the government<sup>38</sup> or shared by both parties depending on the nature of the road concession project. Where the risk is shared by both parties, the government may mitigate the traffic risk by guaranteeing a certain amount of traffic on the road and paying the difference from what the concessionaire would have earned in tolls with the guarantee.

- **Construction Risk:**<sup>39</sup> this will include the long-term risk of construction cost overruns, change in law, industrial actions, work completion delay which might affect the concession project, maintenance structure, etc. How these risks are allocated will depend on the concession model, but construction risks are typically borne by the concessionaire, as they possess the required expertise to properly manage the risks. The concessionaire will typically pass on the risk

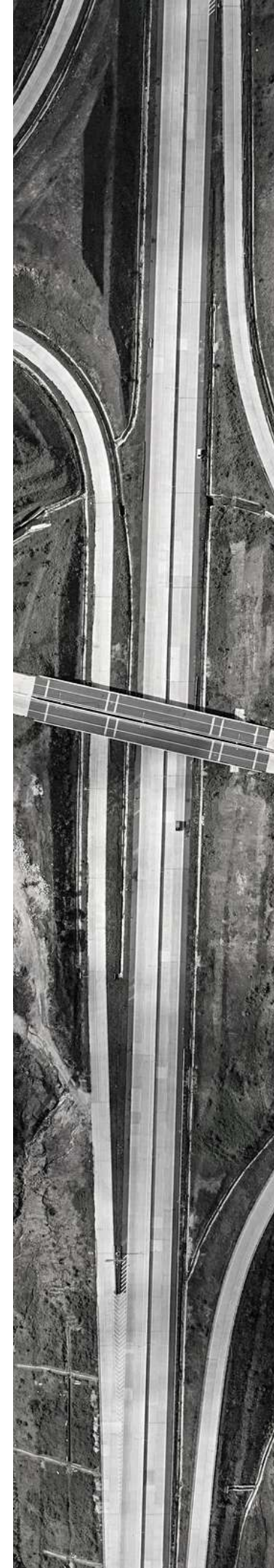
37. <https://ppp.worldbank.org/public-private-partnership/sector/transportation/roads-tolls-bridges/road-concessions>

38. This will usually to be allocated to the government where there is uncertainty as to possible projections

39. *ibid*

to its sub-contractors with robust contractual arrangements backing up such risks. However, the concessionaire will remain solely responsible to the government for this risk.

- **Land and sub-surface risk:** a road concession project would usually require land and right of way for construction of the roads and ancillary infrastructure. The time required for acquiring land, and compensation to people and communities affected by such projects would affect the projects' timeline.<sup>40</sup> This risk is best borne by the government, who is best able to bear the risk.
- **Insecurity Risk:** this is an important risk to take into account in Nigeria given the heightened insecurity in the country. Both the government and concessionaire would need to anticipate such risks, consider how same may affect the demand to use the road on the one hand and the completion time for the project on the other hand, and ensure that steps are taken to mitigate same. Security enforcement is best handled by the government but also takes collaborative efforts by the private sector and stakeholders. How this risk is allocated will depend on the nature of the insecurity risk and to



- what extent the concessionaire can effectively mitigate such risk. In situations of high security threats, the government would be best to handle the security enforcement, but where it is a situation of minor vandalism, the concessionaire or stakeholders could deal with such a risk.
- **Expropriation Risk:** this is risk from compulsory acquisition of concession property or unilateral termination of concession contracts by the government. This could also include indirect expropriation where the government withdraws or refuses to grant necessary licence/permits or enact laws which frustrate the concession project. This will be of particular concern to a concessionaire in long-term concession projects, where there is likely to be a change in government. This risk is best mitigated by ensuring that expropriation events are clearly and specifically defined including the consequences of such events such that the government is incentivised to ensure that such events are not triggered and when they are triggered compensation regimes are also provided for.

<sup>40</sup>. <https://pppknowledgelab.org/sectors/roads>



- **Rule of Law Risk:** the predictability, stability, and security of the legal frameworks regulating the concession project in the country is an important risk factor. This includes the ability to protect the rights of the concessionaire, the efficiency of the judiciary in the enforcement of contracts, the quality of the legislation, and the attitude of the government to judicial enforcements (i.e. government's level of compliance with court rulings). This risk can be mitigated by providing waiver of immunity clauses and robust dispute resolution clauses that ensure that there are avenues for dealing with various disputes before they are escalated to courts or arbitration. Concessionaires in Nigeria with international investors and financiers typically prefer foreign jurisdictions for administering disputes to ensure speedy and efficient dispute resolution without government interference.
- **Regulatory Risk:** acquiring the necessary regulatory permits and licenses is important for the commencement of any concession project. Delay in acquiring necessary permits can adversely affect the length and cost of completion of the project. The licenses and permits envisaged include permits/licenses to construct, approval for the acquisition of land and access rights, as well as the legal requirements for a state to erect toll gates on a federal highway. This may involve interaction with relevant federal and state authorities, procurement of relevant consents, permits, and consideration of any conflicts within the existing regulatory framework. Given the importance of licenses, permits and approvals to the life of the project, financiers need to be comfortable that the following are in place:
  1. willingness of the Government to assist in the procurement of applicable licenses, permits and approvals;
  2. all licenses, permits and approvals are issued for the duration of the concession period;
  3. where such licensee, permits or approvals issued above needs to be reissued, the government should be willing to assist in the reissue, and should ensure that such approvals are not unreasonably withheld if the government (or any of its ministry or agency) is responsible for the issuance of the approval, except where there is a lack of diligence on the part of the concessionaire;
  4. consents and approvals are assignable to lenders; and
  5. consents and approvals will not be subject to termination where the lenders' security or direct agreements are enforced.

### **g) State Support**

Financiers may be hesitant to provide financing for PPP projects in countries classified as high-risk. Therefore, it will be useful to consider what government-backed guarantees or viability gap funding<sup>41</sup> as well as other incentives that may be provided by the government as permitted under the regulatory framework to improve the viability of the project. Where the extant regulatory framework does not permit the provision of government-backed guarantees, the government will need to consider the possibility of amending such law to allow for such support.

## **CONCLUSION**

Nigeria's huge infrastructure deficit continues to negatively affect the Nigerian economy. The road infrastructure deficit is especially an area of concern because of its importance to a market economy and as identified above, the concession of road infrastructure to the private sector is a viable solution to fix Nigeria's infrastructure deficit.

It is however important that concessions of infrastructure are done properly by the governments on the federal and state levels to ensure viability, enhance investor confidence and reduce the risk of abandonment. In doing so, all relevant factors highlighted in this article need to be considered. In particular, all risks associated with a concession arrangement need to be properly allocated and adequately mitigated. In addition, the government, both at the federal and state levels need to, enact and expand their respective PPP legal framework to ensure a more robust PPP legal framework; build strong government institutions; and promote access to finance for infrastructure projects. This will not only ensure the success of concession projects but also promote increased participation from the private sector.

---

41. Viability Gap Funding means a capital grant or incentive or equity or subsidy provided by the government to support concession projects that are economically justified but might not be financially viable.



Detail Commercial Solicitors is distinct as Nigeria's first commercial solicitor firm to specialize exclusively in non-courtroom practice.

Detail

## Contact Us

### Phone Number

---

 +234(0) 12771400-5

### Email Address

---

 [partners@detailsolicitors.com](mailto:partners@detailsolicitors.com)

### Website

---

 [www.detailsolicitors.com](http://www.detailsolicitors.com)