EXAMINING PUBLIC PRIVATE PARTNERSHIP IN NIGERIA: POTENTIALS AND CHALLENGES

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MAY 2011.

CERTIFICATION

This is to certify that this long essay: PUBLIC PRIVATE PARTNERSHIP IN NIGERIA: POTENTIALS AND CHALLENGES was written by EGBEWOLE QASIM AFOLABI. It has been read and approved as meeting part of the requirements for the award of Bachelor of Law (LL.B Hons.) Degree in Common Law in the Faculty of Law, University of Ilorin, Ilorin, Nigeria.

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ABSTRACT

Public Private Partnership has been said to be a long term agreement between a government agency and a private partner for the delivery of goods or services with both party sharing in the risks and rewards inherent in the delivery of the goods or service which include financial risks and responsibilities.

Public Private Partnership is an answer to the high demand for infrastructure which is at an all time high which is not being currently met by traditional contracting methods. Private companies in conjunction with the Public sector or one of its branches have therefore introduced this solution which provide a more integrated financial design construction, maintenance and operational solution to infrastructure projects.

This long essay shall therefore examine in its chapter one introduction of Public Private Partnership in Nigeria, aims and objectives of the study, scope of study, methodology, definition and literature review, this chapter will be the basis for other chapters.

Chapter two will highlight the origin of public private partnership, it will also look at the importance and nature of public private partnership i.e. the meaning and significance of PPP. This chapter will include the types of PPP and how they operate

Chapter three will deal with the advantages of PPP, how it improves and helps in the growth of infrastructure, the opportunities which are opened by PPP, this chapter will be examining the benefits of PPP and why PPP is a better choice. Chapter four will appraise the problems which can be encountered during PPP operation e.g. problem of fund, cultural problems e.t.c.

Chapter five will deal with the conclusion, summary and recommend some needed law reforms that will ensure the achievement of Public Private Partnership objectives in Nigeria.

TABLE OF CONTENTS

COVER
PAGE……………………………………………………………………………..i

CERTIFICATION PAGE…………………………….................................ii

ABSTRACT……………………..……………………………………………….iii

TABLE OF CONTENTS…………………………………….………………..iv-vii

DEDICATION…………………………………………………………………viii

ACKNOWLEDGEMENT……………………………………………………........ix

TABLE OF STATUTES…………………………………………..………....x

LIST OF ABBREVIATIONS……………………………………………………xi-xii

CHAPTER 1

GENERAL INTRODUCTION

1.0.0: INTRODUCTION…………………………………………………………1-4

1.1.0: BACKGROUND OF THE STUDY………………………………………5

1.2.0: OBJECTIVES OF STUDY…………………………………………….....5

1.3.0: FOCUS OF STUDY…………………………………………………..5-6

1.4.0: SCOPE OF STUDY…………………………..……............................6

1.5.0: METHODOLOGY…………………………………………………………6

1.6.0: LITERATURE REVIEW…………………………………………………7-9

1.7.0: DEFINITION OF TERMS………………………………………………9-10

1.8.0: CONCLUSION……………………………..…………………………..10

CHAPTER TWO

HISTORICAL BACKGROUND OF PUBLIC PRIVATE PARTNERSHIP IN NIGERIA

2.0.0: INTRODUCTION…………………………………………………………11

2.1.0: IMPORTANCE OF PUBLIC PRIVATE PARTNERSHIP…………….11-14

2.2.0: NATURE OF PUBLIC PRIVATE PARTNERSHIP…………………….14-30

2.3.0: TYPES OF PUBLIC PRIVATE PARTNERSHIP………………………30-31

2.3.0.1: BUILD OPERATE TRANSFER (BOT) OR BUILD TRANSFER OPERATE (BTO)…………………………………..……………………………………..31

2.3.1.1: BUILD OWN OPERATE (BOO)…………………………..……….32

2.3.1.2: BUY-BUILD OPERATE (BBO)…………………………………………32

2.3.1.3: CONTRACT SERVICES OPERATIONS AND MAINTENANCE…32

2.3.1.4: OPERATIONS, MAINTENANCE, & MANAGEMENT……………32-33

2.3.1.5: DESIGN-BUILD (DB)………………………………..……………33

2.3.1.6: DESIGN-BUILD-MAINTAIN (DBM)……………………………..33-34

2.3.1.7: DESIGN-BUILD-OPERATE (DBO)…………………………………34

2.3.1.8: DEVELOPER FINANCE……………………………………………35

2.3.1.9: ENHANCED USE LEASING (EUL)………………………………35

2.3.2.0: LEASE/DEVELOP/OPERATE (LDO) OR BUILD/DEVELOP/OPERATE (BDO)……………………..…………………………………………………36

2.3.2.1: LEASE/PURCHASE…………………………………………..36

2.3.2.2: SALE/LEASEBACK …………………………………………37

2.3.2.3: TAX-EXEMPT LEASE……………………………………..37

2.3.2.4: TURNKEY…………………………………………………...337-37

2.4.0: CONCLUSION…………………………………………………...38

CHAPTER THREE

ADVANTAGES OF PUBLIC PRIVATE PARTNERSHIP

3.0.0: INTRODUCTION…………………………..……………………….39-41

3.1.0: THE NEED FOR PUBLIC PRIVATE PARTNERSHIP AS A CATALYST FOR ECONOMIC DEVELOPMENT……………………………………41-44

3.2.0: DEVELOPMENT OF INFRASTRUCTURE……….……………..…44-50

3.3.0: OPPORTUNITIES/BENEFITS OF PUBLIC PRIVATE PARTNERSHIP…………………………………...…………………..50-53

3.4.0: CONCLUSION……………………………………………………54

CHAPTER FOUR

PROBLEMS/CHALLENGES OF PUBLIC PRIVATE PARTNERSHIP

4.0.0: INTRODUCTION……………………………………………………………55

4.1.0: PROBLEMS AND CHALLENGES…………………….……………….55-63

4.2.0: REGULATORY ISSUES……………………………………..……....63-65

4.3.0: LEGAL ISSUES……………………………………………………..65-70

4.4.0: FUNDING ISSUES……………………………………………..……70-71

4.5.0: POLITICAL ISSUES………………………………………………..71-72

4.6.0: CULTURAL ISSUES……………………………………………..…72

4.7.0: CONCLUSION……………………………………………………..……73

CHAPTER FIVE

GENERAL CONCLUSION

5.0.0: CONCLUSION…………………………………………………………………74

5.1.0: RECOMMENDATION……………………………………………........74-75

BIBLIOGRAPHY

ARTICLES ON THE INTERNET…………………………………………….......…76-77

PAPERS PRESENTED AT CONFERENCES, WORKSHOPS AND SEMINARS ………………………………………………………………….....77-78

DICTIONARY…………………………………………………………………..78

DEDICATION

This work is dedicated to Almighty **ALLAH** for his infinite mercies, benevolence, forgiveness, guidance and enlightenment.

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I give thanks to Almighty Allah for his unconditional love and mercies, without whom, i am nothing.

My special love goes to my lovely parents Dr and Mrs Egbewole who have always been there for me, love and have guided me. May God keep them on to reap the fruit of their labour.

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TABLE OF STATUTES

Infrastructure Concession Regulatory Commission (Establishment e.t.c.) Act 2005

LIST OF ABBREVIATIONS

ADR: Alternative Dispute Resolution

BTO: Build Transfer Operate

BBO: Buy Build Operate

BOT: Build Operate Transfer

BOO: Build Own and Operate

BOT: Build Operate and Transfer

BOOT: Build Own Operate Transfer

BDO: Build Develop Operate

CBO: Community Based Organizations

DB: Design Build

DBM: Design Build Maintain

DBO: Design Build Operate

DBFO: Design Building Finance Operate

EUL: Enhanced Use Leasing

FAAN: Federal Airport Authority of Nigeria

FDI: Foreign Direct Investments

ICRC: Infrastructure Concession Regulatory Commission

LDO: Lease Develop Operate

MBO: Management Buyout

MMA: Muritala Muhammed Airport

NGO: Non Governmental Organizations

O&M: Operation and Maintenance

OECD: Organization for Economic Cooperation and Development

PPP/ P3: Public Private Partnership

PFI: Private Finance Initiatives

PPA: Power Purchase Agreements

SPV: Special Purpose Vehicle

U.K: United Kingdom

US: United States

VfM: Value for Money

VA: Veterans Affairs

WPA: Water Purchase Agreements

CHAPTER ONE

GENERAL INTRODUCTION

1.0.0: INTRODUCTION

Public Private Partnership is a contractual arrangement which is formed between public and private sector partners which involve the private sector in the development, financing, ownership, and or operation of a public facility or service. In such a partnership, public and private resources are pooled and responsibilities divided so that the partners' efforts are complementary. The private sector partner usually makes a substantial cash or equity investment in the project and the public sector gains access to new revenue or service delivery capacity,[1] and this arrangement between the public and private sector differ from service contracting[2].

Public-Private partnerships relate to perceptions and practices affecting public private sector relationships in ensuring national/global health, development and well-being of the society, and the conceptual aspects of such relationships, including the role of the key players in collaborating to make these partnerships successful or otherwise.

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[1]Dr. Babalakin B. O. Public Private Partnership: 'Infrastructure Development as a vehicle for Economic Development' (being a paper presented at the 2nd Mustapha Akanbi Public Lecture organized by the Faculty of Law University of Ilorin pg 6.)

[2] Service Contracting will be limited to the provision of service with no ownership interest accruing to the private sector.

Though no single, universally accepted definition for public-private partnerships, PPP are often termed to mean different things to different people, which can make assessing and comparing international experience in such partnerships difficult. In general, PPP refers to form of cooperation between public authorities and the private sector to finance, construct, renovate, manage, operate or maintain an infrastructure or service. At their core, all PPP involve some form of risk sharing between the public and private sector to provide the infrastructure or service. The allocation of sizable and, at times significant, elements of risk to the private partner is essential in distinguishing a PPP from the more traditional public sector model of public service delivery. There are two basic forms of PPP: contractual and institutional. Although institutional PPP have been quite successful in some circumstances, particularly in countries with well-developed institutional and regulatory capacities, contractual PPP are significantly more common, especially in developing economies.

Although there is no universal consensus about the definition of public-private partnerships, the following elements typically characterize a PPP: The infrastructure or service is funded, in whole or in part, by the private partner. Risks are distributed between the public partner and private partner and are allocated to the party best positioned to manage each individual risk. PPP are complex structures, involving multiple parties and relatively high transaction costs. PPP is a procurement tool where the focus is payment for the successful delivery of services (the performance risk is transferred to the private partner).

PPP is an output-/performance-based arrangement as opposed to the traditional input-based model of public service delivery where the focus is payment for the successful delivery of services. PPP typically involve bundled services (i.e., design, construction, maintenance and operation) to increase synergies and discourage low-capital/high operating-cost proposals. In general, PPP offer a new and dynamic approach to managing risk in the delivery of infrastructure and services. Although PPP is considered a new concept that has gained prominence in the last 20 years, PPP have actually been around for hundreds of years, wherever the private sector has been involved in the delivery of traditional public services (i.e., water, roads, rail and electricity).

