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EFFECTIVE REGULATION OF PPP PROJECTS: LESSONS FROM SUCCESS STORIES IN VARIOUS JURISDICTIONS

By Tunde Ajia

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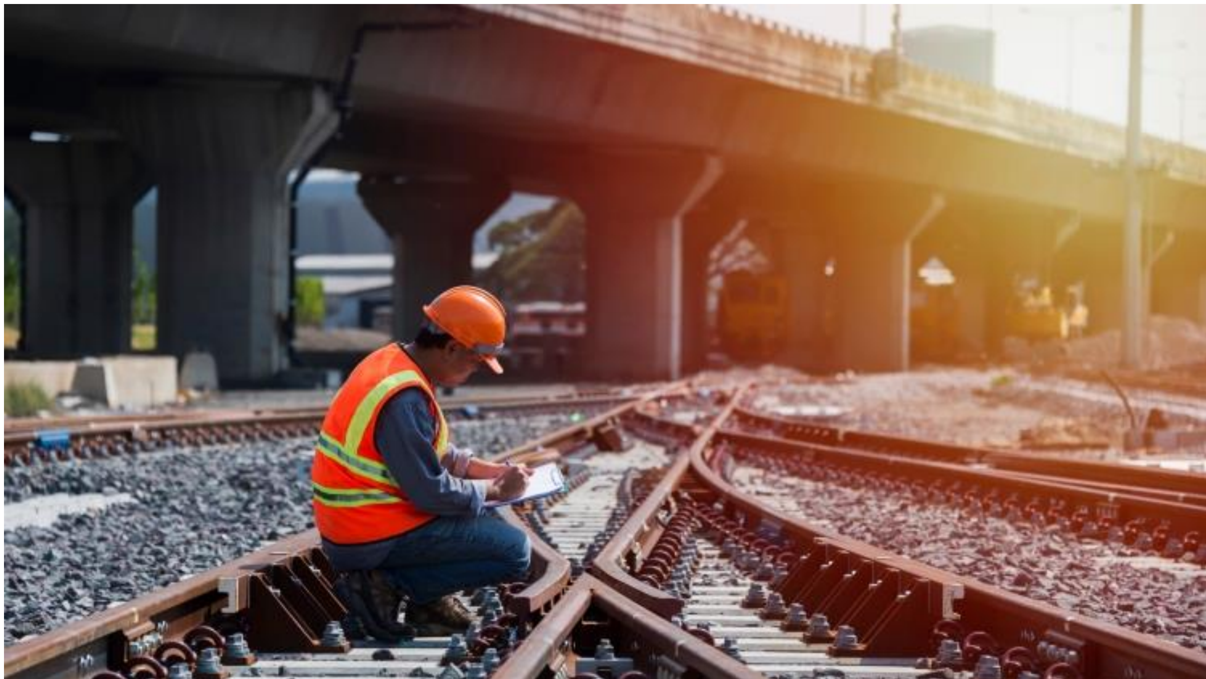

An Engineer on a rail site. Photo Source: World Bank

On the 13th of February 2023, the Federal Government of Nigeria launched a National Monitoring and Evaluation Policy for its Medium and Long-term National Development Plan (NDP) covering 2021 – 2025. The NDP was formulated to address several subsisting development challenges in the country including notable infrastructure deficits, low and fragile economic growth, insecurity, weak institutions, insufficient public service delivery, climate change and weak social indicators.

