



THE PRESIDENCY

Review, Development and Standardization of Public, Private Partnership (PPP) Contract Agreements, Bidding Documents and Procurement Manuals



THE PRESIDENCY

CONTENTS

1. INTRODUCTION.....	4
2. APPROACH AND METHODOLOGY.....	17
3. EXISTING PPP CONTRACTS BIDDING DOCUMENTS.....	21
4. PPP PROCESS FLOW.....	42
5. STANDARDIZATION OF EXISTING PPP CONTRACTS, BID DOUCMENTS	51
6. CONCLUSION.....	80
7. RELEVANT LITERATURE	83

CHAPTER ONE

1. Introduction

1. INTRODUCTION - PUBLIC - PRIVATE PARTNERSHIP (PPP)

This Chapter provides a brief overview of the Public-Private Partnership (PPP) concept; the different models available for implementation of PPPs; the rationale for using PPPs - its advantages and disadvantages; the challenges and pitfalls in PPP procurement; and the characteristics of PPP projects and internationally.

1.1. What are Public-Private Partnerships (PPP)?

The backbone for the development of any nation is the status of its infrastructure facilities. Developing nations across the globe have a great need for expanded infrastructure, as their economies undergo rapid development and urbanization. Physical infrastructure, such as roads and bridges; power generation plants; power transmission and distribution; water and sanitation networks; ports; airports; and transportation systems like railways have to be put in place for the benefit of the public. These infrastructure projects are highly capital-intensive in nature and exert a strain on the public purse. Developing nations generally have limited resources at their disposal and experience a greater pinch when it comes to providing the required infrastructure facilities.

Due to the large investment requirements of infrastructure projects and the scarcity of available resources to provide adequate infrastructure facilities essential for development, the Governments and the public sector authorities in developing countries are constantly on the lookout for alternative sources of funds. One such source is investment by the private sector through the PPP route.

A public-private partnership describes a government service or private business venture which is funded and operated through a partnership between a government and one or more private sector companies. These partnerships are commonly referred to as PPPs.

As per the National Policy on Public-Private Partnership of the Federal Government of Nigeria, a PPP is defined as a contract, whereby the private sector is engaged by the public sector to manage some public services, and to design, build, finance and operate some infrastructure to enhance efficiency, broaden access, and improve the quality of public services. The role of the public sector is to plan and structure projects, while the private sector directly implements the projects.

Public-private partnerships (PPPs) are increasingly being used by governments and public sector authorities throughout the world as a way of increasing access to infrastructure services for their citizens and economies at a reduced cost. PPPs are also a way to increase private sector involvement in the delivery of public services.

PPPs provide a framework to facilitate private sector participation for the implementation of projects while at the same time structuring the role of the Government Procurement Authority, ensuring that social obligations are met and successful sector reforms and public investments are achieved.

The PPP arrangement seeks to allocate the tasks, obligations, and risks among the public and private partners in an optimal way such that the risks associated and the costs incurred are minimized and the quality of the infrastructure and the services provided is improved. The public partners in a PPP are government entities, including ministries, departments, agencies,

municipalities, or state-owned enterprises. The private partners can be local or international entities and may include businesses or investors with technical or financial expertise relevant to the project.

A PPP is structured in a manner that allows both the public and private sectors to enjoy certain advantages relative to each other while performing their specific tasks. The government's contribution to a PPP may take the form of capital for investment, a transfer of assets, or other commitments or in-kind contributions that support the partnership. The government also provides social responsibility, environmental awareness, local knowledge, and the ability to mobilize political support. The private sector's role in the partnership is usually to make use of its expertise in commerce, management, operations, and innovation, to run the project efficiently. The private partner may also contribute investment capital depending on the form of the contract.

The objectives of a PPP are to increase the availability of infrastructure services, and to do so with greater efficiency (lower cost for the level of services provided) than could be achieved using the traditional public sector approach.

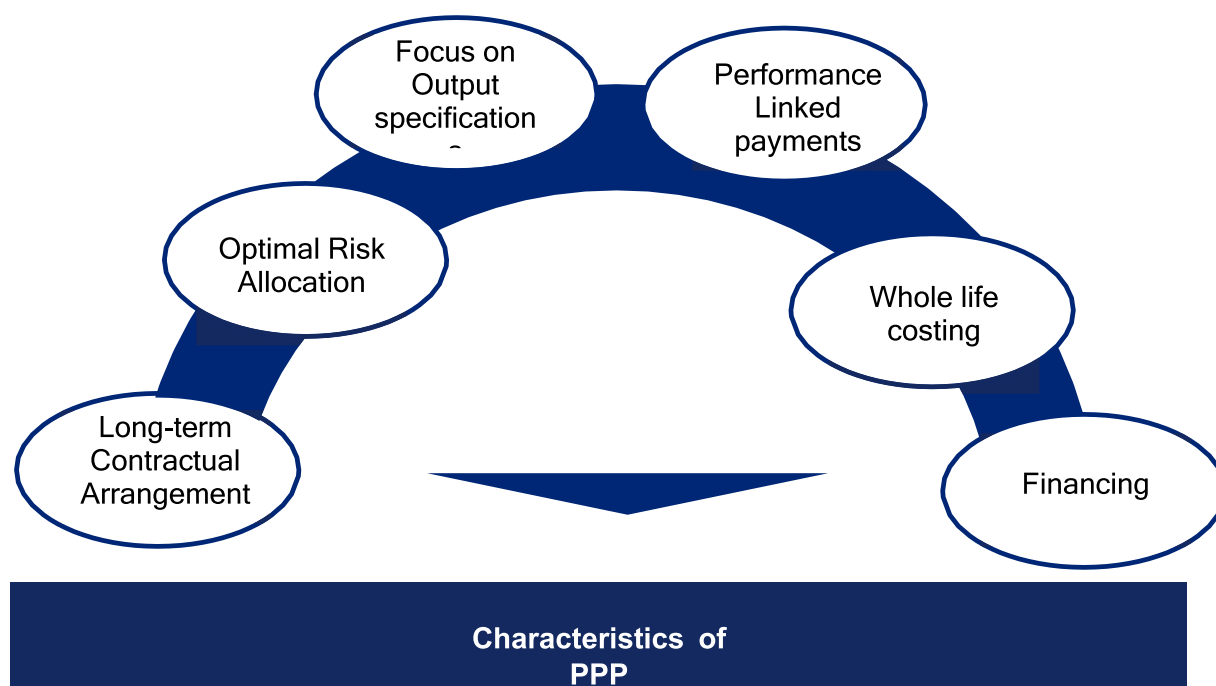
These objectives can be achieved as:

- PPPs allow access to the substantial financial resources of the private sector.
- PPPs enable the public sector to benefit from private sector technical expertise, experience, and efficiency.
- PPPs enable the public sector to transfer project-related risks to the private sector.

To conclude, a PPP brings the public and private sectors together as partners in a contractual agreement, often for a long period of about 15-30 years (called the Concession Period), which matches the life of the infrastructure assets used to provide the services. The private partners (investors, contractors, and operators) undertake the implementation of the project, assume substantial risks associated with project execution, and provide specified infrastructure services. In return, the public sector either pays for those services as long as they are in line with the performance standards agreed, or grants the private partner the right to generate revenue from the project. This allows the government to provide an improved quality of infrastructure services to the citizens in a cost-effective manner resulting from the efficiencies brought in by the private sector partner. It also allows the private sector partner to participate in large infrastructure projects, primarily in the public domain, and generate the required returns from these projects.

1.2. Characteristics of a PPP Project

A public-private-partnership (PPP) involves a contract between a public sector authority and a private party, in which the private party provides a public service through a well-defined project and assumes substantial financial, technical, and operational risks in the project. The characteristics of a PPP project are depicted in the figure below.



The characteristics of a PPP project can be classified into two categories, namely contractual characteristics and financial characteristics. These are elaborated below.

1.2.1. Contractual Characteristics

1.2.1.1. Long-Term Contracts

PPP projects are generally long-term in nature, typically ranging from 15 to 30 years or more, though in particular cases, the project term could be only five to seven years. The tenure of the contract is such that it typically covers the entire economic life of the asset. This ensures that the private sector partner takes a whole life-cycle view for the development of the asset. The asset is then designed, constructed, operated, and maintained such that the whole life-cycle cost of the project is minimized. The private sector operator ensures that the asset is well-maintained throughout its entire economic life.

1.2.1.2. Special Purpose Vehicle (SPV)

Given the capital-intensive nature of infrastructure projects and the risks associated with them, the private sector partner, when implementing such a project on a PPP basis, forms a separate entity called the Special Purpose Vehicle (SPV). The reason for taking up each project through a separate entity is that the risks associated with a project are quite different from those associated with other projects, and the partners for implementing the projects may differ. The SPV also allows the private sector partner to raise limited recourse funding restricted to the SPV without affecting the other projects being implemented by the private sector partner. Accordingly, each infrastructure project which is routed through PPP is typically implemented by an SPV.

When a government tender goes to market for infrastructure services, private sector bidders will pool skills and finances in a consortium that will form the basis of the SPV. The consortium produces a bid which takes into account the whole-life cost of the asset, incorporates the proper level of repairs and maintenance, and reflects the cost of the services provided and the cost of private finance. Competition between bidding consortiums during the procurement process, designed to select the PPP provider, helps to ensure value for money.