In PPP arrangements, the private partner is typically compensated through either: User-based payments (i.e., toll roads, airport or port charges) Availability payments from the public authority [i.e., PFI, power purchase agreements (PPAs), water purchase agreements (WPAs)] A combination of the above in user-based payment structures, the government or public authority often needs to provide some financial support to the project to mitigate specific risks, such as demand risk, or to ensure that full cost recovery is compatible with affordability criteria and the public's ability to pay. Government support mechanisms can take many forms, such as contributions, investments, guarantees and subsidies, but they should be carefully designed and implemented to allow for optimal risk allocation between the public and private sectors. When government supports are present, the objective is to increase private capital mobilization per unit of public sector contribution. Availability payments are at the heart of one form of PPP, the

PFI model. This system provides capital assets for the provision of public services. Developed in the U.K., this model is used for a large number of infrastructure projects and gives the private sector strong incentives to deliver infrastructure and services on time and within budget. PFIs simultaneously allow governments and public authorities to spread the cost of public infrastructure projects over several decades. This creates greater budget certainty, while also liberating scarce public resources for other social priorities. Government Support Mechanisms hosting governments can provide financial support to or reduce the financial risk of a project in many ways. Common forms of government support mechanisms include: Cash subsidy: The government or public authority agrees to provide a cash subsidy to a project. It can be a total lump sum or a fixed amount on a per unit basis, and payments can be made either in installments or all at once. Payment guarantee: The government agrees to fulfill the obligations of a purchaser (typically a publicly owned enterprise) with respect to the private entity in the case of non-performance by the purchaser. The most common example of this is when a government guarantees the fixed payment of an off-take agreement (e.g., PPA or WPA) between a private entity and the publicly owned enterprise. Debt guarantee: The government secures a private entity's borrowings by guaranteeing repayment to creditors in case of default. Revenue guarantee: The government sets a minimum variable income for the private partner; typically this income is from customer user fees. This form of guarantee is most common in roads with minimum traffic or revenue set by a government

1.1.0: BACKGROUND TO THE STUDY

Public private partnership arose as a medium for infrastructure development, i.e. to make available adequate infrastructure through public private partnership's development.

Public private partnership can be said to be a crossover from the normal contracting of projects to private personnel to develop a particular project which the government will pay such private personnel for the provision of such projects and which may not later be fully completed. Here, essence of PPP is to see to the successful development of infrastructure by the contribution and collaboration of both the public and private sectors.

1.2.0: OBJECTIVES OF STUDY

The average Nigerian is suspicious of PPP and is usually of the belief that it is a means of transferring power or control of the nation among a favored few, they refuse to see and appreciate the burden encountered by the private sector and public in ensuring the availability of a lasting and well functioning infrastructure which can better and faster be achieved through PPP. It is therefore expected that the result of this study is to enlighten and or educate those persons ignorant of what PPP is actually about and its mode of operation.

1.3.0: FOCUS OF STUDY

This essay is going to focus on the historical background of PPP, types, nature and importance of public private partnership. It shall also focus on how infrastructure is

developed by PPP and also the advantages and problem faced by public private partnership.

1.4.0: SCOPE OF STUDY

Public private partnership can be said to be a recent development which must be tread on so softly. PPP being a recent development is thus a delicate area of study, so this research will carefully examine widely the gains and benefits of PPP.

The center of concentration being the effects PPP will have in a particular locality i.e. its advantages and disadvantages where it is being practiced and also how it helps in the provision of needed and necessary infrastructure

1.5.0: RESEARCH METHODOLOGY

Public Private Partnership is a recent development and there are certain steps to be put in place and or taken to successfully carry out a public private partnership contracts.

Textbooks dealing on this topic are hard to come by, thus the primary sources of information are materials downloaded from the internet, paper presentation, published and unpublished articles which have all been of immense benefit to this essay.

This essay is analytical and expository in nature and which shall attempt to shed light on gray and unpopular areas of PPP.

1.6.0: LITERATURE REVIEW

This topic is both academic and practical considering the vital role public private partnership plays and expected to play in the society, for example it is an avenue which allows the government to be of constructive use and benefit to the public.

As earlier said, there is shortage of books on PPP which therefore led to the use of paper presented, articles, publications, materials downloaded on the internet for use in the compilation and research on this essay.

DR. B. O. Babalakin[3] has explained some knotty issues on public private partnership with Muritala Muhammed Airport' rehabilitation used as a case study drawing from experiences of the concessionaire, he in the paper discussed on general problems of PPP e.g. Funds, ability of the concessionaire to get loans e.t.c. The paper also discussed infrastructure development and it defined infrastructure to mean 'structural elements of an economy that facilitate the flow of goods and services between buyers and sellers'[4]. It also defined it as 'the basic public works of a city or subdivision, including roads bridges...'[5].

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[3]Dr. Babalakin B. O. 'Public Private Partnership: Infrastructure Development as a Vehicle for Economic Development' (being a paper presented at the 2nd Mustapha Akanbi Public Lecture organized by the Faculty of Law University of Ilorin)

[4] Ibid pg4

[5] Ibid pg4

The article on public private partnership by wikipedia[6] has summarily described the origin and history of PPP, its importance e.t.c. It was said that PPP arose due to pressure to change the standard model of public procurement which arose initially from concerns about the level of public debt, which grew rapidly during the macroeconomic dislocation of the 1970s and 1980s. Governments sought to encourage private investment in infrastructure, initially on the basis of accounting fallacies arising from the fact that public accounts did not distinguish between recurrent and capital expenditures.

The article further stated that the idea that private provision of infrastructure represented a way of providing infrastructure at no cost to the public has now been generally abandoned; however, interest in alternatives to the standard model of public procurement persisted. In particular, it has been argued that models involving an enhanced role for the private sector, with a single private-sector organisation taking responsibility for most aspects of service provisions for a given project, could yield an improved allocation of risk, while maintaining public accountability for essential aspects of service provision.

Initially, most public–private partnerships were negotiated individually, as one-off deals. In 1992, however, the Conservative government of John Major in the United Kingdom introduced the private finance initiative (PFI), the first systematic programme aimed at encouraging public–private partnerships. The 1992 programme focused on reducing the Public Sector Borrowing Requirement, although, as already noted, the effect on public

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[6]public private partnership <www.wikipedia.org/publicprivatepartnership> Accessed on 12 February 2010

accounts was largely illusory. The Labor government of Tony Blair, elected in 1997, persisted with the PFI but sought to shift the emphasis to the achievement of "value for money," mainly through an appropriate allocation of risk.

It should be of note that many more unmentioned materials have been of great contribution to this essay, also is oral discussions with legal practitioners and law students alike which of course cannot all be mentioned but has been of help in this essay.

1.7.0: DEFINITION OF PUBLIC PRIVATE PARTNERSHIP

Public private partnership has been defined as arrangements between governments and private sector entities for the purpose of providing public infrastructure, community facilities and related services. Such partnerships are characterized by the sharing of investment, risk, responsibility and reward between the partners[7].

Public private partnership has also been defined by the Canadian council for PPP as co-operative venture where there is an allocation of the risks inherent in the provision of public service between the public and private sectors[8]

[7] Public private partnership; A guide for Local Government prepared by the British Colombia Ministry of Municipal Affairs, May 1999.

[8] U. S. Pant, Chief controller of Accounts. Ministries of Urban Development; Urban employment & Poverty Alleviation, Government of India Relevance of public private partnership in public construction being a paper presented at the International conference in New Delhi;150 years of the CPWD.

Partnership has been defined by the Encarta Dictionary to mean 'the relationship between two or more people or organizations that are involved in the same activity'.

Infrastructure is defined as the large-scale public systems, services, and facilities of a country or region that are necessary for economic activity including power and water supplies, public transportation, telecommunications, roads, and schools[9].

1.8.0: CONCLUSION

The concept of public private partnership has been explained in this chapter, the fact that public private partnership is on a class of its own which includes the public and private sector together to put in place PPP. Thus subsequent chapters of this essay will further explain the issues raised in this chapter and how exactly PPP works.

[9] Microsoft Encarta 2009. 1993-2008 microsoft corporation.

CHAPTER TWO

HISTORICAL BACKGROUND OF PUBLIC PRIVATE PARTNERSHIP IN NIGERIA

2.0.0: INTRODUCTION

Public-Private Partnership is a long-term contractual agreement between a government agency and a private partner for the delivery of goods or services. As partners, each party shares in the potential risks and rewards inherent in the delivery of the goods or service, including financial risks and responsibilities, and quality assurances for the taxpayer. Public-Private Partnerships are not privatizations because the government entity involved in the agreement retains control and ownership of the project.

The essence of a public private partnership is to improve infrastructural provision in a region or particular place which of course is needed to provide for the citizens and or for supplementary development which can be through the different modes of public private partnership

2.1.0: IMPORTANCE OF PUBLIC PRIVATE PARTNERSHIP

The development of infrastructure is arguably the single most important factor for economic development as infrastructural facilities are the wheels on which any economy runs and it provides the enabling environment for sustained economic growth and wealth.

In Nigeria, it is unarguable that the country suffers from a huge deficit of infrastructure and the infrastructure which is available is not being satisfactorily utilized.

The late President Musa Yar'Adua recently announced that the country needs more than US $19 trillion to provide the needed adequate infrastructure in Nigeria and the aggregate estimate for federation account receipts for the year 2009 was N4.529 trillion which is approximately US$3 billion and Nigeria's annual GDP of approximately US$300 billion is less than 2% of this figure. The foreign reserves which rose to an all time high of about US$62 billion in 2008 and is now less than US$50 billion is approximately an insignificant .

The World Bank recommends that 7-9 percent of the GDP of developing countries like Nigeria should be invested in infrastructure while. The exact figure invested in infrastructure annually though not accurate, it is unlikely that Nigeria has ever attained the recommended percentage and this is especially so considering the fact that 7-9 percent of the Nigeria's is almost equivalent to the gross annual revenues of government from which recurrent and other non-infrastructure related capital expenditure is incurred.

In the light of the above stated, it is evident that the government alone even at the best of times can't afford to provide infrastructural requirements which is needed for the economic development of a country, thus there is the call for the intervention of the private sector. Public private partnership is therefore a necessary and important instrument for the attainment of sustainable economic development.

In most countries, the rationale to undertake projects e.g. e-government and ICT are compelling. All levels of government require modernization, new technologies, better efficiency, and improved services for citizens and customers. However, many of the upgrades and modernization required is not only capital intensive and expensive, but is also complex to manage and outside of the scope and skill-set of most government agencies. By having the private sector perform an e-government or ICT service, on behalf of the government, a potential "win-win" solution can be realized where the private sector finances and operates a system, the government is in a better position to "ensure" effective delivery of the service, and the customer/citizen is receiving a higher quality service and is engaged more constructively in customer interfaces with the public sector.