At the forum held at the Presidential Villa, Abuja, Nigeria's finance minister, Zainab Ahmed, said implementing the plan would require at least N350 Trillion ($760 billion). However, only 9% of that money will come from the Federal Government. The rest, Ahmed revealed, would come from sub-national governments (6%) and the private sector (85%). Therefore, successful implementation would require a strong partnership between the private and public sectors playing their respective roles effectively. By allowing the private sector take center stage in the implementation of its National Development Plan, the Federal Government of Nigeria is not toeing a strange path. In fact, governments of most developing nations have long realised the futility of massive infrastructure and economic undertakings on a lean purse. Take infrastructure in Africa, for instance, new estimates by the African Development Bank (AfDB) suggest that the continent needs $170 billion annually for the next three decades; with a financing gap in the range of $67.6 – $107.5 billion. To put

this in context, the Programme for Infrastructure Development in Africa (PIDA) posited that the road access rate in Africa is only 34%, compared with 50% in other developing climes. Consequently, transportation costs are 100% higher on the continent. More so, only 30% of Africans can access electricity, compared to 70 - 90% in other developing countries. In a digitally driven era where most basic systems now operate online, the continent's internet penetration rate is merely 6%, compared to the 40% average in other developing nations.

It is easy to single out the lack of funding as the primary bottleneck to Africa's infrastructure development. However, a closer look at most government-run institutions over the last three decades reveals a yawning gap in competency and political to deliver critical infrastructure for Africa and Africans. What's more? The lack of adequate accountability structures has made it difficult to track the delivery of critical infrastructure. To fill this gap, forward-thinking governments across the world, have turned to the organised private sector famed for embodying the expertise and access to resources that many public institutions lack. Therefore, Public-Private Partnership (PPP) projects have become widely accepted by governments to finance and deliver public infrastructure and services. PPPs require the involvement of the private sector by investing capital and expertise in a project, while the public sector provides the necessary regulatory and institutional framework. However, without adequate regulatory know-how, the public sector risks stifling the private sector through outmoded supervisory practices or becoming too laid back to allow rogue private players to roam free. Additionally, PPPs are not silver bullets; while they bring significant benefits to communities, they also embody significant risks to public finances, the environment, and even social welfare. Hence, governments must ensure effective regulation so that PPP projects deliver value for money and public benefit.

Regulations: Photo by istockphoto.com

Here I discuss the key components of effective regulation of PPP projects: considering legal and institutional frameworks, project selection and evaluation, risk management and contract management. I believe that these "four legs of the regulatory table," as I like to call them, will ensure balance regardless of the jurisdictions where they are applied.

1. Legal and Institutional Frameworks

Effective PPP project regulation starts with a sturdy legislative and institutional structure. This includes clear and thorough laws and rules that control the PPP process, especially project selection, evaluation and administration. The legal framework should define PPPs clearly and define the duties and obligations of both the public and private sector stakeholders participating in the initiative. Likewise, PPP institutional structures must also be open and well-defined. This includes the creation of specialised PPP departments or organisations within government that oversee the PPP process and ensure that projects are chosen, assessed and handled in accordance with best practices.

Perhaps a contrast analogy of two projects would help with putting this in perspective:

Nigeria (Aviation): Perhaps the most notable poster child of the effects of weak legal and institutional framework in PPPs is the legal battle between the Federal Airports Authority of Nigeria (FAAN) and the Bi-Courtney Aviation Services Limited (BASL). For 23 years, both parties have bickered over contract duration, ownership of the General Airport Terminal (GAT), the exclusivity clause in the contract and BASL's payment to FAAN, the Grantor. Over the years, the conflict has disrupted operations at MMA II, causing significant losses to BASL.

A court ruling dated 3rd March, 2009 held that the "Federal Government and its agents/agencies (including but not limited to the NCAA, NAMA, and FAAN) are bound by the provisions of the Concession Agreement executed on 24th April, 2003 with the Plaintiff in respect of the MMAII." As of this writing, the parties are currently in court regarding the concession tenure and right over the operation of the GAT. Although many other factors led to the two-decade showdown, analysts agree that the absence of an infrastructure regulatory body at the time of the government's agreement with BASL contributed to the misunderstandings. The Infrastructure Concession Regulatory Commission (ICRC) was established in 2008, five years after the initial contract.