1.2.1.3. Allocation of risks and sharing of responsibilities

The key factor to achieve successful implementation of a PPP project is the optimal sharing of risks and responsibilities between the public and private sector. The guiding principle adopted in identifying and allocating responsibilities is that the party best able to manage a particular activity should be responsible for that activity and receive the rewards or losses associated with changes related to that activity. If a party is assigned the responsibility for activities over which it has no control, it will not be able to implement that activity effectively and will increase the contract costs to the government, resulting in poorer value for both the government and the private sector. The allocation of responsibilities in PPP projects vary depending on the nature and objectives of the project.

In a PPP, the responsibilities typically assigned to the private sector include designing and construction of the physical assets; financing the project components and operations; and maintenance of the assets so that they remain in good condition over the Concession period and comply with the standards and specifications agreed with the public sector agency.

The responsibilities which might be required to be retained by the public sector in a PPP include management of costs related to inflation, acquisition of land from public and private land owners, and management of risks that are out of the realm of private sector expertise.

In addition to the responsibilities retained by the public sector as mentioned above, there are certain responsibilities which may or may not be transferred by the public sector to the private sector depending upon the terms of the PPP contract. Based on the structure of the PPP, these might include obtaining planning permission for the facilities to be developed; ensuring that demand/usage of the services match planned levels; and managing the increase in costs resulting from changes in legislation.

1.2.1.4. Output Standards and Specifications

Output specifications form a vital part in encouraging innovation in PPP projects. Producing effective output specifications involves defining the ends without being prescriptive about the means for meeting these outputs. The public agency concerned clearly states the public service requirements for the facilities and services, while leaving room for the private sector to produce innovative, cost-effective solutions. The output specifications detail what needs to be achieved and not how it is to be achieved.

In a PPP project, ideally the public agency concerned makes payments to the private sector based on whether the outcome/output specifications have been met. Therefore, it is vital that both the public and private sectors have a clear understanding of how performance

against these outcome/output specifications are measured and monitored. Performance measurement is usually linked to an agreed set of standards or key performance indicators, which will generally relate to the quality, amount, and frequency of service provision. There is usually an agreement within the PPP contract on how such performance is to be measured and monitored since the payments to the private sector are based on these performance specifications being met.

1.2.1.5 Performance-based payment mechanism

A PPP can be structured in such a manner that the contract includes a performance -based payment mechanism, whereby the public sector only pays when services are delivered by the private sector. Moreover, the recurrent payment varies depending on whether the services provided meet the specified performance standards. The contract can be structured to facilitate incentives or benefit-sharing arrangements, to encourage the private sector to raise the performance above the specified standards. However, if the private sector consistently fails to meet the required performance requirements, the public agency can ensure that service levels are restored by imposing deductions and penalties on the payments to be made to the private sector, by stepping in to take over the operations and delivery of the services, or even by terminating the contract due to private sector default.

1.2.1.6 Whole-Life Costing and a flexible contract with mechanisms for variations over the life of the contract

The PPP contract should be structured in such a way that the operations and maintenance component is included in the contract so that the private sector focuses on the whole life-cycle cost of the project and not just the upfront capital costs. Adoption of a whole life-cycle costing approach encourages a more efficient design, resulting in the reduction of operating costs.

The PPP contract should also have a provision for changing some aspects of the service requirements or service delivery methods, subject to agreement by the public agency and the private provider on cost implications. There is a need for such a provision as there may be a need for changes to the service delivered over the Concession period.

1.2.2. Financial Characteristics

1.2.2.1. Private Financing

In a PPP structure, the responsibility of financing the project assets may or may not rest with the private sector partner, depending on the service delivery model adopted. However, in the models which involve funding the project assets by the private sector, the private sector partner raises project finance through equity and debt finance. The SPV is usually owned by one or more equity investors. Some of these shareholders may be contractors to the consortium, who undertake to carry out construction, design or management of facilities. Others may be pure financial investors. Debt finance, in the form of bank loans or bonds, is also raised to part-finance the construction and operation of the project. Both providers of equity and debt play important roles in the overall success of the PPP project.

1.2.2.2. Viability Gap Funding (VGF)

The PPP route may be judged not viable for a project if the business model does not generate the desired rate of return for the private sector (given the project cost and the high cost of funding), which is responsible for financing the project's assets. Under such circumstances, the public sector may provide a capital subsidy to part-finance the project cost, to reduce the financial burden faced by the private sector and thus make the project more attractive to the private sector. This capital subsidy, usually provided as a percentage of the project cost, is called Viability Gap Funding (VGF). VGF may also be used to provide an annual subsidy instead of a capital grant. The PPP can be structured to accommodate such VGF to generate private sector interest in the project.

1.2.2.3. Contribution of the public to fund PPP projects

In a PPP, although the private sector may provide the capital funding for the project, this is ultimately recovered from the public by means of charges imposed on users, charges recovered from the public sector budget or charges recovered partly from the sponsoring government department and partly from users.

To conclude, a PPP typically has the following characteristics:

- The private sector is responsible for carrying out or operating the project and takes on a significant portion of the associated project risks.
- Often, though not always, the private sector will contribute the majority of the project's capital costs.
- The private sector's costs may be recovered in whole or in part from charges related to the use of the services provided by the project (user fees) or may be recovered through payments from the public sector budget.
- Public sector payments are based on performance standards set out in the contract.
- During the operational life of the project, the public sector's role is to monitor the performance of the private partner and enforce the terms of the contract.
- PPP projects often focus on outputs and services rather than assets to encourage efficient use of public resources and improved infrastructure quality.

1.3. Overview of the PPP Delivery Models

Public-private partnerships (PPPs) can be of various types encompassing various role players, ownership arrangements, and allocations of risk between private and public partners. These different types of partnerships are called PPP models. The choice of a PPP model depends on the objective of the government such as improving service efficiency,

transferring investment risk, maintaining service control or improving the quality of service. The table below presents the different types of PPP models and their corresponding characteristics.

Table 1: Different types of PPP Delivery Models

Nature of contract (Duration)	Characteristics			Commercial Risk	Nature of service & Payment to contractor
	Asset ownership	O&M	Capital Investment		
Service Contract (1-10 years)	Public	Public & Private	Public	Public	A definitive, often technical type of service, fee paid by government for service
Management Contract (3-8 years)	Public	Private	Public	Public	Manage the operation of a government service; fee paid by government for service and a performance-based incentive
Lease Contract (5-10 years)	Public	Private	Public	Private	Manage, operate, repair and maintain a public service to specified standards and outputs. All revenues, fees or charges are recovered from consumers or the users of the service; the service provider pays the government rent for the facility.
Concession (25-30 years)	Public	Private	Private	Private	Manage, operate, repair, maintain and invest in public service infrastructure to specified standards and outputs. All revenues are sourced from consumers for the provision of the service; the service provider pays a Concession fee to the government and may assume existing debt.
BOT/BOO/ Others (15-25 years)	Private & Public	Private	Private	Private	Construct and operate, to specified standards and outputs, the facilities necessary to provide the service. The Government mostly pays the service provider on a unit basis.

Note: The duration period in some contracts may vary depending on the negotiated technical and financial terms of the project.

A brief description of each of these PPP delivery models is given below...

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1.3.1. Service Contracts

Under a service contract, the government (public authority) hires a private company or entity to carry out one or more specified tasks or services for a period, typically one to three years. The public authority remains the primary provider of the infrastructure service and contracts out only portions of its operation to the private partner. The private partner must perform the service at the agreed cost and must typically meet performance standards set by the public sector.

Governments generally use competitive bidding procedures to award service contracts, which tend to work well, given the limited period and narrowly defined nature of these contracts.

Under a service contract, the government pays the private partner a predetermined fee for the service, which may be based on a one-time fee, unit cost or other basis. Therefore, the contractor's profit increases if it can reduce its operating costs, while meeting the required service standards. One financing option involves a cost-plus-fee formula, according to which costs such as labor are fixed, and the private partner participates in a profit-sharing system. The government is responsible for funding any capital investments required to expand or improve the system.

Advantages include:

- Service contracts provide a relatively low-risk option for expanding the role of the privatesector.
- Service contracts have a quick and substantial impact on system operation and efficiency.
- Service contracts provide a means for technology transfer and development of managerialcapacity.

Disadvantages include:

- Service contracts require the public sector agency to administer multiple contracts and require strong enforcement of contract laws. This increased responsibility needs to be fulfilled by the public sector diligently to extract the maximum benefits from private sector participation.
- In a service contract, the private partner is not under an obligation to provide financing. Hence, service contracts are unsuitable if the main objective is to attract capital investment. The effectiveness of the private partner may, in fact, be compromised if other sources offinancing (from government or donors, for instance) do not materialize.
- The private partner's activities are discrete and segregated from the broader operations of the company. So, there may not be a broader or deeper impact on the system operations, resulting in only discrete and limited improvements.

1.3.2. Management Contracts

A management contract expands the services to be contracted out to include some or all of the management and operation components of the public service (i.e., utility, hospital, port authority, etc.). Although the ultimate obligation for service provision remains with the public sector, daily management control and authority are assigned to the private partner or contractor. In most cases, the private partner provides working capital, but no financing for investment.

1.4. Pros and Cons of PPP

PPPs offer the public sector potential cost, quality and scale advantages in achieving infrastructure service targets. However, as every coin has a flip side, PPPs also have certain disadvantages. In general, in a well-designed and supported PPP, the advantages will outweigh the disadvantages. The advantages and the disadvantages of implementing projects through the PPP route are listed below.

1.4.1. Advantages of PPP

The major advantages of using PPP as a route to implement infrastructure projects are:

- Access to private sector finance
- Increased efficiency resulting from the use of private sector skills and transfer of risks to the private sector
- Introduction of sector reforms through reallocation of roles, incentives, and accountability

A brief description of each of these advantages follows.