In Nigeria and other developing countries, sustainable access to healthcare and other socio-economic services and products can be accomplished through public-private partnerships, where the government delivers the minimum standard of services, products and or care, the private sector brings skills and core competencies, while donors and business bring funding and other resources. Such collaborations will be especially productive in promoting poverty alleviation through micro-finance, enhancing health through partnerships as has been the case with polio eradication and other child immunization efforts.

The contribution of PPP in the society cannot be underestimated as it is useful in almost all aspects of life for example PPP can be useful in high priority projects as it helps in

accelerating the implementation of these projects for which the administrations have a lack of funds also is the fact that PPP encourages very rapid provision and less expensive. PPP is all encompassing as it is even useful in economy solutions because it helps boost economic growth through the investment of the private sector.

2.2.0: NATURE OF PUBLIC PRIVATE PARTNERSHIP

Public private partnership, said to be a contractual relationship in which government services or a private business venture is funded and operated through a partnership between the government and one of its agencies and one or more private sector companies.

Basically, public private partnership is a long term commitment to make available new or renovate old and non-functioning infrastructure which the government or its agencies deliver essential services to the public and the use of Public-Private Partnerships (PPPs) in production and distribution of some goods and services is inevitable for attainment of sustainable development. There is a need therefore to forge and promote strong, efficient, effective, sustainable, dynamic and vibrant PPPs so that the private sector can produce and deliver some goods and services hitherto (and now in most parts of Africa) produced and delivered by the public sector.

The public sector has been the main actor in the development process of most countries in Africa and beyond until the mid 1980s. The sector was the main actor in production

and distribution of goods and services in most economies, especially those that embraced centrally planned economic policies, like Tanzania. The commanding heights of these economies were directly owned and managed by the public sector. From the following, the winds of change in the form of many and far-reaching social, political and economic reforms, the role of the public sector in the development process have substantially changed in many countries. Its role now is mainly that of a facilitator for the private sector-led economic development and growth. The role of the private sector in bringing about sustainable development in most economies has increasingly been recognized and acknowledged.

Given the changing roles of the public and private sectors in the bid to bring about sustainable development in most countries, it is no longer sustainable for the public sector to continue to own, manage and operate the commanding heights of the economy. Efficient and effective production and distribution of goods and services is, and should increasingly be left to private sector. Private sector-led economic growth and development, is generally more efficient (both productive and allocative efficiencies) and effective. The sector is more dynamic, resilient, creative, innovative and vibrant than the public one. However, this sector is purely profit-oriented as it embraces the concept of free interplay of the market forces of supply and demand in the production and distribution of goods and services. There is therefore likely to be some market failures in the production and/or distribution of some goods and services. These services therefore will not be available or if available will only be accessible by the rich who can pay for

them. The use of Public-Private Partnerships (PPPs) in production and distribution of some goods and services is inevitable for attainment of sustainable development. There is a need therefore to forge and promote strong, efficient, effective, sustainable, dynamic and vibrant PPPs so that the private sector can produce and deliver some goods and services hitherto (and now in most parts of Africa) produced and delivered by the public sector.

INFRASTRUCTURE:

It has been said that there is no clear cut definition for infrastructure but recognition has been placed on what it is and what it is not, thus infrastructure has been said to be the structural elements of an economy that facilitate the flow of goods and services between buyers and sellers.[10]

Infrastructure has also been said to be public services or systems i.e. the large-scale public systems, services, and facilities of a country or region that are necessary for economic activity, including power and water supplies, public transportation, telecommunications, roads, and schools.[11]

Infrastructure has been further defined by the Infrastructure Concession Regulatory Commission to include among others power plants, highways, seaports, airports, dams,

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[10] The Macmillan Dictionary of Modern Economics (1996)

[11] Microsoft Encarta Dictionaries 2009. © 1993-2008 Microsoft Corporation.

irrigation, telecommunications, railways, interstate transport systems, industrial estates, housing, information technology networks and database infrastructure, satellite and ground receiving stations, land reclamations projects.[12]

Infrastructure is the basic physical and organizational structures needed for the operation of a society or enterprise[13], and in Sullivan & Sheffrin's Economics: Principles in Action, Infrastructure was defined to be the services and facilities necessary for an economy to function[14].

Infrastructure has further been defined by the American Heritage Dictionary to typically refer to the technical structures that support a society, such as roads, water supply, sewers, power grids, telecommunications, and so forth. Viewed functionally, infrastructure facilitates the production of goods and services; for example, roads enable the transport of raw materials to a factory, and also for the distribution of finished products to markets. In some contexts, the term may also include basic social services such as schools and hospitals[15].

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[12] Section 36 Infrastructure Concession Regulatory Commission (Establishment) Act 2005

[13] Online Compact Oxford English Dictionary, http://www.askoxford.com/concise_oed/infrastructure Accessed 17 January 2009

[14] Sullivan, Arthur; Steven M. Sheffrin (2003). Economics: Principles in action. Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. pp. 474. ISBN 0-13-063085-3.

[15] Infrastructure, American Heritage Dictionary of the English Language, (http://education.yahoo.com/reference/dictionary/entry/infrastructure) Accessed January, 2009

CONCESSIONS

Concession has been defined as the act or instance of conceding as by granting something as a right, accepting something as true or acknowledging defeat[16]. It has further been described to be a business operated under a contract or license associated with a degree of exclusivity in business within a certain geographical area. For example, sports arenas or public parks may have concession stands. Many department stores contain numerous concessions operated by other retailers. Similarly, public services such as water supply may be operated as concessions.

The owner of the concession the 'concessionaire' pays either a fixed sum or a percentage of revenue to the entity with the ability to assign exclusive rights for an area or facility. A concession may involve the transfer to the concessionaire of the right to use some existing infrastructure required to carry out a business (such as a water supply system in a city); in some cases, such as mining, it may involve merely the transfer of exclusive or non-exclusive easements.

In the case of a public service concession, a private company enters into an agreement with the government to have the exclusive right to operate, maintain and carry out investment in a public utility (such as a water supply system) for a given number of years. Other forms of contracts between public and private entities, namely lease contract

[16] http://www.merriam-webster.com/dictionary/concession Accessed 7 May 2011

and management contract are closely related but differ from a concession in the rights of the operator and its remuneration. A lease gives a company the right to operate and maintain a public utility, but investment remains the responsibility of the public. Under a management contract the operator will collect the revenue only on behalf of the government and will in turn be paid an agreed fee.

Ownership of public assets is a sensitive issue for all governments. However, budgetary shortfalls as well as the repeated failure of governments all over the world to maintain these assets have forced them to change their attitude towards private ownership of such assets. As a result, policymakers have devised various ways in which the private sector can be brought in to maintain and operate public assets. Thus, concession contracts, through which ownership rights continue to reside with public authorities save operation rights and associated returns being transferred to private players, have been gaining popularity around the world. Under concession contract, private partner gets exclusive rights from the government to operate, maintain and sometimes even carry out investment in a public utility for a given period of time. In return, the private party pays either a fixed sum, a percentage of revenue from the utility or a combination of the two to the government for exclusive rights over a facility. Revenue to the private party comes from the user fee charged to users of the facility. There are different types of concession contracts, including: ex-leasing, franchise, build operate- transfer (BOT) etc. Private finance initiatives (PFIs) may also be considered similar to concessions. The major

advantage of a concession is that it allows certain public assets, for which private ownership is economically inefficient and politically not possible, to be maintained and operated efficiently by private players. Bidding for concession contracts introduces competition into the industry, albeit in an artificial sense. Such competition often induces private players to minimize cost, as one of the criteria used for awarding a concession is price cap regulation, in which they need to state the minimum price they would charge for services provided. Finally, in concession, competition between firms occurs before investment commitment that generally creates enough space for optimal pricing.

On the negative side, concessions require complex design and monitoring systems: thus, they are difficult to implement. Moreover, it is not possible for a concession contract to cover all uncertainties involved; this implies that fixing one price over the period of contract often turns out to be unviable and creates space for renegotiation and its abuse. Furthermore, there are no incentives for the private party to maintain the facility well or undertake necessary investment towards the end of the contract period.

Concession contracts are typically defined by the following four features:

- The contract governs the relationship between the concession-granting authority and the private concessionaire. The concession-granting authority is the government, an inter-ministerial commission, or less common – and the least appropriate – the regulatory agency.

- The concession is awarded for a limited but potentially renewable period, during which concessionaire enjoys the exclusive right to use the assets, exploit existing facilities, and develop new ones. The contract determines conditions under which concessionaire uses these facilities and the prices at which it provides the service. The facility continues to be publicly owned.
- The concessionaire is responsible for all investments and for developing all new facilities, many of which are specified in the contract – under the supervision of state or regulator. The concessionaire retains control and use rights over the new assets until they are handed over at the expiration of the contract. The contract might contain a clause specifying compensation for investments not fully amortized by the end of the concession period, and clauses specifying causes and remedies for early termination of contract and stating penalties and fines for non-compliance with agreed upon terms.
- The concessionaire is remunerated based on contractually established tariffs (with appropriate guidelines for review and adjustment) collected directly from users. These prices are typically regulated through rate-of-return or price-cap mechanisms, usually driven by the principle of "efficient financial equilibrium" – allowing the firm to earn a fair rate of return on its investments. If revenues do not cover costs, compensation mechanisms are established.

Given a wide range of settings in which they are used, concessions are often far more complicated than these basic features suggest. Concession contracts also usually contain

other obligations and rights that require regular regulatory oversight in monitoring compliance, reconciliation of interpretations, adjustment of tariffs in the event of contingency, periodic tariff reviews, and renegotiation of triggers and terms. The government's role thus involves setting rules for competition at the bidding stage and enforcing terms of agreement and compliance with regulations"[17]

Generally, the awarding process has to be competitive to ensure efficiency. The common trend is to follow a competitive bidding process. However, in some exceptional situations the government has to go for direct award of the concession or through bilateral negotiations. Thus, there are two ways of awarding concession – direct award and competitive bidding.

Bilateral negotiation is considered to be less efficient compared to competitive bidding as the concessionaire selected through this process may not be the best available in terms of ability to manage the given public asset. He may not be the one likely to pay the highest concession fee or charge the most efficient rent from the consumer. Therefore, 'bilateral negotiations' to award concessions should be avoided, except when there is only one candidate for a concession. Competitive bidding is the most commonly followed practice throughout the world, and is used to find the most efficient firm in the market. The process starts with some pre-qualification of potential buyers based on financial and

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[17] J. Luis Guasch, "Granting and renegotiating Infrastructure Concessions Doing it Right" WBI Development Studies, pg 27.

technical criteria that reduce the number of bidders, but at the same time lower the risk of non-compliance by a defective bidder. However, when compared to bilateral negotiations, competitive bidding is associated with a higher probability of renegotiation. This is because bidders under a competitive bidding process often tend to quote tariffs that are less than the long run marginal cost of providing the service. As a result, they often try to renegotiate tariff levels during the contract period.

