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HAGF/SH/2020/VOL.1/45

24th July 2020

The Deputy Chief of Staff to the
Office of the Vice President
State House
Abuja.

**RE: RESOLUTION OF CONFLICTS BETWEEN THE INFRASTRUCTURE
CONCESSION REGULATORY CONCESSION (ICRC) AND THE BUREAU
OF PUBLIC ENTERPRISES (BPE) OVER THE ADMINISTRATION OF PPP
CONCESSIONS**

I wish to refer the State House correspondence dated 3rd July 2020 with Ref. No.: SH/OVP/DCOS/LGR&C/HAGF/641 on the above captioned subject-matter.

2. I write to express my concurrence with the Draft Circular which you forwarded for my review. The contents of the Draft Circular reflect the Legal Opinion previously issued by the Office of the Attorney General of the Federation on this matter via letter dated 19th May 2015 with Ref. No.: HAGF/ICRC/2015/VOL.1 (see particularly Paras. 3, 4, 5, 6, 7 & 8 thereof), a copy of which is attached herewith for your perusal.
3. I wish to reaffirm the said Legal Opinion to the effect that the Infrastructure Concession Regulatory Commission reserves the regulatory mandate over all Public Private Partnership (PPP) arrangements in Nigeria and that any MDA (inclusive of the BPE) must carry out their PPP transactions in accordance with the ICRC Act.
4. However, there is a need to renumber the paragraphs of the Draft Circular by numbering the paragraph starting with "The Federal Government has approved..." as Para. 3 while the present Para. 3 is to be renumbered as Para. 4.
5. Please accept the assurances of my highest regards.

A handwritten signature in black ink, appearing to be 'Abubakar Malami'.

ABUBAKAR MALAMI, SAN
Honourable Attorney - General of the Federation
& Minister of Justice

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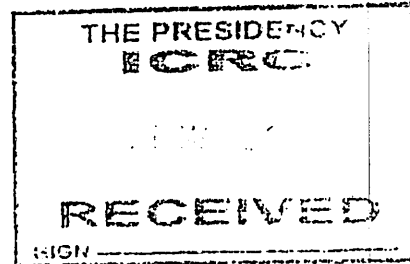
Federal Ministry of Justice
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Nigeria

HAGF/ICRC/2015/VOL.1/

19th May, 2015

1. The Director-General,
Infrastructure Concession Regulatory Commission,
Plot 1270, Ayangba Street,
Area 11, ✓
Abuja.

2. The Director-General,
Bureau of Public Enterprises,
11, Osun Crescent,
Maitama District,
Abuja.



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**RE: CONCESSION PROCESS FOR THE NPA WARRI OLD PORT TERMINAL
"B" BY THE BPE, NPA & FEDERAL MINISTRY OF TRANSPORT**

I write with respect to the attached correspondence received from the Chairman of the Infrastructure Concession Regulatory Commission requesting my opinion on the appropriate Federal Government Agency with the mandate of regulating concessions in Nigeria with particular reference to the above mentioned concession.

2. It is regrettable that this issue has remained unresolved between the Infrastructure Concession Regulatory Commission (ICRC) and the Bureau of Public Enterprises (BPE) despite previous opinions from my office explaining the position of the law as well as the extant government policy on the matter.

3. Section 1(1) of the Infrastructure Concession Regulatory Commission (Establishment, ETC) Act 2005 (ICRC Act) expressly

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requires every Federal Government Ministry, Agency or Corporation or body intending to concession its infrastructure to do so in accordance with the ICRC Act. It is the responsibility of ICRC under section 20 to among others, ensure compliance with the provisions of the Act and perform such other duties as may be directed by the President, from time to time, to ensure the efficient performance of the functions of the Commission under the Act.

4. The above provisions unequivocally place on ICRC the regulatory mandate over concessions of the infrastructure of all MDAs in Nigeria. There is no provision in the Public Enterprises (Privatisation and Commercialisation) Act (the enabling law under which the BPE operates), that confers similar or any regulatory powers on BPE with respect to concessions. In fact, there is no law that confers on BPE the power to concession infrastructure other than its own infrastructure. This is because by section 1 of the ICRC Act, only MDAs involved in the financing, construction, operation or maintenance of an infrastructure can concession such infrastructure.

5. Furthermore, section 2 of the Public Enterprises Act appears to have limited the mode of privatisation of enterprises under that Act to disposition of shares. The implication of these provisions is that the law does not contemplate the concession by BPE itself, of enterprises listed for privatisation under the Public Enterprises Act unlike the case of outright disposition of shares of such enterprises.

6. There is no doubt that in the past, concessions under the Public Enterprises Act may have been successfully facilitated or granted by the BPE without recourse to any other authority. This was primarily because there was not in existence then any specific or functional legal or institutional framework for concessions in Nigeria. It would certainly be improper under the present state of the law, for BPE to continue to grant or facilitate such concessions without recourse to the ICRC. To encourage such would

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undermine the establishment of the ICRC and that is certainly not in line with the extant government policy on PPPs.

7. With the coming into force of the ICRC Act, all concessions whether made pursuant to the Public Enterprises Act or not, must not only be granted by the infrastructure owner MDA even if facilitated by BPE, but must also be done in accordance with the provisions of the Act and under the regulatory authority of the ICRC. In other words, it is the responsibility of the ICRC to regulate all concessions entered into or granted by any MDA in Nigeria including those facilitated by BPE pursuant to the Public Enterprises Act.

8. The above position is also consistent with the extant directive of Mr. President as contained in Circular No. SGF/OP/1/S.3/X/610 dated September, 10, 2013 and the policy thrust of the Federal Government as contained in the National Policy on Privatisation both of which require all MDAs to involve the ICRC prior to their commencement of PPPs.

9. In view of the foregoing the concession of Warri Old Port Terminal "B" and all other concessions made or granted by any MDA or facilitated by the BPE whether or not under the Public Enterprises Act, must be made in accordance with the provisions of the ICRC Act and subjected to the regulatory authority of the ICRC.

10. Please accept the assurances of my highest regards and esteem.



MR. MOHAMMED BELLO ADOKE, SAN, CFR
Honourable Attorney-General of the Federation
and Minister of Justice