1.4.2. Access to private sector finance

One of the key factors driving the economic growth of any nation is the availability of adequate infrastructure facilities. With the increase in population and the passage of time, there is a constant need for rehabilitation and refurbishment of the existing infrastructure and addition of new infrastructure facilities to meet the growing infrastructure needs of the population. Infrastructure projects by their very nature are highly capital-intensive and require large capital investments. As a result, governments often experience an ever-increasing need to find sufficient financing to develop and maintain the infrastructure, required to support growing populations. Governments are challenged by the demands of increasing urbanization, the rehabilitation requirements of aging infrastructure, the need to expand networks to new populations, and the goal of reaching previously non-served or underserved areas. Furthermore, infrastructure services are often provided at an operating deficit, which is covered only through subsidies; subsidies result in an additional drain on public resources.

Combined with most governments limited financial capacity, these pressures drive a desire to mobilize private sector capital for infrastructure investment. PPPs help to mobilize this private sector capital. PPP projects involve the private sector in arranging and providing finance. This frees the government from the need to meet financing requirements from its own revenues (taxes) or through borrowings. By taking over the responsibility for raising finance from the government, PPPs can enable more investment in infrastructure and increased access to infrastructure services.

Using private sector finance also allows the government to move large capital expenditure

programs off the balance sheet. This has been a motivating factor for PPPs in countries where the constraint on finance is a government commitment to a borrowing (i.e. public debt).

PPP also provides the private sector with the opportunity to participate in implementing infrastructure projects and benefiting from its capacity and experience in managing businesses (utilities in particular). The private sector seeks compensation for its services through fees for services rendered, resulting in an appropriate return on capital invested.

1.4.3. Increased efficiency resulting from private sector participation

The public sector often lacks adequate skills to utilize the scarce public resources in an efficient manner. The public sector typically offers weak incentives for efficiency and is thus poorly positioned to efficiently build and operate infrastructure. Injecting such incentives into an entrenched public sector is difficult, though not impossible.

The private sector in contrast is exposed to competitive pressures that are difficult to replicate for public agencies. This gives the private sector an edge over the public sector in carrying out the capital (design, construction) and operating phases of the project. Private sector operators have a clear goal of maximizing profits, which are generated, in part, by increased efficiency in investment and operations.

Improving the efficiency of services and operations also increases the chances of those services being economically sustainable and their provision at competitive rates, even after satisfying the profit requirements of the private operators.

PPP allows the government to pass operational roles to efficient private sector operators while retaining and improving its focus on core public sector responsibilities, such as regulation and supervision. Properly implemented, this approach should result in a lower aggregate cash outlay for the government and better and cheaper services to the consumer. This should hold true even if the government continues to bear a part of the investment or operational cost since the government's cost obligation is likely to be targeted, limited, and structured within a rational overall financing strategy.

1.4.4. Sector reformation through reallocation of roles, incentives, and accountability

At times, PPP acts as a catalyst to provoke a larger discussion of and commitment to a sector reform agenda. A reform program that includes PPP provides an opportunity to reconsider the assignment of sector roles to remove any potential conflicts and to consider a private entity as a possible sector participant.

Implementing a specific PPP transaction often entails executing concrete reform steps to support the new allocation of sector roles such as the passage of laws and establishment of separate regulatory bodies.

1.4.5. Disadvantages of PPP

The disadvantages of PPPs are described below. Most of these disadvantages can be minimized under certain circumstances and through careful management of the PPP design by the sponsoring authority. However, public sector capacity (experience and expertise) is required to manage the PPP process.

1.4.6. Difficulty in demonstrating value for money in advance

Ideally, a project should be procured as a PPP on the basis of a clear demonstration that it provides value for money (VFM) compared to public sector procurement. However, it is

difficult to demonstrate VFM in advance due to uncertainties in predicting what will happen over the life of the project and due to lack of information about comparable previous projects.

1.4.7. Complex procurement process with associated high transaction costs

The PPP project must be clearly specified, including the allocation of risks and a clear statement of the service output requirements. The long-term nature of PPP contracts requires greater consideration and specification of contingencies in advance. The tendering and negotiation process is a costly exercise, particularly, as transactions advisors and legal experts are required. The tendering costs in PPPs are typically in the range of 1-3% of project value.

1.4.8. Risk of contract renegotiation

PPPs usually cover a long-term period of service provision (for example 25-40 years or life of the asset). Any agreement covering such a long period into the future is subject to uncertainty. If the requirements of the public sponsor or the conditions facing the private sector change during the lifetime of the PPP, the contract may need to be renegotiated to reflect these changes. This entails large costs to the public sector and the benefit of competitive tendering is usually not available under such circumstances.

However, this issue can be mitigated by selecting relatively stable projects as PPPs and by specifying in the original contract terms how future contract variations should be handled and priced.

1.4.9. Enforcement and monitoring

The successful implementation of a PPP project depends upon the ability of the sponsor to monitor performance against standards during the construction and operations period and to enforce the terms of the contract. However, this is usually difficult to attain unless special mechanisms and dedicated monitoring capacity are put in place by the sponsor.

1.5. Challenges and Pitfalls in PPP Procurement

Although PPP projects can be beneficial to the government and the private sector, there are certain areas in which care needs to be taken to ensure that the PPP is implemented successfully with the acceptance of all stakeholders and to the satisfaction of all beneficiaries. Some common pitfalls are described below.

1.5.1. Institutional/ Legislative Framework

The success or failure of PPPs can often be traced back to the initial design of PPP policies, legislation, and guidance. A common pitfall is placing too many restrictions, conditions and expectations of risk transfer on the private sector, which make it impossible to structure a financially feasible deal.

1.5.2. Clear project objectives

The key factor driving the success of PPPs as a means for timely and successful implementation of infrastructure projects is the clarity of the project objectives and a well-defined scope of work for both the private and the public sectors. For improved performance and greater contribution by the private sector, the public sector may specify the output standards and specifications expected from the public service and allow the private sector the freedom to design the inputs to achieve the specified service. However, within the public sector, officials sometimes lack consensus about the purpose and expected outcomes of the project and, consequently, often try to compensate for this failure by over-specifying the project inputs.

1.5.3. PPP model selected for the project

Selection of an appropriate PPP model, depending upon the characteristics of the project, is the key to ensure successful implementation of a project through the PPP route. The main distinction between the various PPP models is the level and nature of risk shifted from the public sector to the private sector. A common pitfall is the selection of a PPP model that transfers demand risk (the amount of use the infrastructure will receive) to the private sector even when the private contractor has no control over these factors. This almost always leads to project failure.

CHAPTER TWO

Methodology

Our Proposed Approach

Our approach is structured along five (5) phases;

Based on our experience of undertaking similar engagements, we are of the opinion that to adequately deliver a seamless end - end advisory service, we recommend that the assignment be phased in the following order;

Phase 1

1. Project Mobilization and Initial Diagnostics - Week 1
2. Collation of Existing PPP contracts, Bid Documents and Process Manual -Week 2 - 3
3. Review of Existing PPP contracts, Bid documents and process manuals - Week 4 - 5
4. Standardization of existing PPP contracts, Bid documents and process manuals - Week 5 - 7.
5. Other activities leading to successful execution of the assignment - Week 7 - 8

Deliverables:

- Weekly reports for review of progress of assignment
- Weekly meeting for the progress report
- Support and guidance to the ICRC take over and implementation of the report.
- Technical Reports on the key aspects of the assignment.
- Any other mutually agreed deliverable in line with the assignment.

Our Proposed Methodology

Stakeholder Consultation

Rapidly aligning diverse stakeholders around a shared view of a complex problem/opportunity landscape, the case for change and agreement on a smart solution or course of action, is a constant challenge we face as change agents and trusted advisors.

We use our **CATALYST** approach to achieve this. It is a facilitated co-design approach for solving complex problems. It engages diverse stakeholder groups in a collaborative style and environment to agree the case for change and help shape creative solutions. By getting the people who are part of the system to be part of the solution, we get to better outcomes and importantly, outcomes your people feel they own – rather than something imposed on them by consultants or leadership.

- Empowerment and alignment among groups at different levels of the organization to greatly improve the effectiveness of implementation and change process.
- High degree of cross-departmental interaction is necessary for key decision-making.
- Buy – in and simultaneous engagement from multiple stakeholders is desired.

The benefits of using **CATALYST**

Owned True Alignment and buy-in - Stakeholders intensively involved in design, development and delivery. - Real commitment, ownership & intent to deliver. - Rapid progress means people don't lose interest. - Reduced risk of change fatigue as key people called on only when required.	Owned Improved Solution Quality • Right expertise involved at right time and early enough to influence the outcome. • Pragmatic solutions that deliver what is needed. • Flexible solutions to meet changing needs. • Reduced risk of delivering inappropriate solutions.	Owned Accelerated Timeframe • Highly structured and rigorously facilitated, time-boxed processes. • Minimized demand on scarce business resources and key stakeholders. • Truly transparent progress visible to all key stakeholders.	Owned Reduced Costs of Assessment and Design • Shorter timeframes mean reduced costs of delivery. • Right decisions made at the right time reduce costly rework. • Reduced training effort for end users. • Optimal usage of available skills and capabilities.
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At the heart of each **CATALYST** event are three fundamental components:

- Explore – define the challenges and the problem statement, identify trends and weak signals, look for patterns, apply lateral thinking, draw on case studies and global models and experiences, review market research, understand your customer's/stakeholders hearts and minds, explore parallel industries for insights and leading practices, apply systems thinking, explore possibilities, define what is known and what gaps exist in data and analysis, use scenarios and metaphors to create new ideas.
- Design – define design principles, design conceptual solutions, test business and operating models for strategic success, for change, for growth, for market responsiveness, for employee engagement, for the future, for new Ways of working, for operational excellence, for longevity, for financial and service delivery success, for attaining the objectives of the client.
- Act – sketch out the journey, milestones, owners, start dates, costs, end dates, interdependencies, business case accountabilities, measurement, benefit, commitment, sponsorship, the value proposition, the communication plan, a galvanized team of passionate owners/stakeholders.