Once the concession is awarded through competitive bidding, next stage is the selecting concessionaire, which is based on an open competitive bidding. After specifying important parameters (technical and non-technical), the short listed bidders are asked to bid on various factors depending on the nature of the project. For instance, under highway projects, bidders are allowed to bid on the amount of grants sought by them and one who states the lowest amount wins the bid. If the crucial variable is the concession fee, then the one who states the highest concession fee is the winner. And if the project is on a revenue sharing basis, then the bidder, who offers the highest revenue, share will be the winner. In some projects a bidder who asks for the lowest amount of subsidy for the concession period gets the tender if certain other conditions are satisfied.

Other criteria used are minimum duration of the concession, largest investment value, minimum total revenue, largest number of retained workers, and the best overall proposal etc. Sometimes multiple criteria are also used to select the concessionaire. In such cases, combinations of two or more criteria are used in selecting the concessionaire.

Concession period is determined by factors, which are project specific such as capacity of the asset to generate revenue, user tariffs, total investment, depreciation and operation and maintenance cost of the asset etc. For example, in port related projects, determining factors for the length of concession would be the capacity of the port terminal to handle cargo and average demand for port services. In case demand is uncertain in nature, a long concession period is preferred to mitigate the risk.

Concession period usually reflects the number of years required to recover the investment. For long duration concessions, fixing a particular time period for full amortization is usually not feasible as infrastructure services require continuous investments that cannot be predicted well in advance; investments almost always must be made toward the end of the contract and cannot be amortized before its expiration.

Operation and Maintenance (O&M) of the project is one of the most important factors in determining quality of services to be delivered. While the concessionaire is responsible for O&M throughout the project life, government does monitor these activities to ensure quality of service.

O&M is also important because the asset at the end of the project needs to be given back to government in the same condition as it was at the time of starting of the operation or even in an improved form.

Returning the asset back to the government in good condition is a crucial stipulation of the concession agreement. Once quality of the asset is ensured, government can either take over the asset or go for re-bidding. In India for example, most projects based on concession agreements are either at a preliminary stage or halfway through their concession periods.

There is hardly any information available on projects, for which the first concession period is over. As a result, there is not much awareness about however exactly reversal of assets is carried out in infrastructure projects.

However, some questions are still to be explored: what happens to the asset once the government takes it over? How does the government decide which assets will go for rebidding and which ones will be run by the government itself? How does the government ensure quality of service when it takes over the assets?

Variables that are negotiated at the time of the bidding process have wide implications for the reversal of assets that occur at the end of the concession contract. Therefore, it is important that the concession contracts are designed efficiently and effectively to ensure better quality of services not only at the beginning or during the concession contract, but also towards the end and thenceforth.

PUBLIC PRIVATE PARTNERSHIPS (PPPs)

Public - Private Partnership (PPP) is, conceptually, collaboration between public and private sector organizations in public service delivery as provided by the Commonwealth Local Government handbook[18]. Four groups of actors have been provided as being relevant in PPPs. These are: the Government; Non Governmental Organizations (NGOs), Community Based Organizations (CBOs); and the private sector. Also PPPs management systems and techniques are of different varieties and these are:

- Contracting Out which is the placing of a contract by a public agency to an external private company.
- Franchising/Concession: A private partnership takes over responsibility for operating a service and collecting charges and possibly for funding new investments in fixed assets.
- Affermage: Public authority controls construction and owns the fixed assets but contracts out operations, maintenance and collecting service charges.
- Leasing: Making use of equipment/assets without purchasing but paying a lease.
- Privatization: Public service is entirely sold to a private partner.

[18] Commonwealth (2003). 'Public – Private Partnerships: A Review with Special Reference to Local Government' in Commonwealth Local Government Handbook. KPL. Rochester

    - Management contract: Private organization takes over responsibility for managing a service to specified standard by using staff, equipment etc, of public authority.
    - Build Own and Operate (BOO): Partnership between public and private sectors whereby the private firm may build, own and operate the asset/service.
    - Build Operate and Transfer (BOT): Same as BOO but the asset/service will be transferred to the public sector after a period of time.
    - Management Buyout (MBO): The management of well run internal functions negotiates the purchase of that function and becomes a private venture.
- Co-operatives: Self governing voluntary organizations designed to serve the interest of their members, working in partnership with public authorities.

The most commonly practiced form of PPP is contracting out. According to Sohail[19], there are no strict PPPs classification that can be made, because partnership classification depends on the type of services, the nature and strengths of the partners and the objectives of the PPPs. Partnerships are basically institutional arrangements which constitute rules defining the relationships that govern the partnerships, roles, responsibilities and accountability mechanisms (formal or implied). The overall aim of PPP is to meet public needs, which would not have been realized without joint efforts. Through PPPs, inter-alia, the public sector will be able to maintain partial ownership and management of services, avoid accusations of

[19] Sohail, M., Plummer, J., Slater, R., and Heymans, C., 'Local Government Service Partnerships: A Background'. (Commonwealth Local Government Conference. Pretoria, South Africa 2003)

“whole sale” transfer of service delivery to the private sector and at the same time be effective in its role of political accountability to its constituents.

PPP & COMMUNITY SERVICE DELIVERY:

The condition of community services provision and availability in Africa is generally poor. Services provided are inferior and financing system for infrastructure increase, maintenance and repair is inadequate. These problems are exacerbated by rapid urbanization. Effective and efficient urban for infrastructure and services provision are important in delivering major benefits in economic growth, poverty alleviation, environmental sustainability and sustainable development in general. African countries need to improve basic services such as water, sanitation, waste management, transport infrastructure, health services etc so as to meet the needs of more people. Better service delivery is crucial for sustainable growth, development and poverty reduction. It increases people’s standards of living and contributes to sustainable development.

Public sector provision of these services however has proved to be inadequate and unsustainable due to, inter-alia, the nature of the public sector. Until very recently the sector has been typically characterized by inefficiency and lack of effectiveness, leading to poor performance. This in turn can be attributed to many closely inter-linked and self-reinforcing characteristics of the sector like political interference; unclear objectives; limited operational autonomy; inadequate managerial skills vis a vis technical, human, conceptual and design skills; inadequate accountability and transparency; heavy and cumbersome bureaucracy; poor

workers' morale; inappropriate economic settings; inadequate capital and lack of appreciation of the free inter-play of the market forces of supply and demand. Such a sector therefore is inadequate in the whole exercise of effectively, efficiently and sustainably producing, rendering and improving the needed quantity and quality of goods and services.

The private sector therefore can be seen as the next best and more sustainable alternative. The private sector is more effective and efficient; it appreciates and embraces more the market forces of supply and demand; is less bureaucratic; more dynamic and vibrant; is the current predominant global ideology and a viable engine of growth and sustainable development. The sector however is first and foremost profit motivated. It would not embark in producing and distributing goods and services where there is no direct economic/pecuniary profitability. For example, the sector will not invest in some services and infrastructure, however important for the community they are perceived to be, if the net pecuniary gain is not positive. There will therefore be market failure in the production and distribution of such services.

The private sector in most of the African countries in general and Tanzania in particular is still in its infancy. Many African countries embarked on socialist policies after independence. It is only recently; that some of these countries changed the socialist ideologies in the wake of the new wave of change to more market- and therefore private sector-led economy. On top of the infancy of the private sector in the region, the sector is relatively very small in size and capital base, especially so for the indigenous, as opposed to the foreign (in form of Foreign

Direct Investments – FDIs) private sector. The former is likely to lack adequate experience, skills, knowledge and exposures needed to provide and expand the quantities and qualities of goods and services needed in a sustainable manner.

One option in facing the challenges above is to enhance the role of both the public and private sectors in owning, financing and management/operation of the production and distribution of goods and services. Consequently, Private Public Partnerships (PPPs) is, and should increasingly be viewed as a 5 mechanism to provide state functions and municipal goods and services on a cost effective and sustainable basis.

In PPPs, the public sector is publicly accountable and responsible for ensuring that the needs of different sections of the population are treated equitably. The public sector has the responsibility to ensure that any contract awarded is actually the best option to reach optimum value for tax payers' money. They must make sure that they do not create a private monopoly situation. The private sector is responsible to its clients, shareholders, and owners.

2.3.0: TYPES OF PUBLIC PRIVATE PARTNERSHIP:

There can be several different types of P3's which form a spectrum, in terms of risk allocated differently between the private and public sector partnership

Build-operate-transfer (BOT), build-own-operate (BOO), build-own-operate-transfer (BOOT), design-building-finance-operate (DBFO) and similar arrangements are contracts specifically designed for new projects or investments in facilities that require extensive

rehabilitation. Under such arrangements, the private partner typically designs, constructs and operates facilities for a limited period from 15 to 30 years, after which all rights or title to the assets are relinquished to the government. Under a build-operate-own (BOO) contract, the assets remain indefinitely with the private partner. The government will typically pay the BOT partner at a price calculated over the life of the contract to cover its construction and operating costs, and provide a reasonable return.

2.3.0.1: BUILD/OPERATE/TRANSFER (BOT) ORBUILD/TRANSFER/OPERATE (BTO):

The private partner builds a facility to the specifications agreed to by the public agency, operates the facility for a specified time period under a contract or franchise agreement with the agency, and then transfers the facility to the agency at the end of the specified period of time. In most cases, the private partner will also provide some, or all, of the financing for the facility, so the length of the contract or franchise must be sufficient to enable the private partner to realize a reasonable return on its investment through user charges.

At the end of the franchise period, the public partner can assume operating responsibility for the facility, contract the operations to the original franchise holder, or award a new contract or franchise to a new private partner. The BTO model is similar to the BOT model except that the transfer to the public owner takes place at the time that construction is completed, rather than at the end of the franchise period.

2.3.1.1: BUILD-OWN-OPERATE (BOO):

The contractor constructs and operates a facility without transferring ownership to the public sector. Legal title to the facility remains in the private sector, and there is no obligation for the public sector to purchase the facility or take title. A BOO transaction may qualify for tax-exempt status as a service contract if all Internal Revenue Code requirements are satisfied.

2.3.1.2: BUY-BUILD OPERATE (BBO):

BBO is a form of asset sale that includes a rehabilitation or expansion of an existing facility. The government sells the asset to the private sector entity, which then makes the improvements necessary to operate the facility in a profitable manner.

2.3.1.3: CONTRACT SERVICES OPERATIONS AND MAINTENANCE:

A public partner (federal, state, or local government agency or authority) contracts with a private partner to provide and/or maintain a specific service. Under the private operation and maintenance option, the public partner retains ownership and overall management of the public facility or system.

2.3.1.4: OPERATIONS, MAINTENANCE, & MANAGEMENT

A public partner (federal, state, or local government agency or authority) contracts with a private partner to operate, maintain, and manage a facility or system proving a service.

Under this contract option, the public partner retains ownership of the public facility or system, but the private party may invest its own capital in the facility or system. Any private investment is carefully calculated in relation to its contributions to operational efficiencies and savings over the term of the contract. Generally, the longer the contract term, the greater the opportunity for increased private investment because there is more time available in which to recoup any investment and earn a reasonable return. Many local governments use this contractual partnership to provide wastewater treatment services.