USA (Rail): While on the flip side, The East Link Light Rail (ELLR) project in Seattle, Washington State, USA, remains a shining example of project success buoyed by a proper legal and institutional framework. Scheduled to open in 2024, the $3.7 billion project was developed as a partnership between Sound Transit, a public

transit agency, and private companies including Jacobs Engineering Group, Kiewit Infrastructure West, and others. The goal was to construct a 22-kilometer light rail line to connect Seattle, Bellevue and Redmond, providing residents with a faster and more efficient public transit option. A range of federal and state laws and regulations also led to its success. Some of them include the Federal Transit Administration's New Starts program, which provides funding for transit projects that satisfies certain conditions and the Washington State Growth Management Act, which promotes efficient land use and transportation planning. More so, the partnership was governed by several legal agreements, including a memorandum of understanding that outlined the roles and responsibilities of the public and private partners and a design-build contract that established the scope of work and timelines for the project.

The existing institutional framework also played a critical role in the ELLR's success. The project was overseen by a joint Sound Transit and private sector project team, which provided expertise and guidance throughout the planning and construction process. And this team was supported by a range of other stakeholders, including local governments, community groups and transit riders.

1East Link Light Rail (ELLR) in Seattle. Source: Wikipedia

Today in Nigeria, the ICRC develops and implements the Federal Government's PPP framework in Nigeria. Its personnel, many of whom are Certified Public-Private Partnership Professionals (CP3P), are trained to handle complex PPP undertakings.

More so, its training arm, the Nigeria Institute of Infrastructure and Public Private Partnership (NII3P) provides a variety of capacity building programmes for project divisions in several Ministries, Departments and Agencies, as well as other private practitioners. The ICRC has, time and again, had some members of its staff as resource persons at the Institute.

However, where competence and experience is not so lacking, it is safe to allow such agencies ample regulatory room to exercise their powers in ways that safeguard the interest of the Nigerian Government in any PPP arrangement. One way to do this is by passing into law the proposed Public Private Partnership Regulatory Commission Bill 2022. When passed into law, the bill would enable the Commission to "impose sanctions or appropriate penalties to ensure compliance with the provisions of the law, regulations or guidelines issued by the Commission".

The powers to imposes sanctions also comes with an enhanced supervisory role to "regulate the participation of the public and private sectors in the financing of construction, development, designing, operation or maintenance of infrastructure, service or development projects of the federal government through public private partnership arrangements; and for related matters". In July 2022, the Nigerian Senate passed the Bill. It awaits concurrence by the House of Representatives.

2. Project Selection and Evaluation

In my opinion, this is the most important step in regulating PPPs. A thorough selection and evaluation process saves developing economies from so-called white elephant projects; projects whose cost of use far outweigh their socioeconomic and environmental benefits. A proper selection process involves identifying potential PPP projects that meet the public sector's infrastructure and service delivery needs and evaluating them against a set of predefined criteria. The process must be transparent and objective, with clear guidelines and criteria for evaluating potential projects. One key factor in project selection is to identify projects that are suitable for PPPs from those that are not. PPPs are most appropriate for projects that have clear revenue streams, long-term demand and a clear public benefit. Whereas, projects that are unsuitable for PPPs, such as those with uncertain revenue streams or significant social or environmental risks, should not be executed as PPPs.

Once potential PPP projects have been identified, they must be subjected to a thorough evaluation process. This involves assessing the project's financial, technical, social and environmental feasibility and comparing it to other procurement options. The evaluation process should be transparent, objective and based on sound analytical methods, such as cost-benefit analysis or risk analysis.

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Sri Lanka (Telecommunications): A clear example is the Lotus Tower standing 309m on the Colombo skyline in Sri Lanka. Built to house 50 TV stations, 35 Radio stations and 20 telecom service providers, the $113 million tower is unsuitable as a communications facility as waves cannot cover the island or bypass the Hanthana mountains, critics say. As of late 2022, the Lotus Tower Management Company said it would open its observation deck to the public to minimise losses. But it remains closed due to safety concerns.

Lotus Tower is one of several elephant projects from the Rajapaksa regime ousted in November 2022. Infamous for embarking on what experts call "misplaced projects," the regime has been criticised for its convoluted procurement processes, which ignore transparent selection and evaluation criteria.