The **CATALYST** process brings together decision makers, implementers and subject matter specialists from your organization, ours and from the broader environment around your value chain and the market and eliminates distractions so that all participants focus on one thing – realizing your objectives.

We would agree with you at the mobilization and planning phase how best to use **CATALYST** to canvass inputs, validate and test options and perspectives, develop and agree elements and flight plan. We work with you to design a stakeholder map, the levels of engagement required, the timing, objectives and format of such engagement and the communication channels to be used.

No	Task Name	ICRC	ICRCs	Deliverables	Timelines		
Phase 1: Project Due Diligence							
A. Project Mobilisation							
1	Understand the Terms of Reference	X	X	Inception Report	Week 1		
2	Preparation of ICRC for the project	X	X				
3	Conduct stakeholder analysis and map out stakeholder management plan	X	X				
4	Brief ICRC on the comprehensive plan of activities for the engagement including timetable of activities and milestones;	X	X				
5	Review the objectives and requirements of the project;	X	X				
6	Discuss key issues and findings to date from the information that has been provided to us, identifying steps that need to be taken in respect of any of those findings	X	X				
B. Initial Diagnostics							
7	Project description: General idea about what the project is about	X	X				
8	Project focus: Highlights about the project, specifying the exact needs the project expects to fulfil	X	X				
9	Determine goals for the project and what results are expected to be achieved	X	X				
10	Highlights on the type of benefit to be obtained from engaging in the project.	X	X				
11	Likely constraints to the execution of this project will be identified and summarized.	X	X				
Phase 2: Review of Concession Agreements							
1	Review existing PPP contracts to be provided by the ICRC	X		Comprehensive Red Flag and Recommendation Report on Reviewed PPP contracts Addendum to the PPP contracts	Weeks 2 - 4		
2	Identify terms, clauses and conditions that may require amendments to enable the practicability, effectiveness and ease of implementation of PPP projects	X					
3	Advise on the rationale for identifying the term, clauses and conditions and their respective implications on the expected objectives of the PPP contracts	X					
4	Make recommendations on updates to be included as addendum to existing contracts or to form part of new PPP contract templates for future PPP transactions	X					
5	Provide support during the re-negotiation of proposed amendments such as preparing notes for discussion, attending and participating at meetings with the legal team	X					
6	Prepare, review and finalise approved amendments to form addendum to the existing PPP contracts or additional terms, clauses and conditions to be included in future PPP contracts	X					
Phase 3: Review of ICRC Regulatory Guidelines							
1	Obtain information on need, current processes and responsible persons in charge of each governance document (i.e policies and process manual)		X	Comprehensive Red Flag and Recommendation Report on Reviewed Regulations Amended governance documents and new ones as may be applicable and to be approved for future use by ICRC.	Week 2 - 4		
2	Review existing governance documents on current practices within the ICRC. This will involve interviewing some of the staff of the Commission.		X				
3	Highlight the adequacy or otherwise in current governance processes and their resultant impact.		X				
4	Make recommendations on amendments where applicable, propose new policies where necessary or amalgamation of existing ones.		X				
5	Participate in stakeholder meetings with different policy owners within ICRC to understand specific requirements and needs of each and incorporate into policy document to be created or updated		X				
6	Draft policies and amendments (where applicable) incorporating information obtained at various stakeholder meetings and approved recommended items from the review		X				
7	Review and finalise approved updated and new policies		X				
8	Follow up to ensure updated and newly created policies are thoroughly executed by identified policy owners and that these are properly preserved for future use by the ICRC.		X				
Weekly Update Meeting (Friday 12 noon)		X	X		Weekly		

CHAPTER THREE

Existing PPP Contracts and Bidding Documents for PPP Projects

Existing PPP Contracts

S/N	PROJECT	GRANTOR
1.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Apapa)	Nigerian Ports Authority (NPA)
2.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Apapa)	Nigerian Ports Authority (NPA)
3.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Apapa)	Nigerian Ports Authority (NPA)
4.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Apapa)	Nigerian Ports Authority (NPA)
5.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Apapa)	Nigerian Ports Authority (NPA)
6.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Tincan Island)	Nigerian Ports Authority (NPA)
7.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Tincan Island)	Nigerian Ports Authority (NPA)
8.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Tincan Island)	Nigerian Ports Authority (NPA)
9.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Tincan Island)	Nigerian Ports Authority (NPA)

10.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Tincan Island)	Nigerian Ports Authority (NPA)
11.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Tincan Island)	Nigerian Ports Authority (NPA)
12.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Onne)	Nigerian Ports Authority (NPA)
13.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Onne)	Nigerian Ports Authority (NPA)
14.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Onne)	Nigerian Ports Authority (NPA)
15.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Onne)	Nigerian Ports Authority (NPA)
16.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Calabar)	Nigerian Ports Authority (NPA)
17.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Apapa)	Nigerian Ports Authority (NPA)
18.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Calabar)	Nigerian Ports Authority (NPA)
19.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Warri)	Nigerian Ports Authority (NPA)
20.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Warri)	Nigerian Ports Authority (NPA)

21.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Warri)	Nigerian Ports Authority (NPA)
22.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Warri)	Nigerian Ports Authority (NPA)
23.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Warri)	Nigerian Ports Authority (NPA)
24.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Port Harcourt)	Nigerian Ports Authority (NPA)
25.	Concession for the Development, Finance, Maintenance, Operate and Transfer of Port Terminal (Port Harcourt)	Nigerian Ports Authority (NPA)
26.	Development and Operate of Deep - Water Port (Lekki, Lagos)	Lekki Port LFTZ Enterprise Limited
27.	Concession for the Operation, Management and Provision of Primary, Secondary and Tertiary Health care at the Garki Hospital Abuja	Federal Capital Territory Administration (FCTA)
28.	Concession for the operation and maintenance of two warehouses located in Lagos and Abuja, through an Operate and Management contract	Federal Ministry of Health
29.	Concession for the renovation of 18 Blocks Student Hostel of the Kaduna Polytechnic	Mark Point Project Limited
30.	Concession Agreement for the Design, Build, Finance, Operate TCN's Fibre Optic Cable Telecommunication Infrastructure for the Western part of Nigeria	Transmission Company of Nigeria
31.	Concession Agreement for the Design, Build, Finance, Operate TCN's Fibre Optic Cable Telecommunication Infrastructure for the Western part of Nigeria	Transmission Company of Nigeria

32.	Public Private Partnership and Joint Venture Agreement for the Establishment of a Military Clothing Factory, Kaduna, Kaduna State	Defence Industries Corporation of Nigeria (DICOM)
33.	Concession contract for the Design, Finance, Upgrade, Operate and transfer of the Nigerian Correctional service shoe and garment Factories at Aba in Abia State and the Leather (Tannery) Factory at Janguza, Kano State	Nigerian Correctional Service (NCoS)
34.	Concession contract of the integrated digital trunking communication system designed to provide a robust, reliable, secured and Independent Multimedia Communication system (voice, video and data)	Federal ministry of Police Affairs
35.	Concession for the Production of ECOWAS Biometric Identity Cards	Federal Ministry of Interior
36.	Concession contract for the Design, Development, and Management of a Secured Ticketing solution for the NRC Rail Services for the Five (5) stations along NRC rail corridor between Abuja and Kaduna	Nigerian Railway Corporation (NRC)
37.	Concession Agreement for the Operation, Maintenance, Design and Sales of Electricity Product - Niger State	Kainji Hydro Electricity Plc
38.	Concession Agreement for the Operation, Maintenance, Design and Sales of Electricity Produce - Niger State	Shiroro Hydro Electricity
39.	Concession for the Design, Construct, Install, Operate and Maintain the Dadin kown Hydro Dam for the purpose of Electricity Generation with a capacity of 39 MW - Gombe State	Federal Ministry of Water Resource
40.	Concession of Gurara Hydro Power Project Kaduna Operate and Maintain PPP Project (30 Mega Watts)	Federal Ministry of water Resource
41.	Concession for the Service Management of Gurara Phase 1 Multipurpose Dam Facilities	Federal Ministry of water Resource

42.	Concession of Grain Storage Facilities for food storage (Silos) in Ado Ekiti	Federal Ministry of Agriculture and Rural Development
43.	Concession Grain Storage Facilities for food storage (silos) in Akure	Federal Ministry of Agriculture and Rural Development
44.	Concession Grain Storage Facilities for food storage (silos) in Gaya	Federal Ministry of Agriculture and Rural Development
45.	Concession Grain Storage Facilities for food storage (silos) in Ikenne	Federal Ministry of Agriculture and Rural Development
46.	Concession Grain Storage Facilities for food storage (silos) in Jos	Federal Ministry of Agriculture and Rural Development
47.	Concession Grain Storage Facilities for food storage (silos) in Ogoja	Federal Ministry of Agriculture and Rural Development
48.	Concession Grain Storage Facilities for food storage (silos) in Sokoto	Federal Ministry of Agriculture and Rural Development
49.	Concession Grain Storage Facilities for food storage (silos) in Igbariam	Federal Ministry of Agriculture and Rural Development
50.	Concession Grain Storage Facilities for food storage (silos) in Ezilo	Federal Ministry of Agriculture and Rural Development
51.	Concession Grain Storage Facilities for food storage (silos) in Ibadan	Federal Ministry of Agriculture and Rural Development
52.	Concession Grain Storage Facilities for food storage (silos) in Bulasa	Federal Ministry of Agriculture and Rural Development