2.3.1.5: DESIGN-BUILD:

A DB is when the private partner provides both design and construction of a project to the public agency. This type of partnership can reduce time, save money, provide stronger guarantees and allocate additional project risk to the private sector. It also reduces conflict by having a single entity responsible to the public owner for the design and construction. The public sector partner owns the assets and has the responsibility for the operation and maintenance.

2.3.1.6: DESIGN BUILD MAINTAIN:

A DBM is similar to a DB except the maintenance of the facility for some period of time becomes the responsibility of the private sector partner. The benefits are similar to the

DB with maintenance risk being allocated to the private sector partner and the guarantee expanded to include maintenance. The public sector partner owns and operates the assets.

2.3.1.7: DESIGN BUILD OPERATE:

A single contract is awarded for the design, construction, and operation of a capital improvement. Title to the facility remains with the public sector unless the project is a design/build/operate/transfer or design/build/own/operate project. The DBO method of contracting is contrary to the separated and sequential approach ordinarily used in the United States by both the public and private sectors. This method involves one contract for design with an architect or engineer, followed by a different contract with a builder for project construction, followed by the owner's taking over the project and operating it.

A simple design-build approach creates a single point of responsibility for design and construction and can speed project completion by facilitating the overlap of the design and construction phases of the project. On a public project, the operations phase is normally handled by the public sector under a separate operations and maintenance agreement. Combining all three passes into a DBO approach maintains the continuity of private sector involvement and can facilitate private-sector financing of public projects supported by user fees generated during the operations phase.

2.3.1.8: DEVELOPER FINANCE:

The private party finances the construction or expansion of a public facility in exchange for the right to build residential housing, commercial stores, and/or industrial facilities at the site. The private developer contributes capital and may operate the facility under the oversight of the government. The developer gains the right to use the facility and may receive future income from user fees.

While developers may in rare cases build a facility, more typically they are charged a fee or required to purchase capacity in an existing facility. This payment is used to expand or upgrade the facility. Developer financing arrangements are often called capacity credits, impact fees, or extractions. Developer financing may be voluntary or involuntary depending on the specific local circumstances.

2.3.1.9: ENHANCED USE LEASING (EUL):

An EUL is an asset management program in the Department of Veterans Affairs (VA) that can include a variety of different leasing arrangements (e.g. lease/develop/operate, build/develop/operate). EULs enable the VA to long-term lease VA-controlled property to the private sector or other public entities for non-VA uses in return for receiving fair consideration (monetary or in-kind) that enhances VA's mission or programs

2.3.2.0: LEASE DEVELOP OPERATE (LDO) OR BUILD DEVELOP OPERATE (BDO):

Under these partnerships arrangements, the private party leases or buys an existing facility from a public agency; invests its own capital to renovate, modernize, and/or expand the facility; and then operates it under a contract with the public agency. A number of different types of municipal transit facilities have been leased and developed under LDO and BDO arrangements.

2.3.2.1: LEASE PURCHASE:

A lease/purchase is an installment-purchase contract. Under this model, the private sector finances and builds a new facility, which it then leases to a public agency. The public agency makes scheduled lease payments to the private party. The public agency accrues equity in the facility with each payment. At the end of the lease term, the public agency owns the facility or purchases it at the cost of any remaining unpaid balance in the lease.

Under this arrangement, the facility may be operated by either the public agency or the private developer during the term of the lease. Lease/purchase arrangements have been used by the General Services Administration for building federal office buildings and by a number of states to build prisons and other correctional facilities.

2.3.2.2: SALE LEASEBACK:

This is a financial arrangement in which the owner of a facility sells it to another entity, and subsequently leases it back from the new owner. Both public and private entities may enter into sale/leaseback arrangements for variety of reasons. An innovative application of the sale/leaseback technique is the sale of a public facility to a public or private holding company for the purposes of limiting governmental liability under certain statues. Under this arrangement, the government that sold the facility leases it back and continues to operate it.

2.3.2.3: TAX EXEMPT LEASE:

A public partner finances capital assets or facilities by borrowing funds from a private investor or financial institution. The private partner generally acquires title to the asset, but then transfers it to the public partner either at the beginning or end of the lease term. The portion of the lease payment used to pay interest on the capital investment is tax exempt under state and federal laws. Tax-exempt leases have been used to finance a wide variety of capital assets, ranging from computers to telecommunication systems and municipal vehicle fleets.

2.3.2.4: TURNKEY:

A public agency contracts with a private investor/vendor to design and build a complete facility in accordance with specified performance standards and criteria agreed to

between the agency and the vendor. The private developer commits to build the facility for a fixed price and absorbs the construction risk of meeting that price commitment. Generally, in a turnkey transaction, the private partners use fast-track construction techniques (such as design-build) and are not bound by traditional public sector procurement regulations. This combination often enables the private partner to complete the facility in significantly less time and for less cost than could be accomplished under traditional construction techniques.

In a turnkey transaction, financing and ownership of the facility can rest with either the public or private partner. For example, the public agency might provide the financing, with the attendant costs and risks. Alternatively, the private party might provide the financing capital, generally in exchange for a long-term contract to operate the facility.

2.4.0: CONCLUSION:

This chapter has discussed the importance of public private partnership where it stated how it is useful for the development of the society by developing infrastructure. The chapter has also explained the nature of PPP and shows how it works explaining the concept of concessioning which is an important aspect of PPP. The chapter went further to enumerate the types of public private partnership which are available for partnership projects between the public and private sector depending on that which particularly goes best with the project at hand.

CHAPTER THREE

ADVANTAGES OF PUBLIC PRIVATE PARTNERSHIP

3.0.0: INTRODUCTION:

Infrastructure is the basic physical and organizational structures needed for the operation of a society or enterprise,[20] or the services and facilities necessary for an economy to function.[21] The term typically refers to the technical structures that support a society, such as roads, water supply, sewers, electrical grids, telecommunications, and so forth. Viewed functionally, infrastructure facilitates the production of goods and services; for example, roads enable the transport of raw materials to a factory, and also for the distribution of finished products to markets and basic social services such as schools and

hospitals.[22] In military parlance, the term refers to the buildings and permanent installations necessary for the support, redeployment, and operation of military forces.[23]

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[20]'Infrastructure' Online Compact Oxford English Dictionary, http://www.askoxford.com/concise_oed/infrastructure accessed 17 January, 2009

[21]Sullivan, arthur; Steven M. Sheffrin. Economics: Principles in action. Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. pp474 ISBN 0-13-063085-3http://www.pearsonschool.com/index.cfm?locator=PSZ3R9&PMDbSiteId=2781&PMDbSolutionId=6724&PMDbCategoryId=&PMDbProgramId=12881&level=4. Accessed 12 March 2009

[22]'Infrastructure', American Heritage Dictionary of the English Language, http://education.yahoo.com/reference/dictionary/entry/infrastructure accessed 17 January, 2009)

Encompassing all things to all people is hardly a useful way to define infrastructure – clouding investors, governments, and their citizens' ability to understand, advocate, and direct capital toward durable, networked assets with widespread societal benefits. Primary infrastructure components are generally monopolistic in nature and require large financial commitments for their development, repair and replacement. They can be built, touched, enabled, disabled, and function together to form interrelated, dependent systems that deliver needed commodities and services to society. In doing so, they facilitate economic productivity and promote a standard of living. Infrastructure can then be more concisely defined as 'the physical components of interrelated systems providing commodities and services essential to enable, sustain, or enhance societal living conditions'[24].

The development and maintenance of essential public infrastructure is an important ingredient for sustained economic growth and poverty reduction. Poor infrastructure is perhaps the most binding constraint to growth throughout the Asia-Pacific region. Infrastructure investment can lift economic growth and support social objectives.

Health, education, and efficient water and sanitation services help lay the groundwork for

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[23] ' Infrastructure' JP1-02, Department of Defense Dictionary of Military and Associated Terms, p. 260, 12 April 2001 rev. 31 August 2005 http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA439918&Location=U2&doc=GetTRDoc.pdf accessed 17 January, 2009

[24] Fulmer, Jeffrey. 'What in the world is infrastructure?' PEI Infrastructure Investor (July/August): 30–32.

a more productive, healthy population capable of contributing to sustained economic growth. Likewise transport infrastructure improves access to services and markets in rural areas.

3.1.0: THE NEED FOR PUBLIC PRIVATE PARTNERSHIP AS A CATALYST FOR ECONOMIC DEVELOPMENT:

Public Private Partnership (PPP) Project means a project based on a contract or concession agreement, between a Government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges.

Private Sector Company means a company in which 51% or more of the subscribed and paid up equity is owned and controlled by a private entity

While there is no single definition of PPPs, they broadly refer to long-term, contractual partnerships between the public and private sector agencies, specifically targeted towards financing, designing, implementing, and operating infrastructure facilities and services that were traditionally provided by the public sector. These collaborative ventures are built around the expertise and capacity of the project partners and are based on a contractual agreement, which ensures appropriate and mutually agreed allocation of resources, risks, and returns.

PPPs do not mean reduced responsibility and accountability of the government. They still remain public infrastructure projects committed to meeting the critical service needs of citizens. The government remains accountable for service quality, price certainty, and cost-effectiveness (value for money) of the partnership. Government remains actively involved throughout the project's life cycle. Under the PPP format, the government role gets redefined as one of facilitator and enabler, while the private partner plays the role of financier, builder, and operator of the service or facility. PPPs aim to combine the skills, expertise, and experience of both the public and private sectors to deliver higher standard of services to customers or citizens. The public sector contributes assurance in terms of stable governance, citizens' support, financing, and also assumes social, environmental, and political risks. The private sector brings along operational efficiencies, innovative technologies and managerial effectiveness, access to additional finances, and construction and commercial risk sharing.

Not all projects with private sector participation are PPP projects. Essentially, PPPs are those ventures in which the resources required by the project in totality, along with the accompanying risks and rewards/returns, are shared on the basis of a predetermined, agreed formula, which is formalized through a contract. PPPs are different from privatization. While PPPs involve private management of public service through a long-term contract between an operator and a public authority, privatization involves outright sale of a public service or facility to the private sector. A typical PPP example would be a toll expressway project financed and constructed by a private developer.

A PPP project is essentially based on a significant opportunity for the private sector to innovate in design, construction, service delivery, or use of an asset. To be viable, PPPs need to have clearly defined outputs, avenues for generating nongovernmental revenue, and sufficient capacity in the private sector to successfully deliver project objectives.

In a PPP, the 'private' partner could be a private company, a consortium, or a nongovernmental organization (NGO). Typically, a PPP project involves a public sector agency and a private sector consortium which comprises contractors, maintenance companies, private investors, and consulting firms. The consortium often forms a special company or a 'special purpose vehicle' (SPV). The SPV signs a contract with the government and with the subcontractors to build the facility and then maintain it.

The PPP is operationalized through a contractual relationship between a public body (the conceding authority) and a private company (the concessionaire). This partnership could take many contractual forms, which progressively vary with increasing risk, responsibility, and financing for the private sector. These contracts are usually financed by user fees or tariffs or government subsidies.