USA (Utilities): This was not the case in the San Francisco Public Utilities Commission (SFPUC) Biosolids Digester Facility project, in California, USA. It involved a partnership between the San Francisco Public Utilities Commission and private firm Synagro Technologies, Inc, to construct a facility for processing biosolids into usable fertilizer and renewable energy. Biosolids are leftovers from wastewater treatment.

The project owes its success largely to the rigorous selection and evaluation process involved to identify the partnership opportunity. Before kickoff, SFPUC conducted a comprehensive analysis of its biosolids management needs and determined that a public-private partnership was the best option for meeting those needs. To select a suitable project partner, the SFPUC then conducted a competitive procurement process. The procurement process included a detailed evaluation of potential partners based on technical expertise, financial capability and experience with similar projects. Synagro Technologies, Inc. was eventually selected as the partner based on its strong proposal and track record.

3. Risk Management

There is no PPP regulation without the management of risks. PPP projects involve significant risks, both for the public and private sector parties involved. They range from construction risks, such as delays and cost overruns, and operational risks, such as changes in demand or revenue. PPP projects can also have significant social and environmental risks, such as negative impacts on communities or the environment.

Effective risk management involves identifying, assessing and mitigating these risks. No doubt, this requires a thorough understanding of the risks involved in the project, and a clear allocation of risk between both sector parties involved.

Sadly, in some cases, the public sector tends to allocate the bulk of the risk to the implementing private sector partner. This diminishes trust and engenders a defensive approach that may ultimately undermine the project. Risk allocation should be based on a thorough analysis of the risks involved and should be transparent and equitable.

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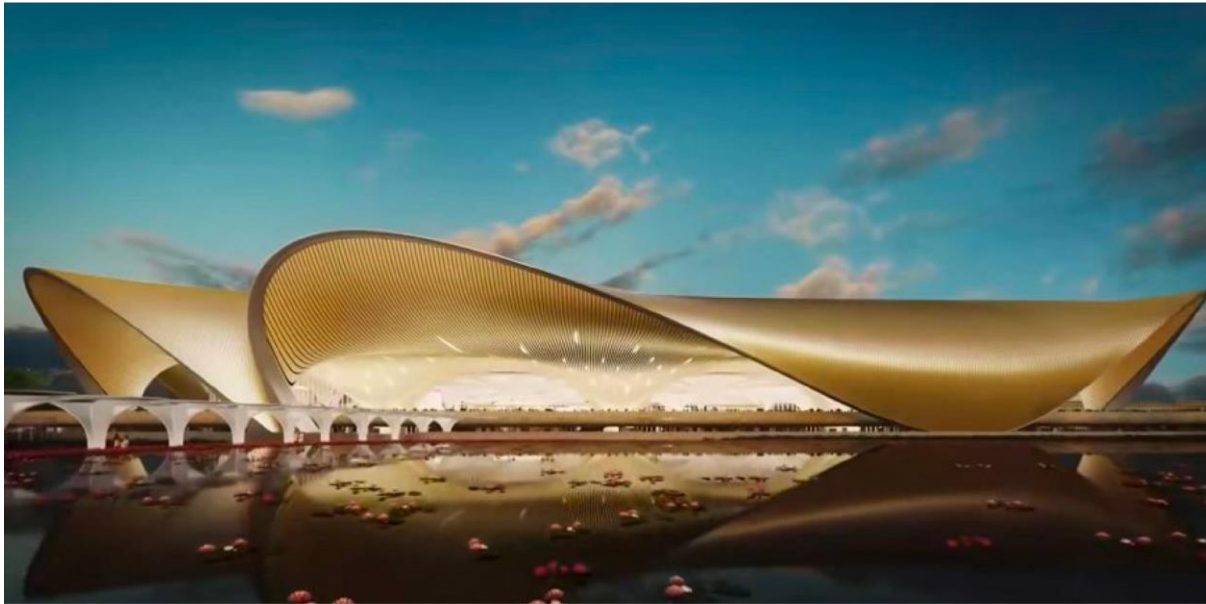

Navi Mumbai International Airport in India Source: https://marathon.in/infrastructure/navi-mumbai-airport/

India (Aviation): No one understands this better than the consultants who first worked on the $2.2 billion Navi Mumbai International Airport in India. This was a joint venture between the Airports Authority of India (AAI) and a consortium led by GVK Power and Infrastructure Limited. The goal? To construct a new airport to serve one of India's busiest cities.