53.	Concession Grain Storage Facilities for food storage (silos) in Jahun	Federal Ministry of Agriculture and Rural Development
54.	Concession Grain Storage Facilities for food storage (silos) in Kaduna	Federal Ministry of Agriculture and Rural Development
55.	Concession Grain Storage Facilities for food storage (silos) in Kwali	Federal Ministry of Agriculture and Rural Development
56.	Concession Grain Storage Facilities for food storage (silos) in Lafiagi	Federal Ministry of Agriculture and Rural Development
57.	Concession Grain Storage Facilities for food storage (silos) in Uyo	Federal Ministry of Agriculture and Rural Development
58.	Concession Grain Storage Facilities for food storage (silos) in Gombe	Federal Ministry of Agriculture and Rural Development
59.	Concession Grain Storage Facilities for food storage (silos) in Makurdi	Federal Ministry of Agriculture and Rural Development
Above are some of the listed PPP Contracts		

BIDDING DOCUMENTS

3.1. Stages of a typical PPP Project (PPP Lifecycle)

Identifying, developing and implementing a project through the PPP route involves a series of steps. As per the National Policy on Public-Private Partnerships, the PPP project lifecycle in Nigeria consists of the following phases.

- **Phase I: Project Development** - This phase consists of the following steps:
 - ✓ Identification of the need for undertaking the project,
 - ✓ Arriving at the appropriate solution to meet the identified need,
 - ✓ Preparing economic, social and environmental cost benefit analysis, and an Environmental Impact Assessment, if required,
 - ✓ Testing the affordability and the Value for Money (VFM) of the different procurement options,
 - ✓ Preparing the pre-feasibility and full feasibility studies (together called the Outline Business Case) and getting the necessary approvals for this OBC.

- **Phase II: Project Procurement** - This stage consists of the following:
 - ✓ Creation of a project team and management structure,
 - ✓ Preparation of an Information Memorandum and bid documentation,
 - ✓ Market consultation and selection of the preferred bidder through a competitive and transparent Bidding Process,
 - ✓ Preparation and Approval of the Full Business Case; the FBC needs to be approved by the Federal Executive Council prior to contract award.
 - ✓ Award of the contract to the preferred bidder.
- **Phase III: Project Implementation** - This stage involves the following:
 - ✓ Monitoring of the design and construction, and subsequently operation and maintenance of project assets to ensure compliance with the required service standards,

3.3 Procurement Procedure (Selection of a Private Developer)

The key to the successful implementation of a project through the PPP route is the selection of an appropriate private developer that is well qualified for the delivery of the services. The Procurement Procedure is critical towards selecting an appropriate private developer that will partner with the public sector to successfully execute and manage the proposed project.

The Procurement Procedure should enable the MDA to a) shortlist reputable and experienced bidders with **Technical Experience** and **Financial Strength** to execute the project, b) Receive and evaluate Technical and Financial Proposals from bidders, leading to the selection of the Preferred Bidder and c) Enter into a Contract agreement with the Preferred Bidder (or the SPV set up by the Preferred Bidder). In this context, the procurement of a private developer should be done through a Competitive Bidding Process.

A major advantage of Competitive Bidding is the greater transparency inherent in the process. Most of the international lending institutions and grant funding organizations require the use of competitive bidding as a condition for their support. Competition not only provides transparency in the process but also provides a mechanism for selecting the best-value proposal. However, it is important to recognise that the benefits of competition are only realised if there is sufficient interest to generate multiple bidders. Competitive Bidding therefore requires a significantly higher level of preparation by the MDA compared to conventional procurement. To this end, Competitive Bidding should follow a Two-Stage Process as described below.

3.3.1 The Bidding Process

As discussed in the previous section, Competitive Bidding following a Two-Stage Process should be adopted for the selection of the private developer. To this end, in the first stage, applications to qualify are invited against threshold technical and financial criteria specified in the Request for Qualification (RFQ) document. Firms are short-listed based on their Technical and Financial capabilities. The shortlisted firms are required to submit detailed proposals in response to a Request for Proposal (RFP) document. The Proposals are then evaluated as per the conditions

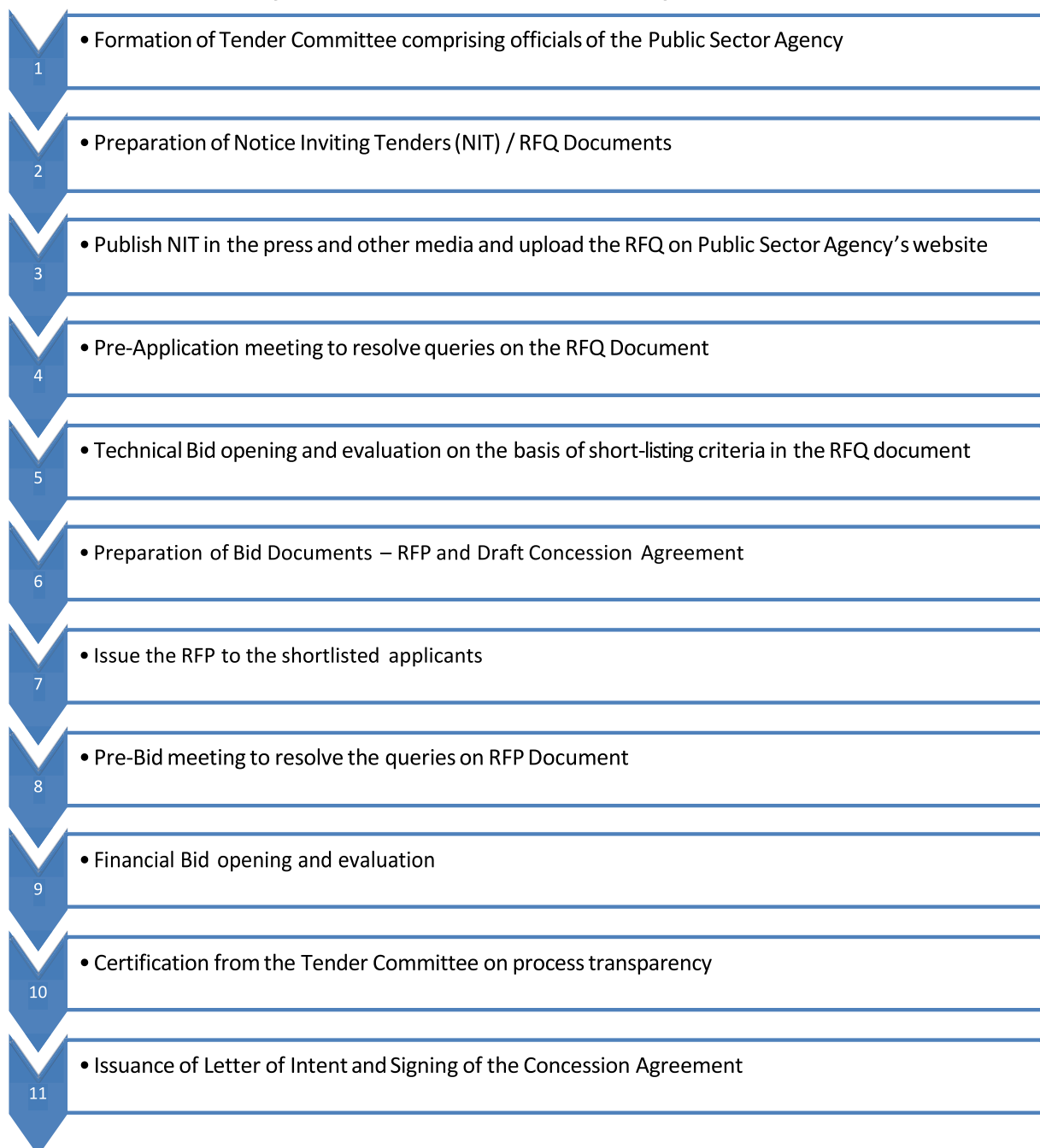
of the RFP. The table below provides the indicative steps and timelines in a Two-Stage Bidding process.

Table 3: Indicative steps and timelines - Two stage bidding

Sr. No.	Event Description	Estimated Date
Stage-1: Pre-Qualification Stage		
1	Publication of RFQ document	Zero Date (X)
2	Submission of query by the perspective bidders	X + 15 days
3	Pre-bid meeting	X + 20 days
4	Authority response to queries	X + 30 days
5	Application Submission Due Date	X + 60 days
6	Opening of Technical Proposal	X + 60 days
7	Technical Capability Evaluation & Report	X + 75 days
8	Acceptance of Technical Evaluation Report by the Procurement Committee	X + 80 days
Stage-2: Bid Stage		
1	Sale of Bid/RFP document to short-listed applicants	X + 90 days
2	Submission of query by the perspective applicants	X + 105 days
3	Pre-Bid meeting	X + 110 days
4	Authority response to queries	X + 130 days

The figure below is a flow chart showing the steps in a typical Bidding process.

Figure 8: Steps involved in the Bidding Process



A brief description of the various steps involved in the Bidding Process is given below.