The public sponsor of the PPP decides the degree of private participation required for the particular project. This decision is usually based on the government's objectives of undertaking the project, the degree of control it desires, and the ability of the PPP consortium to deliver the required service. It is also influenced by the provisions of the

existing legal and regulatory framework, the structuring of the project to attract private resources, and the potential to generate future cash flows.

PPPs often involve complex planning and sustained facilitation. Infrastructure projects such as roads and bridges, water supply, sewage and drainage involving large investment, long gestation period, poor cost recovery, and construction, social, and environmental risks. When infrastructure is developed as PPPs, the process is often characterized by detailed risk and cost appraisal, complex and long bidding procedures, difficult stakeholder management, and long-drawn negotiations to financial closure. This means that PPPs are critically dependent on sustained and explicit support of the sponsoring government. To deal with these procedural complexities and potential pitfalls of PPPs, governments need to be clear, committed, and technically capable to handle the legal, regulatory, policy, and governance issues.

3.2.0: DEVELOPMENT OF INFRASTRUCTURE:

According to etymology online,[25] the word infrastructure has been used in English since at least 1927 and meant: The installations that form the basis for any operation or system. Other sources, such as the Oxford English Dictionary, trace the word's origins to earlier usage, originally applied in a military sense. The word was imported from the French language, where it means *subgrade*, the native material underneath a constructed

[25] Online Etymology Dictionary. Douglas Harper, Historian. http://dictionary.reference.com/browse/infrastructure, Accessed: 7 May 2011

pavement or railway. The word is a combination of the Latin prefix "infra", meaning "below" and "structure". The military use of the term achieved currency in the United States after the formation of NATO in the 1940s, and was then adopted by urban planners in its modern civilian sense by 1970.[26]

The term came to prominence in the United States in the 1980s following the publication of *America in Ruins* (Choate and Walter, 1981), which initiated a public-policy discussion of the country's "infrastructure crisis", purported to be caused by decades of inadequate investment and poor maintenance of public works.

That public-policy discussion was hampered by lack of a precise definition for infrastructure. A U.S. National Research Council panel sought to clarify the situation by adopting the term "public works infrastructure", referring to:

> "...both specific functional modes - highways, streets, roads, and bridges; mass transit; airports and airways; water supply and water resources; wastewater management; solid-waste treatment and disposal; electric power generation and transmission; telecommunications; and hazardous waste management - and the combined system these modal elements comprise. A comprehension of infrastructure spans not only these public works facilities, but also the operating procedures, management practices, and development policies that interact together with societal demand and the physical world to facilitate the transport of people and goods, provision of water for drinking

[26] The Etymology of Infrastructure and the Infrastructure of the Internet, Stephen Lewis on his blog Hag Pak Sak, posted September 22, 2008. http://hakpaksak.wordpress.com/2008/09/22/the-etymology-of-infrastructure-and-the-infrastructure-of-the-internet/ accessed: 17 January, 2008

and a variety of other uses, safe disposal of society's waste products, provision of energy where it is needed, and transmission of information within and between communities."[27]

In Keynesian economics, the word infrastructure was exclusively used to describe public assets that facilitate production, but not private assets of the same purpose. In post-Keynesian times, however, the word has grown in popularity. It has been applied with increasing generality to suggest the internal framework discernible in any technology system or business organization.

Infrastructure is the regional system of public works upon which a society relies. It consists of hospitals, schools, roadways, airports, wastewater treatment/plants, energy plants, housing, etc.

Investments in infrastructure can directly contribute to improving human welfare, economic growth and can therefore be used as a lever to reduce poverty. Inequality not only declines with larger infrastructure stock, but also with the improved quality of infrastructure services. In a way, whether a nation is undeveloped, developing, or mature, they all hold a common characteristic in today's economy: the need to construct, repair, refurbish, and modernize their infrastructure. In developing nations there usually exists a legitimate urge for development, due to its inhabitants lacking basic services with regards to heavy infrastructure provision plans. If, on one hand, the development of infrastructure comes to help; on the other hand, much planning is required to enhance its goal and also

[27]Infrastructure for the 21st Century, Washington, D.C.: National Academy Press, 1987.

to mitigate the possible negative impacts. A massive infrastructure investment, if carried-out the wrong way, can threaten the economic, social and environmental cohesion of a particular area or region.

Further embedded in the legitimate idea of fostering development through the infrastructure business, lays its construction interface. The UK Commission for Architecture and Built Environment stresses that "constructing and running public infrastructure and services account for approximately one third of all carbon emissions" (CABE)[28]. Bearing in mind the speed at which urbanization is proliferating in the world and the impact that new power plants, highways, or airports (among other infrastructure), may bring to particular regions, there is a sense of urgency in introducing sustainable practices into the infrastructure development initiatives, particularly in the construction sector.

However, the first priority in both national and municipal budgets of developing nations is to tackle the recurring insufficient funds situation, which is an essential step to financing their required and desired facilities. Yet, the lack of funds can be so extreme, as it oscillates from time to time, that it does not only constrain new project investment, but it affects the maintenance of present infrastructure. As the World Bank has reported, it is estimated that the maintenance of some existing highway systems in Africa would have

[28] CABE.. 'News: Public building can do more to tackle climate change.' Retrieved 26 March 2007, from http://www.cabe.org.uk/default.aspx?contentitemid=1835. Accessed 26 March 2007

cost US$12 billion over the past decade, whereas reconstruction costs will amount to US$45 billion Levy 1996[29]. Therefore it's cost-efficient to invest in maintenance of highways. This kind of loss in such a key infrastructure sector directly affects the region in achieving economic distinction, and it is a factor that will determine a country's success in economic prosperity.

It was in the last decades that an alternative to public investment has reemerged with full force in the infrastructure development scene and consolidated itself as a possible option for avoiding the constraints of the public sector. One of the solutions found to meet the investment challenge is a broad and evolving arrangement called Public-Private Partnership (PPP), in which governments make use of private capital in social and economic projects. Basically, the idea is that, by the use of private economic interest to provide services that were traditionally fulfilled by public authorities, the private corporation ceases to be only contractors and transforms itself into actors with specific interests and initiatives. Therefore, the private sector participation and know-how shall not only contribute to raising funds for projects, but also, if the process is well-structured and transparent, it contributes to delivering innovative and quality services to society.

The PPP arrangement that, in its contemporary form, was started in the Organization for Economic Cooperation and Development (OECD) countries is now becoming more

[29] Levy, S. M. *Build, Operate, Transfer: Paving the Way for Tomorrow's Infrastructure*, (John Wiley & Sons, Inc.)

popular in other world regions, including the developing nations. The proliferation of the arrangement worldwide seems to be transforming it from a simple alternative to structuring and financing national infrastructure, to a whole new way of seeing infrastructure development in the international development scenario. A further transformation that PPP is passing through is the modernization of its core principles and values. Basically, it is transforming itself from a way to relieve the government's balance sheet to a simpler, but more elaborate, idea of delivering Value for Money (VfM). The Advisory Council of Western Australia writes that the main drives for VfM are: risk transfer, whole life costing, innovation, and asset utilization. These two transformations, anchored in infrastructure development initiatives, and the closeness of the field with the vast construction business, makes the basic understanding of the PPP structure indispensable in assessing the ways in which sustainability ideas can be thought of and incorporated into field practices. However, the particular transformation of delivering VfM, coined in the United Kingdom's (UK) experienced PPP market, does not imply that it would be equally adopted in all arrangements worldwide.

The PPP arrangement and ideas have reached many of the developing regions. In Latin America, it has propagated due to some of the governments' difficulties in raising urgently needed investments for their enterprise. The situation of low capital and investments resulted in inefficient and poor service provisions, which affects economic development in the areas of competitiveness and equity in the region. Longing for investment channels to finance its infrastructure, the Brazilian government is today a

vivid example on the continent, after Chile and Mexico's engagement in PPP arrangements, of a nation that has embraced the private initiative to foster infrastructure development.

3.3.0: OPPURTUNITIES / BENEFITS OF PUBLIC PRIVATE PARTNERSHIP:

Public-Private Partnership is a contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to sharing the resources, each party shares the potential risks and rewards in the delivery of the public service and/ or facility. Sectors where PPPs have been used successfully are transportation, water/ wastewater management, urban planning, infrastructure and utility development, financial management and education.

The Public-Private Partnership projects are long-term partnerships (typical projects have the duration between 20 and 40 years). Another distinctive feature of the PPP projects is the fact that the private partner carries the risk for the invested capital, not the public sector, as it is the case of projects based on outsourcing. PPP projects enable the risk to be optimally spread, and each subject of the partnership to take the risks they are able to manage best.

Another specific characteristic is that, differently from other types of projects where the public sector enters into co-operation with the private sector, the outputs of this co-

operation are defined from the beginning. Therefore, on one side, the public sector exactly specifies the type of the service the private sector has to provide, its quality, the price and the control mechanisms. On the other side, the private sector implements the entire project by ensuring its funding and maintenance. The basic implementation condition of a PPP project is its ability to achieve, from the point of view of the public sector, a greater benefit in relation to the expenditures, compared with the situation when the public sector implements the given project by itself, using its own forces and from its own sources, i.e. respecting the principle of value for money.

The advantages of Public Private Partnerships (PPP's) include the following:

- Speedy, efficient and cost effective delivery of projects.
- Value for money for the taxpayer through optimal risk transfer and risk management.
- Efficiencies from integrating design and construction of public infrastructure with financing, operation and maintenance/upgrading.
- Creation of added value through synergies between public authorities and private sector companies, in particular, through the integration and cross transfer of public and private sector skills, knowledge and expertise.
- Alleviation of capacity constraints and bottlenecks in the economy through higher productivity of labour and capital resources in the delivery of projects.

- Competition and greater construction capacity (including the participation of overseas firms, especially in joint ventures and partnering arrangements).
- Accountability for the provision and delivery of quality public services through performance incentive management/regulatory regime.
- Innovation and diversity in the provision of public services.
- Effective utilization of state assets to the benefit of all users of public services.
- Faster implementation.

The allocation of design and construction responsibility to the private sector, combined with payments linked to the availability of a service, provides significant incentives for the private sector to deliver capital projects within shorter construction timeframes.

BETTER RISK ALLOCATION

A core principle of any PPP is the allocation of risk to the party best able to manage it at least cost. The aim is to optimize rather than maximize risk transfer, to ensure that best value is achieved.

ACCELERATION OF INFRASTRUCTURE

PROVISION: PPP often allows the public sector to translate upfront capital expenditure into a flow of ongoing service payments. This enables projects to proceed when the availability of public capital may be constrained (either by public spending caps or annual budgeting cycles), thus bringing forward much needed investment.

REDUCED WHOLE LIFE COSTS

PPP projects which require operational and maintenance service provision provide the private sector with strong incentives to minimize costs over the whole life of a project, something that is inherently difficult to achieve within the constraints of traditional public sector budgeting.

IMPROVED QUALITY OF SERVICE

International experience suggests that the quality of service achieved under a PPP is often better than that achieved by traditional procurement. This may reflect the better integration of services with supporting assets, improved economies of scale, the introduction of innovation in service delivery, or the performance incentives and penalties typically included within a PPP contract.