However, the project was ill-fated from the start. Buffeted by land acquisition disputes, environmental concerns and delays in obtaining vital clearances from regulatory bodies, the ensuing delays and cost overruns have seen the project's estimated cost rise from the original estimate of $2.2 billion to over $4.2 billion.

The 2008 global economic meltdown also impacted the project, leading to a shortage of funds for the consortium and delays in securing finance. However, these factors were only amplified by the consortium's poor risk management, which underestimated the challenges and risks involved in the project. Therefore, it failed to implement effective risk mitigation strategies, leading to significant delays and cost overruns, ultimately making the project economically unviable.

In 2019, the AAI terminated the contract with the consortium to complete the airport construction in 2024. When completed, Navi Mumbai would have spent 17 years from approval to completion.

Rwanda (Utilities): On the other end of this spectrum is the Kigali Bulk Water Supply Project in Rwanda. This project was a partnership between the Government

of Rwanda and a private sector consortium led by Metito, a global water management company. The project aimed to provide reliable and sustainable water supply to the rapidly growing city of Kigali, which was facing severe water shortages. KBWS owes its success in large part to the effective risk management strategies that were put in place.

The project team conducted a comprehensive risk assessment and developed a risk management plan that identified potential risks and established strategies for mitigating them. To further mitigate risk, the partnership also established clear roles and responsibilities, established procedures for decision-making and conflict resolution, and established mechanisms for sharing risk and reward equitably.

Kigali Bulk Water Supply (KBWS) Project. Source: Ewandan Ministry of Infrastructure

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4. Contract Management

PPP projects involve complex legal and financial arrangements. They also require detailed contracts that set out the roles, responsibilities and obligations of the public and private sector parties. Therefore, effective contract management is essential to ensuring proper implementation and that projects are delivered according to the terms of the contract.

Perhaps a contrast analogy of two projects would help with putting this in perspective:

…To be concluded in Q1 2023 Bulletin.

Endnotes

i. https://punchng.com/minister-rejects-proposal-seeking-to-establish-new-agencies/

ii. https://www.afdb.org/en/news-and-events/press-releases/african-development-bank-sets-course-close-infrastructure-gap-board-approval-its-first-public-private-partnerships-strategic-framework-48875

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. . . (Continued from Q4 2022

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For context, effective contract management involves several key undertakings which include:

1) **Contract monitoring and performance management**: This involves monitoring the performance of the private sector party and ensuring that they are meeting their obligations under the contract.
2) **Dispute resolution:** PPP contracts often involve complex legal and financial arrangements, creating enough avenue for disputes between governments and private entities.
3) **Establish Clear Objectives and Standards**

   The first stage in successfully regulating PPP projects is to create clear project goals and standards. These goals and standards must be defined at the start of the undertaking and must be in the public's interest.

   Clear goals and standards will help to ensure that the project fulfills the requirements of the community it serves, is cost-effective and produces the desired results. In establishing objectives and standards for a PPP project, regulators must ask:

   a) What are the key project goals?
   b) How will the host community benefit from the project?
   c) What benchmarks should we use to measure project success?
   d) How would we finance the project, and what are the risks associated with the financing?

With these questions settled, regulators must work alongside project stakeholders to develop clear objectives and standards to guide development and evaluation by:

4) Establishing Clear Roles and Responsibilities

Here, the regulators identify the roles and responsibilities of the public entity, the private entity and any third-party contractors or consultants involved in the project.