Step 1: Formation of a Procurement Committee

A Procurement Committee is formed for overseeing and conducting the Bidding process. Typically, the Committee is formed with one representative from the Finance, Commercial, Legal and User Departments. This committee appoints the co-ordinator if the bid process is to be managed in house, or an external consultant (Transaction Advisor) to manage the bid process. The Co-ordinator or the Transaction Advisor puts forward the evaluation report for approval or seeks guidance from the committee in case of any ambiguities while interpreting the provisions of the RFQ and RFP documents.

Step 2: Notice Inviting Application and Issue of Request for Qualification (RFQ)

The MDA prepares and issues a notice inviting Applications from interested applicants for the proposed project. This notice provides a brief overview of the assignment, the project area and qualification/eligibility criteria, together with the submission deadline. Along with this, the MDA issues a Request for Qualification (RFQ) document that provides details of the Qualification and Eligibility criteria, with instructions for submission of Applications. The Notice inviting Applications is typically published in at least two national dailies and, on the same date, the RFQ is uploaded on the official website of the MDA and of the ICRC.

The RFQ includes the formats for submission of Applications and instructions on how to present proof/testimonials of eligibility and qualification. These include Details of applicant, Power of Attorney, Details of Eligible Projects and their Completion Certificates, Statement of Legal Capacity, Board Resolution, Solvency Certificate, Non-Collusion certificate, and Certificate of Incorporation of entity, in conformity with the qualification requirements.

Step 3: Pre-Application Meeting and Issue of clarifications

A Pre-Application Bid meeting is held to clarify doubts and answer queries from prospective bidders regarding the Project and the RFQ. After the meeting, the RFQ may be modified if deemed necessary, to update any changes to the requirements by issuing an addendum. The revised bid documents are uploaded again on the website.

Step 4: Evaluation of Applications and short listing of bidders

The bids are evaluated based on the technical and financial criteria as per various clauses of the RFQ. At this stage, the evaluation normally focuses on threshold criteria such that all proposals meeting the criteria are shortlisted for the next stage; all other proposals are rejected. Compared to awarding marks and scoring, a Pass-Fail approach is unambiguous and is generally the preferred approach for evaluation of responses to the RFQ.

Step 5: Request for Proposals stage

The RFQ stage culminates in the approval of the shortlisted bidders by the Procurement Committee and issuance of the RFP to the shortlisted bidders. Depending on the type of contract and the local requirements, the bid package can range from a concise set of documents to several volumes of material. Typically, the RFP Document comprises of three parts as described below:

- **Part I Instructions to Bidders (ITB):** This document contains an introduction to the MDA, project scope and objective, instructions for preparing the bid document, different forms to be enclosed in the bid, timelines for the bidding process, and supporting documents to be attached for the bidding.
- **Part II Project Information Memorandum (PIM):** The project information memorandum consists of project details including: Population profile – Density, income group, economic activities in the project area; complete details of the land to be utilised with proof of ownership; report on the existing assets and their use for the proposed infrastructure services ; Contour map of the site with proposed approach road drawing; Annual budget of the MDA including the Balance sheet and Profit & Loss account ; Annual Budget for the infrastructure services to be offered; Revenue from the existing infrastructure services with assumptions on user charges; Construction and O&M guidelines; Environmental guidelines; Manpower deployed; Existing contract for the proposed infrastructure services and any other pertinent information.
- **Part III Draft Contract Agreement:** The Draft Contract Agreement deals with the detailed terms and conditions on which the project is awarded and broadly covers:
 - ✓ Scope of Work, Period of Contract,
 - ✓ Construction period,
 - ✓ Parameters on which contract is to be granted (VGF, Premium, etc.),
 - ✓ Obligations of the PPP service provider and sponsoring authority,
 - ✓ Process of handing over of site to PPP service provider,
 - ✓ Monitoring and supervision details,
 - ✓ Safety requirements,
 - ✓ Support and incentives to be given by the sponsoring authority,
 - ✓ Operations & Maintenance requirements,
 - ✓ Force majeure and Termination payment,
 - ✓ Dispute resolution mechanism, and
 - ✓ Other terms and conditions relevant to the project.

Step 6: Pre-bid conference and Processing of clarifications

Pre-bid meetings are a key element of the communication strategy that helps the MDA build substantial trust and confidence with the bidders and other stakeholders. Key considerations include:

- Adequate time should be provided between the issue of RFQ/ RFP and the date of the pre - bid meeting and deadlines for submissions. Operators should provide their queries in writing within the specified number of days before the pre-bid meeting. However, additional questions may be entertained at the pre-bid meeting.
- The pre-bid meeting should be attended by senior representatives of the MDA together with their advisers on the project.
- The pre-bid meeting may be followed by a visit to the project site or service area arranged by the MDA.
- The deliberations of the pre-bid meetings will be duly documented and all responses and clarifications must be communicated in writing to all bidders. The responses are also published on the MDA's website.

Step 7: Proposal content and evaluation

At the RFP stage, Bidders are required to submit their proposals in two parts, namely, **Technical Offer** and **Financial Offer**. The **Technical Offer** is normally evaluated through a scoring approach with a threshold cut-off score of 70 marks. Financial Offers of only those Bidders scoring above this threshold are opened. A detailed description of the Bid Evaluation criteria is provided below under the Bid Documents for PPP Procurement – Request for Proposal (RFP).

Step 8: Approval by Procurement Committee and Issue of Letter of Intent (LOI)

The Project Coordinator or the Transaction Advisor presents the evaluation reports – Technical and Financial, as per the procurement timeline to the Procurement Committee. This Committee considers and approves the report then issues a certificate of transparency and on this basis, recommends the Preferred Bidder to FEC.

After certification from the Procurement Committee, and approval by FEC, the technical and the financial proposals of the preferred bidder are incorporated in the contract and the OBC prepared by the MDA is updated based on the pricing and the technical information contained in the preferred bidder's bid to constitute the FBC.

A Letter of Intent (LOI) of the bid is issued by the MDA in favour of the Preferred Bidder. The LOI specifies the Conditions Precedent to be completed by the Preferred Bidder. These typically

include a) Furnishing the Performance Security and any other Project Development Fees payable and b) Formation of an SPV if required under the RFP. Once the Conditions Precedent

to the signing of the Contract Agreement is met, the Agreement is signed between the MDA and the Preferred Bidder.

The key input for the selection of the private developer and for appropriate allocation of the project risks are the Bid Documents which must be drafted with care. The section below provides a description of the Bid documents as a key tool for PPP procurement.

3.4. Bid Documents for PPP Procurement

The Bid Documents will differ depending upon the contract type and the procurement approach being followed for the selection of private developer. Some of the key Bid Documents involved during the procurement of private developer are described below.

3.4.1. Request for Qualification (RFQ)

The RFQ is often the first formal stage in the Bidding Process, although it may follow an EOI when that is deemed necessary. An RFQ is used to make a short list of potential bidders comprised of those who are technically and financially qualified for the project. These shortlisted bidders are then invited to submit bids for the project at the RFP stage.

By reducing the number of bidders, the overall cost of the bid process is lowered for both the bidders and the Sponsor who has to evaluate them. Reducing the group of qualified bidders encourages stronger bids as the selected bidders are better able to assess their chances of winning amongst a smaller group and are likely to invest more effort in the bid process.

There should be rough drafts of the most critical project documents available before issuing the RFQ. These drafts should be prepared before the application for In-principle Clearance. If such drafts have not been prepared in advance, the RFQ process may not run smoothly and there is likely to be a lengthy delay between the RFQ and RFP stages. Project documents are finalised after the qualification stage.

Contents of the RFQ

An RFQ is a more detailed document than an EOI. It includes the following information about the project and qualification procedure:

- Description of key project details including,
 - Description of the project scope and objectives, with a focus on the services to be provided including performance levels;
 - Skills, expertise and experience required to meet these objectives;
 - Envisaged PPP model and financing mechanism;
 - Envisaged Payment mechanism;

- Project timeframe and indicative implementation schedule; and
- A draft of the Concession Agreement can be included as an annexure.
- Details of the qualification requirements and Bidding Process, including:
 - Qualifying criteria for the evaluation and selection of shortlisted bidders;
 - Details of the pre-submission conference or meeting and of other opportunities to ask questions or seek clarification;
 - Process for submitting responses and evaluation;
 - Indicative procurement schedule;
 - Specific legal requirements or restrictions associated with the RFQ or the project;
 - Other general instructions to applicants; and
 - Application forms (as annexure)

The Concession Agreement is usually issued along with the RFP as a Volume II document.

Qualifying Criteria

The qualifying criteria used to evaluate the responses to the RFQ should be:

- Based on the project requirements
- Selected before the RFQ is prepared
- Related to a scoring system
- Clearly stated in the RFQ itself.

The criteria reflect the technical, financial and other requirements of the particular project and are chosen specifically for that project. The requirements' section of the RFQ specifies that the responses should provide all necessary information to meet the qualifying criteria.

Qualifying criteria may include:

- Technical qualifications
 - Experience with similar projects, in terms of service outputs and project size and complexity
 - Experience with PPPs in similar projects and generally
 - Relevant experience locally and internationally
 - Specific technical capabilities of the firm or consortium
 - Experience of working together (if firms are forming a consortium)
- Financial qualifications
 - Ability to raise sufficient funding for the project and in the form required
 - Consortium structure, including minimum equity contribution of lead firm and evidence of binding agreement among the members
- Evidence of no conflict of interest

The RFQ may also request brief comments on the project scope and structure in order to evaluate the firm or consortium's understanding of the requirements.

A **scoring system** is developed to allow the firms to be ranked. The Independent Monitor may review the criteria and the scoring system.