BETTER INCENTIVES TO PERFORM

The allocation of project risk should incentivize a private sector contractor to improve its management and performance on any given project. Under most PPP projects, full payment to the private sector contractor will only occur if the required service standards are being met on an ongoing basis.

3.4.0: CONCLUSION:

The essence and benefits of public private partnership can’ be overemphasized and this chapter has been able to deal with those benefits of public private partnership on the community at large. This chapter has also showed the reasonability, effectiveness and efficiency of public private partnership especially through the use of infrastructure in order to develop the community social amenities. It has shown how the private sectors through PPP indirectly contribute to the community.

CHAPTER FOUR

PROBLEMS AND CHALLENGES OF PUBLIC PRIVATE PARTNERSHIP

4.0.0: INTRODUCTION

Despite trillions of dollars provided by the taxpayers in public bailouts and much more in accommodative actions by central banks, financial institutions around the world, including many of those behind Public private partnership projects continue to teeter on the brink of insolvency. It was only effective public nationalization of major banks and financial institutions in a number of countries that managed to save the world's financial system from collapsing around the world thereby almost causing the end of pubic private partnership projects.

4.1.0: PROBLEMS AND CHALLENGES:

In a thoroughly perverse twist, free market economic policies can be linked to the largest public bailouts in history and Nobel-Prize winning economist Joseph Stiglitz has

described it as a "new form of public-private partnership, one in which the public shoulders all the risk, and the private sector gets all the profit"[30]

Public-private partnerships have fundamentally been about giving private investors and financiers high returns with low risks, at the long-term expense of taxpayers and the public. The financial backers of P3s were able to borrow capital at lower rates of interest, thanks in large part to unregulated and often fraudulent activities in financial markets. This narrowed the interest rate spread between private and public sector borrowing rates, allowing P3s to appear more financially attractive than otherwise. They were still a bad deal for taxpayers, but low private sector costs of borrowing meant that faulty accounting didn't have to cover up as much.

These low borrowing rates for the private sector were not based on economic fundamentals or realistic calculations of risk in the private sector. Private financial institutions engaged in systemic cover-ups, miscalculations, and passing on of undisclosed risks to unsuspecting investors. The unregulated financial markets allowed financial speculation to flourish, siphoning funds away from productive investments in the real economy. As a result, the paper economy grew, but real economy stagnated. Then the whole house of cards came crashing down, as a result, private financing costs

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[30] The Problem with Public-Private Partnerships Economic crisis exposes the high costs and risks of P3s by Toby Sanger, Corina Crawley National Office | The Monitor Issue(s): Public services and privatization April 1, 2009

for PPPs have increased and will continue to stay relatively high, while costs of public borrowing have tumbled. This will continue to make PPPs both more costly and more risky for the public.

The spread (difference between public and private sector interest rates) for short-term borrowing rates for example in Canada is now about 100 basis points higher than it was during the five years of easy credit[31]. According to a recent industry report, the spreads for PPP financing have doubled, on average, compared to last year. On a typical project, this increased spread of 100 basis points would increase the cost of financing by about 10% to 15%, or by upwards of $20 million for $100 million over 30 years.

There is no foundation to the claim that the private sector is better at managing risk than the public sector. Virtually all PPPs in Canada have been justified on the basis that they transfer large amounts of risk to the private sector. But a growing list shows that PPPs are both more risky and more costly for the public:

• B.C. Bridges. The financing behind Partnerships B.C.'s flagship Golden Ears Bridge project came close to collapse when its financial backers almost went into default. The German government came to the rescue with a $77 billion bailout of the German-based

[31] A Matter of Time: Will the Credit Crisis Impact Canadian P3s? Daniel Roth, Managing Director Infrastructure Advisory Practice, Ernst and Young. Canadian Council for Public-Private Partnerships. http://www.pppcouncil.ca/pdf/matteroftime.pdf Accessed 22 May 2010

parent of the Irish Depfa Bank. The other financial partner of this project, Dexia, also received a $9.6 billion injection from taxpayers[32].

• Alberta Schools. A key player behind Alberta's P3 schools project has also come close to collapse. Last year, Babcock and Brown Ltd. lost 97% of its stock value while its P3 arm, Babcock and Brown Partnerships Ltd, recently laid off 25% of its staff[33].

In every single project approved so far as a PPP in Ontario, the costs would have been lower through traditional procurement if they had not inflated by these calculations of the value of "risk." The calculations of risk could just as well have been pulled out of thin air – and they are not small amounts. For a number of projects, the estimates of risks transferred inflated the base project costs by over 50%. The total amount of risk supposedly transferred through projects in Ontario has now reached over $1 billion, all based on sketchy calculations. The total cost savings of traditional procurement compared to PPPs for Ontario's projects has now reached well over $500 million if these dubious calculations of risk are excluded.

[32] Ibid pg56

[33] Ibid pg 56

Some examples of excessive costs include:

• Ontario hospitals: Ontario’s Auditor-General recently revealed that the province’s flagship P3 hospital, Brampton Civic, cost the public $200 million more than if it had been publicly financed and built directly by the province.

• East Coast Toll Roads: An estimated more than $300 million in tolls were produced on the Cobequid Pass for a deal in which private financiers put up $66 million. The Nova Scotia government is paying an effective interest rate of 10% for 30 years, twice its rate of borrowing. High fines for using adjacent roads force truckers to use the toll road.

• Universities: A P3 project at the Université de Québec à Montréal failed, doubling the cost to the public from $200 million to $400 million.

• West Coast Highways: B.C.'s Sea-to-Sky Highway will cost taxpayers $220 million more than if it had been financed and operated publicly.

Risks can never be completely transferred through P3s, because governments will always be ultimately accountable for delivering public services and infrastructure.

This responsibility is not changed by expensive and lengthy P3 agreements. If problems arise, it is the public that always has to pick up the bill at the end of the day.

If PPP operators run into problems or don't achieve expected returns, they can just walk away, leaving the public sector to pick up the tab.

• Recreation: The City of Ottawa was forced to bail out two of three of its flagship PPP recreation arena projects in 2007. Both of the parent companies were still very profitable, but wanted even higher returns.

• Water and wastewater: Hamilton's water and wastewater services had to be taken in-house after a string of owners, including an Enron subsidiary, created a financial mess of the PPP, including a raw sewage spill that had to be cleaned up at public expense.

PPP programs in Canada are largely modeled on the U.K.'s "Private Finance Initiative" (PFI), which has its own spectacular failures.

Metronet, the private company that won a £30 billion, 30-year PPP deal to upgrade and maintain London's Tube network, failed and had to be taken over by the City of London's transport authority last year. The Metronet failure has already cost U.K. taxpayers an extra £2 billion (nearly $4 billion Canadian) and left Londoners with 500 subway stations in various states of disrepair for a P3 deal that was forced on their city by the central government under its PFI initiative. And this is just the beginning: costs for the City of London are already expected to grow by an additional £1 billion. Even the normally conservative Economist magazine now admits that these P3 deals now look like "complicated costly mistakes."

Other projects in the U.K., Australia, and New Zealand are in crisis or have been under call for greater oversight.

Governments are under increased pressure to speed up infrastructure investments as an important means of stimulating the economy.

The same factors that make P3s complicated and risky also mean that they usually involve significant delays and high legal and financial costs. This means they are particularly inappropriate for the type of accelerated infrastructure investments that are now required for the economy.

As the U.K. Treasury has advised: ‘A PFI transaction is one of the most complex commercial and financial arrangements that a procurer is likely to face. It involves negotiations with a range of commercial practitioners and financial institutions, all of whom are likely to have their own legal and financial advisors. Consequently, procurement timetables and transaction costs can be significantly in excess of those normally incurred with other procurement options’.

In Vancouver, for instance, the publicly operated and financed Millennium Line rapid transit project started operation three years after the process got under way. In comparison, the P3-financed Canada Line transit project is not expected to be in service until 2009, eight years after B.C. Transit got its process started. Similarly, the Evergreen Line transit line has also been delayed until 2014, at least 10 years after approval.

The recent announcement by the British Columbia government that it has raised the threshold for projects to be considered as a public-private partnership to $50 million in order to accelerate capital investment is a clear acknowledgement that the P3 requirement delays investment, particularly for smaller projects.

Recent failures, bailouts, and excessive costs show that the risk analyses and value-for-money accounting used to justify P3s are clearly flawed and cover up the true costs and risks for the public. Governments in Canada will be forced to rescue or bail out a growing number of P3 projects in the coming years, particularly with harsh and turbulent economic conditions expecting to persist for a several years.

At the same time, private investors will put increasing pressure on governments to increase the number of P3s, since they provide them with long-run, secure, and relatively high returns. But taxpayers who subsidize these high returns should be very concerned.

The current financial and economic crisis didn't just occur because of a number of isolated failures in the financial industry. The unregulated financial markets allowed financial speculation to flourish, siphoning away funds from productive investments in the real economy. As a result, the paper economy grew, but the real economy stagnated with negative or zero rates of productivity growth during recent years.

Public-private partnerships are not just a highly questionable deal for the taxpayers; they also have a negative impact on the economy. The investment banks and funds that are

now heavily promoting P3s would do more good for the economy if they returned to what should be their primary role: financing investments to boost productivity and growth in the languishing private sector economy. Smaller Canadian contractors are squeezed out of access to infrastructure contracts while international firms take public funds sunk into P3 projects out of the country.

Public services and infrastructure are best financed and delivered by the public sector. Private industry has a key part to play in its traditional role of designing and constructing public infrastructure under contract. But expanding these deals to include private financing and operations makes them much more complicated, expensive, and risky. Canadians need more public investment to rebuild our economy – but they can't afford more expensive, unaccountable, and risky public-private partnerships.

4.1.0: REGULATORY ISSUES

Until very recently, there was simply no regulatory framework for PPP in Nigeria. PPP in line with the different methods of financing same was to a large extent an alien concept. In fairness to the public service, there were no precedents or reference points. There was clearly a serious knowledge gap on the part of the regulators in dealing with issues. These posed major problems to both sides of the transaction and may have accounted to a large extent to some of the challenges already enumerated. For example, the poor knowledge of the nature of PPP is responsible for the perception that it is primarily for revenue

generation rather than to provide infrastructure or services required by the public. The government has taken a further step by the passage of the Infrastructure Concession Regulatory Commission (Establishment, etc) Act 2005, which establishes the Infrastructure Concession Regulatory Commission. A cursory examination of the enabling Act however suggests that the commission has very little effective powers and might end up being largely a monitoring and policy making entity without the capacity to enforce compliance particularly on the side of the government.

There is still an absence of a well defined open and accessible procurement process for PPPs. By now we should have detailed rules and regulations that set out in particular detail processes and procedures for applying for and securing an infrastructure concession in Nigeria.