ICRC DG Mr Michael Ohiani leads delegation of staff and members of the Public Private Partnership Units Consultative Forum (3PUCF) on a Monitoring Visit to Lekki Deep Seaport - July 2022

Clear roles and responsibilities ensure that all stakeholders understand their respective obligations and work together to achieve that. Conflicts of interest are largely minimised when every stakeholder is accountable for their actions.

5) Establishing Effective Governance Structures

Effective governance structures ensure the regulation of PPP projects in ways that maximise their benefits and minimises risks. Such structures must be designed to provide oversight and accountability for all aspects of the project, including its financing, construction and operation.

An effective governance structure for PPP projects must include clear lines of authority and decision-making responsibilities; regular reporting and monitoring mechanisms; effective dispute resolution procedures; independent oversight and evaluation mechanisms; establishing effective governance structures for PPP projects can help prevent corruption; ensure transparency and accountability; and build public trust in the project.

6) Due Diligence

Due diligence involves a thorough assessment of the private entity's financial and operational capacity, as well as an analysis of the project's potential risks and benefits. It covers the financial capacity of the private entity; operational capacity of the private entity; risk assessment and management; legal and regulatory compliance; environmental and social impact assessment.

Effective due diligence helps regulators to identify potential issues and risks associated with a PPP project and take appropriate measures to mitigate them.

7) Ensure Transparency and Accountability

PPP initiatives require substantial public and corporate resources. As a result, public access to details about the project's funding, construction and operation is critical.

Regulators can ensure transparency and responsibility by requiring all project papers, including PPP projects are used to fund and deliver public infrastructure and services.

Figure 2Abuja-Kaduna Rail Infrastructure

8) Legal and Institutional Framework

The legal and institutional structure is the foundation of all successful PPP regulation. The legal structure must define the rights and duties of the parties and provide systems of conflict resolution. The institutional structure must define tasks and obligations of the various stakeholders' and ensure that they have the required ability to carry out those responsibilities.

In addition, the legislative and administrative structure must guarantee that the PPP initiative is in line with the national development strategy and policies. The PPP should reflect one or more of the government's objectives and must also define the parameters for project selection and the procurement procedure.

9) Risk Allocation

Due to the substantial financial, technological and operational risks involved in PPP projects, effective regulation ensures that such risks are equitably shared among all its partners.

Risk allocation must be founded on a thorough examination of the project's risks and the parties' capacity to handle them. As a general rule of thumb, the private partner takes up risks that it can handle better than the public sector and vice versa. For instance, the public sector stands a better chance to overseeing political and regulatory hazards because they are better handled by the government.

10) Effective Monitoring and Evaluation

When the Federal Government launched its monitoring and evaluation blueprint for the NDP, it was creating an avenue for effective regulation of PPP components of the plan. Periodic monitoring and evaluation ensure that PPP projects are meeting their objectives and delivering the expected outcomes. It must be based on clear and measurable performance indicators which are aligned with the project objectives. These objectives must also be reviewed and updated regularly for relevance.

Conclusion

The Agenda 2063, the African Continental Free Trade Agreement and other broad developmental initiatives all carry an infrastructural component. Africa needs infrastructure to develop, but it cannot develop without infrastructure. It's a Catch-22.

To overcome this dilemma, the continent and its states must build robust regulatory mechanisms that attracts the trust of the private sector and citizens' confidence. More PPP projects will crop out of Africa in the coming decades. Therefore, effective regulation is required to ensure their delivery. This would necessarily require a clear legal and institutional framework, appropriate risk allocation, transparent procurement processes and effective monitoring and evaluation.

Endnotes

i. https://punchng.com/minister-rejects-proposal-seeking-to-establish-new-agencies/

ii. https://www.afdb.org/en/news-and-events/press-releases/african-development-bank-sets-course-close-infrastructure-gap-board-approval-its-first-public-private-partnerships-strategic-framework-48875

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viii. https://sfpuc.org/about-us/news/san-francisco-public-utilities-commissions-biosolids-digester-facilities-project

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