Both the criteria and the scoring system are explicitly stated in the RFQ. This allows potential bidders to judge whether they are sufficiently qualified for the project and allows them to focus their responses on what the MDA wants.

3.4.2. Request for Proposal (RFP)

The RFP, together with the Draft Concession Agreement (CA), comprise the Bid Documents. These are the most important documents in the bidding process. The objective at the RFP stage is to select a preferred bidder based on an objective, comprehensive and transparent selection process. The RFP and CA specify the main terms of the project which are largely non-negotiable at the award stage. It is therefore important that these terms are clear and well understood by all parties. The Concession Agreement also lays the foundation for the contract management process throughout the life of the PPP.

A quality RFP provides bidders with clarity on the requirements of the project and assures them that the public partner is credible and well organised. This makes them more likely to devote resources to bid. It also reduces the likelihood of delays to the bidding process as a result of subsequent changes to the RFP.

The draft Bid documents are finalised based on the details from:

- The project specifications contained in the feasibility study;
- VGF or other grant approval and any added requirements or requested changes; and
- The qualification criteria developed at the RFQ stage

Contents of the RFP

The RFP is the comprehensive request for proposals from the shortlisted firms or consortia. The RFP communicates to the bidders the MDA's requirements. The RFP typically includes several sections detailing the essential aspects of the project and the bid, for example:

- *General instructions to bidders including,*
 - Introduction and overview of the RFP itself, detailing its contents and purpose
 - Instructions to bidders, including details of the minimum submission requirements, required format for financial bids, and submission procedures
 - Details of pre-bid meetings, site visits and data room
 - Requirements for Bid Security or contract performance security
- *Detailed description of the project scope and required service outputs based on the specifications developed in the feasibility study including,*
 - Output-focused specification
 - Site-specific details
 - Financing requirements
 - Environmental and social safeguard requirements

- *Draft Concession Agreement specifying the commercial framework in legal terms including,*
 - The intended risk allocation
 - Roles, rights and responsibilities of all parties
 - Key schedules to the Agreement, including
 - ✓ Site description
 - ✓ Specifications and standards
 - ✓ Required tests and inspections, and procedures for testing, independent inspections, and reporting
 - ✓ Schedule of user fees/ tariff rates
 - ✓ Financial arrangements, such as performance security and escrow accounts

Criteria for bid evaluation

- The evaluation of bids is based on the following approaches
 - ✓ In the case of projects where the developer is responsible for detailed designing of the facilities, there is flexibility available to introduce innovation and design efficiencies, and a Quality cum Cost Based Selection (QCBS) approach may be used. But where Technical Proposals shall be allotted a specified weight, the Financial/Price Proposal shall carry the residual weight. The actual selection of weights shall be made based on the specific requirements of the PPP project.
 - ✓ In all other projects, Least Cost approach shall be used. Under the Least Cost approach, the financial proposals of all bidders who qualify on technical criteria, are opened and assessed. The bidder quoting the most advantageous financial offer to government is then selected as the preferred bidder.
- The process and evaluation methodology are set out so that bidders take comfort from an auditable process with the necessary checks. The RFP specifies that the technical and financial criteria of the bid will each be scored out of 100 points. The scores achieved shall be combined into the bidder's overall score, using the following formula:

$$\text{Total Bid Score} = X * (\text{Technical Score}/100) + Y * (\text{Financial Score}/100)$$

Where:

X is the weight for technical;

Y is the weight for financial, and this will be 100% in Least Cost approach;

- For the purposes of applying the above mentioned formula, 'technical' refers to all project factors under evaluation other than the price elements.

- The evaluation of the various elements of the technical and price proposal shall be aimed at gauging whether the proposal provides an integrated solution to the service delivery requirement of the MDA. The weights for technical and financial proposals shall vary across projects. The evaluation of the bid is performed from a perspective of an integrated service delivery solution.
- Where discount rates are used for the assessment of Financial Proposals, such discount rate shall be the Government of Nigeria bond rate adjusted for risk premium (risk associated with the project). The selected government bond should have a similar maturity as the project life.
- The Selection/Financial criteria for a PPP project may be one or a combination of the following:
 - ✓ Lowest contract value;
 - ✓ Lowest bid in terms of the present value of user fees;
 - ✓ Highest revenue share to the Government;
 - ✓ Highest upfront fee;
 - ✓ Shortest concession period;
 - ✓ Lowest present value of the subsidy or grant;
 - ✓ Lowest capital cost and Operation & Management cost for Projects having a definite scope;
 - ✓ Highest equity premium;
 - ✓ Lowest quantum of State Support solicited in present value terms;
 - ✓ Lowest net value of payments required from the Government;
 - ✓ Such other suitable selection criteria as the Appropriate Approving Authority may approve, allow or prescribe.
- All clarification sought and responses to the clarification shall be documented and sent to all pre-qualified bidders. The MDA shall maintain a register of bidder notes and meetings and copies of the minutes of such meetings should be circulated among the bidders.
- The evaluation is conducted by the Tender Evaluation Committee appointed and chaired by the representative of the MDA and includes:
 - ✓ The Transaction Advisor;
 - ✓ Selected members from the MDA;
 - ✓ Representative from the PPP Resource Centre;
 - ✓ Any other member as may be considered necessary for the project.
- The Tender Evaluation Committee, in turn, could be divided into functional teams to focus on evaluation of specific aspects of the bidders' proposals. For example, the Tender Evaluation Committee could have separate teams for undertaking technical review, legal

review, local preference review and financial review. The number of teams may depend upon the complexity of the project evaluation.

- Where applicable, alternate or variant bids submitted by bidders that meet the minimum requirements of the RFP, shall be evaluated subsequent to the evaluation of conforming bids. Each alternate bid shall be evaluated as a stand-alone proposal.
- The evaluation report of the Tender Evaluation Committee along with all supporting scores sheets and notes will be submitted to the PPP Resource Centre and the same will be reviewed for process compliance.
- In the event that no single bidder emerges as the preferred bidder, the Federal Executive Council can recommend a Best and Final Offer (BAFO) process.
- Following this evaluation, the highest ranking bid based on the evaluation criteria shall be declared the preferred Bidder and the MDA shall award the contract to the Bidder who submitted the highest ranking bid.

3.5. Negotiations

Before the award of contract to the Preferred Bidder, there are typically certain negotiations between the MDA and the Preferred Bidder to reach consensus on the terms of the contract, the allocation of risks among the parties and the deliverables of the parties under the contract. This negotiations process must be carefully planned and managed to ensure that it is fair and transparent. It should be carried out in such a manner that the confidentiality of the negotiations is strictly maintained. Such a negotiations process provides the bidder with the opportunity to optimize the value for money of the bid. The key steps in the negotiations stage include:

3.5.1. Preliminary Activity

Prior to entering into negotiations, the MDA appoints a negotiations team, which in turn undertakes the following preliminary activities.

- **Define and articulate the objective of the negotiation:** The objective of the negotiation is to refine the understanding of the terms and conditions of the project and to reach a consensus on a mutually acceptable PPP agreement;
- **Prepare a timeline for negotiations:** This timeline includes the start and end dates of negotiation and is also structured to fall within the period of validity of the bid;
- **Identify a negotiations team:** This involves first identifying the skills set required for negotiations and then matching up qualified persons within and outside the MDA with the defined skill set. A lead negotiator should be identified.
- **Develop a negotiation strategy:** To be able to effectively negotiate, it is important for the negotiation team, in consultation with the project team and transaction advisors, to anticipate the preferred bidder's interests and any potentially contentious issues. The negotiation team develops a negotiation plan which takes into account certain predefined positions of the MDA as well as setting the minimum negotiating parameters.
- **Establish initial contact with the preferred bidder:** A formal written communication inviting the preferred bidder for negotiations is sent. This communication includes the administrative

details such as date, time, venue and expected duration of negotiations. It also provides the bidder with the key points of discussion, the approach proposed by the MDA and any additional information required from them. The composition of the bidder's negotiation team is one such requirement.

3.5.2. Initiate negotiations and manage the negotiation process

The actual act of negotiation takes multiple interactions between the negotiating team and the preferred bidder to arrive at a set of mutually acceptable terms and conditions for the project.

The key considerations during this process include:

- Initiating the negotiations with an opening statement on the objective of the project and how it fits into the strategic objectives of the MDA. In this first contact, a clear delineation of role and responsibilities of each member of the respective negotiation teams is clarified so as to create an atmosphere of trust and cooperation
- Pre-determination and joint agreement on the agenda of each subsequent meeting
- Carefully document all discussions and interactions during the meetings. The MDA must appoint an assigned drafter to track; number and date all documents being negotiated. The MDA also ensures security of documentation and limits access to documentation as required
- Working towards identifying and suggesting options to resolve issues and situations of stalemate in the discussions
- The negotiating team must produce minutes of the meetings and obtain the written agreement from the preferred bidder that the same are a true and accurate record of the negotiations held.

3.5.3. Formal settlement

The formal settlement between the two parties happens subsequent to them reaching a compromise wherein both parties believe that the settlement is the best possible under the circumstances.

The MDA strives to make the funding agreements unconditional. Conditions precedent in the PPP agreement must be limited as far as possible. This refers to matters that need to be resolved, failing which the agreement, if signed, would not be enforceable. There may be some conditions that may not be met before signing the PPP agreement, but efforts are made to ensure that these are minimised. During the formal settlement, the MDA should:

- Record all details of the negotiation
- Agree on how any potential conditions precedent can be minimized
- Agree to the required follow-up in contract management (of outstanding issues that do not impact on negotiated settlement) and the relevant timeframes.
- Establish a preliminary schedule for signing the PPP agreement.