Inconsistency in policy is another regulatory issue in PPP projects e.g. is the MMA II Concession[34] which raised issue of airport taxes in Nigeria and study has revealed that tax charged in Nigerian airports is one of the lowest in the world and was far below the world average. In most countries, it is a major revenue stream for airports and was identified by the financiers as an important source of repayment of the credit facilities granted. But prior to the commissioning of MMA II, a commitment was made to review the tariff and steps in this regard were only recently taken over.

[34] Muritala Muhammed Airport Terminal Phase II Lagos awarded to Bi-Courtney consortium in 2003

Incessant changes in relevant political office holders and the Chief Executives of Regulatory agencies is also a major problem with PPP projects for example the MMA II concessionaire over a period of 7 years has had to deal with 6 different Ministers and 5 different Chief Executives of the Federal Airports Authority of Nigeria (FAAN), each with different policies, divergent opinions and perspectives on Concession Agreement and concession itself. This also impacted the issue of consistency in policy mentioned earlier. Maintaining and managing a relationship with the successive political office holders and chief executives as stated in the MMA II case can be a very serious challenge because it means that there is the likelihood of an agreement changing almost every time these people are changed.

4.2.0: LEGAL ISSUES

Until very recently, there were no legal framework for PPPs in Nigeria and this has posed a serious challenge to both the government and the concessionaires because there were no legally defined operating parameters to describe how to go about with PPP. Though the recent enactment of the ICRC Act[35] has to an extent addressed this issue. The Act laid down broad principles on which concessions are to be granted and has given certain guarantees and hope to potential concessionaires. For instance, it has provided that

[35] Infrastructure Concession Regulatory Commission (Establishment e.t.c.) Act 2005

concessions must be structured in a manner that ensures that the concessionaire derives reasonable profits from the concession.[36]

The Act has however not contained any detailed provisions to ensure compliance and it has also not given the commission sufficient power to supervise concession and enforce compliance with its provisions. So in the face of it, it would appear that the commission is largely a policy making body and there is real need to strengthen the commission and to make it a better commission for handling every detail pertaining to any infrastructure or service the government may decide to concession and since its sole business will be concessioning, it would not be constrained by the tendency of other government Agencies and Ministers to hinder PPPs due to the fact that it is seen to undermine their powers and sources of revenue.

There is the need for the reform of our administration of justice system to ensure speedy pace of our justice system.

The slow pace at which the Justice delivery system works is also a major impediment to doing business in Nigeria and which may cause serious delays in a PPP project but alternatives can be sought by examining alternatives to litigation. Research has shown that there are about 3 stages of dispute resolution accessible to parties to concession before going to court and it is hoped that any dispute would be satisfactorily resolved between the parties but where there is the involvement of a third party, then court may be

[36] Section 7 Infrastructure Concession Regulatory Commission (Establishment e.t.c.) Act 2005

the available option for the concessionaire and it is of note that concessions have characteristics that pose particularly serious challenges for dispute resolution. They typically involve many players and last a long time; they often involve services that have a public nature, which makes prompt conflict resolution essential for avoiding interruptions in their provision; they often involve large investments in immobile assets (e.g., sunk costs), which leave investors vulnerable to expropriation and political pressures. Finally, concessions generally consist of intricate web of legal arrangements for the construction, financing, and operation of infrastructure. In terms of dispute resolution, this implies a need for expertise in dealing with a complex of commercial, legal, and technical issues.

When dispute resolution costs and uncertainties are high, private participation in infrastructure may be held back. Judicial systems should play a key role, but in many developing economies they tend to be cumbersome, slow, and expensive: they often lack sufficient technical expertise for the type of dispute in question, are perceived as favoring the public party and often are subject to corruption. Thus alternative approaches should be sought.

There are several options, including recourse to administrative bodies, arbitration, and nonbinding alternative resolution mechanisms.

• Recourse to quasi-judicial or administrative bodies, such as sector regulators are mostly appropriate when disputes arise from regulatory decisions and their resolution requires

technical expertise. They have the advantage of offering a less confrontational approach to dispute resolution than the judiciary, which is valuable in a long-run relationship. The drawback is that regulators and administrative bodies may not be (perceived as) independent from the government nor are generally accountable.

• Arbitration is a technique for dispute resolution under which the parties agree to submit some or all of their disputes to an arbitral tribunal that is empowered to render decisions (called awards) that are binding on the parties. Arbitration tribunals often comprise one, three, or five members. The parties typically choose members based on their expertise on a particular subject matter. The assistance of local courts is also needed in order to enforce arbitral awards. Arbitrations can be domestic (that is, in the host country of the investment) or international (that is, in a country other than the host country of the investment). Confidentiality, expertise, neutrality, and integrity of arbitrators are the main advantages of this approach. Most large infrastructure projects involving foreigners typically include an international arbitration clause, as foreign investors often see international arbitration, as opposed to domestic arbitration, as the only mechanism able to provide them with some assurance of repair and compensation in case of conflict with the government. However, when many domestic parties (workers, users, land-owners, etc.) are involved, foreign arbitration may not be feasible.

• Alternative Dispute Resolution (ADR) mechanisms include a wide range of techniques that are nonbinding on the parties. ADR procedures can be independent of any formal

procedure, whether judicial, arbitral, or other, or, alternatively, it can be used in combination with such procedures. While ADR may be convenient to settle technical matters, for example by submitting the claims to a recognized expert, the recommendations are generally nonbinding, so that the parties are not assured of a resolution.

Which mechanism is the most appropriate depends on the goals in dispute settlements (enforceability, promptness, access to non corrupt forums), and on the characteristics of the project (its scale, the number of parties involved, the type of service supplied, the presence or absence of foreign investors). However, arbitration and, when needed and possible, international arbitration have emerged as the most promising dispute resolution mechanism.

In Peru, arbitration seems to have been relatively effective. The Electrical Concessions Law holds that the Board of Directors of the Electricity Tariffs Commission plays the role of "last administrative resort" for matters related to the setting of rates. Chile has developed a framework based on arbitration. A conciliatory commission, composed of three members, is appointed. One member is nominated by the concessionaire, one by the authorities, and the third by mutual accord. If an agreement is not reached, the concessionaire, and only the concessionaire, has the choice of either taking the matter to the judicial system or requesting the establishment of the arbitration commission. This second commission is formed by the same members as the previous one, but its decision

are binding and not subject to appeal in the courts. This feature of the Chilean framework has been criticized as leading to unnecessary duplication of procedures.

4.3.0: FUNDING ISSUES

This is a major problem for any concession agreement because raising that kind of needed credit locally is almost impossible especially considering the fact that most banks were skeptical about the project as it is new and there is no precedent to show for the success or failure as the case may be.

Infrastructure development requires a long term finance and raising long term loans remains a challenge in the country as most funds available from Nigerian banks were short term and raising funds internationally was not much easier and country risk issues always posed a major challenge, but an alternative source of long term funding is the capital market particularly the bond market but this may also not be adequate due to the up and down usually experienced in the capital market and further is the fact that the Nigerian's capital market is still too shallow and underdeveloped for green-field infrastructural projects.

The practice in other countries is that government give sovereign guarantees to the concessionaires of key infrastructure as well as all kinds of other incentives to make it easier for the concessionaire to raise finance. These are countries that have single digit interest rates which are unlike Nigeria.

It should be noted that risk and benefits are shared in PPP among the public and private sector and the benefit for the government is essentially the infrastructure or service provided to the public and not the profits from its operation but in the case of Nigeria, no sovereign guarantee or other similar incentives are granted to ease the challenges of funding instead concession agreements were structured in a manner in which financial risks accrued to the concessionaire and none accruing to the government e.g. In the case of MMA II which was even obligated to pay concession fees to the government before it started making profit from the investment.

4.4.0: POLITICAL ISSUES

This is a very important aspect of public private partnership because where there is the absence of political will to PPP, then its likelihood of working will be very slim and also is the fact that the next administration may not be interested in or may want to re-concession it due to different reasons among which is the fact that there is this tendency with new administrations to change some policies decided upon by the previous administrations, so concessionaires try to speed up commissions of projects before the deadline of the present administration and at the end of the day causing increase in the cost.

Also, where administrations are in favor of PPP, agencies meant to implement government policies fail to display the necessary and needed political will to ensure that these policies succeed except where there is determination that PPPs succeed, there are

sufficient vested interests in the country against PPP that would ensure that the government's initiative to promote PPP fail and it is very important in this early stage that it does not because it will chase away potential investors and this great tool for economic development would have been lost.

4.5.0: CULTURAL ISSUES

Public private partnership projects encounters serious resistance from the labour unions, civil service, off-takers, also is the negative perceptions from the general public, failure of parties to honour the sanctity of contractual agreements.

Public private partnership are meant to be partnerships between the public and private sector in which responsibilities, risks and obligations are shared between each side in order to guarantee the greatest benefit to the public. It is thus unfortunate in Nigeria where some civil servants tend to see the private sector concessionaire as the enemy that wants to deprive him of his job and income and sees the concessionaire as an adversary that must be overcome at all cost. Though the untoward acts of these civil servants are not general as some persons have been helpful in ensuring that these projects come to reality.

Another major cultural issue encountered by concessionaires is the beliefs by public servant that the government is not bound to honour its contractual obligations or that the government can unilaterally rescind contracts it entered into voluntarily.

4.6.0: CONCLUSION

This chapter has specifically highlighted the problems accrued with public private partnership generally and especially that of Nigeria. This chapter has been able to show the major problems encountered by concessionaires during the PPP project with particular reference made to the MMA II[37] which states some of the problems encountered during the construction.

[37] Muritala Muhammed Airport Terminal Phase II Lagos awarded to Bi-Courtney consortium in 2003

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.0.0: CONCLUSION:

This work has essentially focused on potentials and challenges of public private partnership placing its search light on its nature and types, going further to talk on the benefits and challenges facing PPP within and without Nigeria including among others regulatory, legal, political funding and cultural issues.

I believe it is now understood what exactly public private partnership is all about, that it is not just a process of siphoning money or for controlling of the government by particular set of people but is a very essential tool in community development.

5.1.0: RECOMMENDATION:

The importance of public private partnership cannot be overemphasized thus government must commit itself making provision of those materials that can facilitate an orderly development of PPP for example providing a strong framework for the private sector in order to build their confidence in the scheme.

Public opinion should be properly managed and assurance should be made to enlightening and educating the public as an important stakeholder by constantly disseminating information to the public at large.

The capital market should be developed and deepen and powerfully empowered such that it will suit the necessities and requirements of the public private partnership projects and also, political, regulatory and economic stability should be ensured

The government should enhance laws, regulations and institutions or put in place new ones where needed and improve the environment to achieve better participation and encouragement of the private sector in the provision of better infrastructures to the community. It is the expectation that with the enactment of specific laws on privately financed infrastructure projects, there will be greater private participation in infrastructure provision and development thereby bringing about the much needed infrastructural development in a developing economy such as Nigeria. Though the Infrastructure Law and the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, which are all laws on privately financed infrastructure projects, have not fully adopted all the principles contained in the recommendations of UNCITRAL on privately financed infrastructure projects, it is believed that the enactment of the various legislations on privately financed infrastructure projects is a welcome development and there will be further improvements in the laws in the future.

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