Once a formal settlement is reached between the negotiations committee and the preferred bidder:

- It is signed by all members of the negotiations team and the representatives of the preferred bidder;
- The negotiations team forwards its recommendations and the signed formal settlement to the Appropriate approving Authority;

- All communication to and from the preferred bidder, all reasons/ justifications for any changes in terms and conditions or reasons for any deviations are attached to the signed formal settlement that is sent to the appropriate Approving Authority;
- The independent monitor directly submits its certificate to the appropriate Approving Authority on the conduct of the proceedings by the negotiations team.

The recommendations of the Negotiations Team may be to:

- Proceed with contract award to the preferred bidder, incorporating the agreements reached during negotiations;
- Revise the negotiation objectives and hold further negotiations, or
- Terminate the negotiation and reject the preferred bidder.

If the negotiations team recommends rejection of the preferred bidder, it may also, where appropriate, recommend inviting the reserve / next ranked bidder for negotiations in the case of competitive bidding. The results of any approved negotiations are specified in a letter of bid acceptance and incorporated into the contract document.

If negotiations are commenced with the next ranked bidder or a new bidder is invited, the MDA would usually not reopen earlier negotiations; and the original preferred bidder is informed in writing of the reasons for termination of the negotiations.

The appropriate Approving Authority reviews the recommendations and then either approves the recommendation, authorizing the MDA to proceed; or may refuse to authorize acceptance and refer the matter back to the MDA with further instructions.

Contract Award

After finalization of the project agreement between the Negotiations Team and the preferred bidder, a relevant Accounting Officer appointed by the MDA signs the contract on behalf of the Federal Government and is responsible for both the project procurement and its implementation. After the Award of the Contract to the Preferred Bidder, the Preferred Bidder needs to achieve the financial closure of the project within an agreed timeline in the Concession Agreement.

CHAPTER FOUR

PPP PROCESS FLOW

INFRASTRUCTURE CONCESSION REGULATORY COMMISSION
Plot 1270 Ayangba Street Area 11 Garki Abuja, Nigeria; Tel: +234- 09-4604900.;
email: info@icrc.gov.ng

A PPP over Federal Government Infrastructure would typically follow the Phases and Steps below:

PPP Project Identification Phase

1. Project identification by Ministries, Departments and Agencies (MDA)
2. MDA's should involve and engage with the Infrastructure Concession Regulatory Commission (ICRC) prior to commencing PPP to ensure viability and bankability of proposed projects.
3. MDA's should consult and engage with the Federal Ministry of Finance (FMoF) prior to commencing PPP projects, in order to minimize the risk and contingent liabilities arising from such projects.

PPP Project Development and Preparation Phase

4. A Transaction Adviser (TA) would be engaged by the MDA through competitive bidding process as required under the Public Procurement Act of 2007, to produce the report that would show the bankability of the project, this report is called an Outline Business Case (OBC)
5. The MDA would thereafter forward the OBC to the ICRC for review. Subject to assessment, ICRC would issue an OBC Certificate of Compliance to the MDA or decline issuance and advise the MDA accordingly.
6. The MDA would then submit the OBC along with ICRC OBC Certificate of Compliance of the Federal Executive Council (FEC) through the line Minister for Approval.

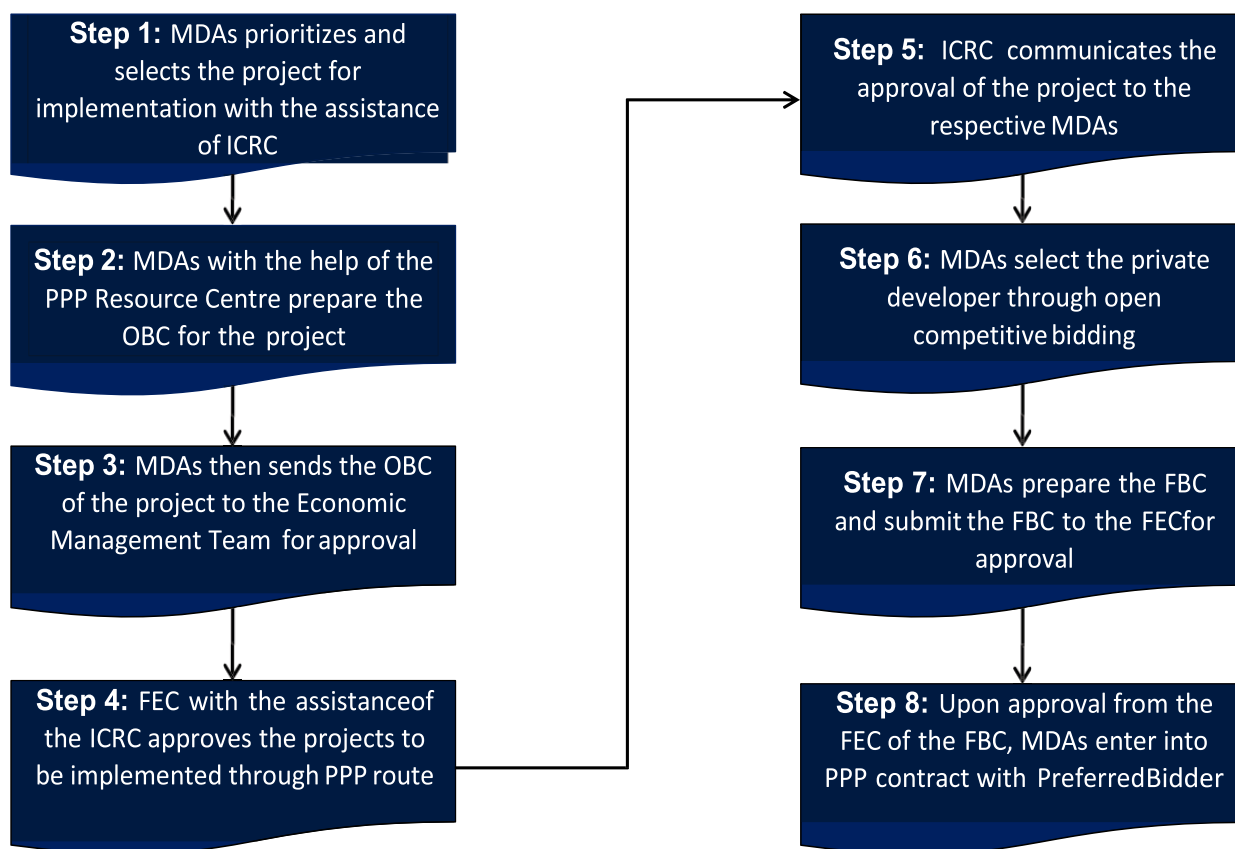
PPP Procurement Phase

7. If the project is approved by FEC, the MDA's TA would commence a procurement process leading to a competitive bidding process from which a preferred PPP Project Proponent (Investor) will emerge.
8. **Negotiations** would thereafter ensue, leading to the conclusion of a Full Business Case (FBC) document and submission of the FBC to ICRC for review. Subject to assessment, ICRC would issue an FBC Certificate of Compliance to the MDA or decline issuance and advise the MDA accordingly.
9. The MDA would again submit the FBC along with the ICRC Certificate of Compliance to BC through the line Minister, for Approval.
10. If the FBC is approved by FEC, this would be followed by the signing of a contract between the MDA and the preferred PPP Project Proponent (Investor). ICRC will thereafter take custody of the contract as required under the Section 20 of the ICRC Act.

PPP Implementation Phase

11. Eventually, for the project to take off, the preferred PPP Project Proponent (Investor) must achieve **Financial Close**³
 12. The MDA is required under Section 12 of the Act to supervise the project diligently. On the other hand, the ICRC and the MDA are required, under Section 10 of the Act, to conduct regular joint Inspections of the Project until the end of the contract.
1. Outline Business Case: A document prepared by the MOA's TA that aims to establish the need for the project and its outline parameters and scope, including costs and bankability demonstration.
 2. Full Business Case: A document prepared by the MDA's TA prior to financial closure and award of contract, which provides all the, information needed to support a decision to award a contract and commit actual funding, as well as provide a basis for the necessary project management, monitoring evaluation and benefits realization,
 3. Financial Close: The time when the financial documentation and covenants have been executed with lenders to the project, and conditions precedent have been satisfied or waived. it is now permissible to draw money for project execution. ICRC/ PPP/Process/December 2015.

Figure 11: PPP procurement at Federal level



A brief description of the procurement and approval process for a PPP project at the Federal Level is provided below.

- **Step 1:** The MDAs with the assistance of the ICRC select and prioritise the projects to be implemented on a PPP basis for each sector;
- **Step 2:** For the projects selected to be implemented through the PPP route, the respective MDA with the regulatory assistance of the ICRC prepares an Outline Business Case (OBC);
- **Step 3:** The OBC is then submitted by the MDA to the Economic Management Team for the FEC approval;
- **Step 4:** The EMT with the assistance of the ICRC approves the projects to be implemented through the PPP route for various sectors;
- **Step 5:** The ICRC communicates the respective MDAs about the projects approved by the FEC for implementation through the PPP route;
- **Step 6:** The MDAs select the private developer for the implementation of the project through open competitive bidding process;

- **Step 7:** Once the Preferred Bidder is selected, the MDA prepares a Full Business Case (FBC) on the basis of the OBC and the proposal of the Preferred Bidder and submits the same to the FEC for approval; and
- **Step 8:** Upon approval of the FBC by the FEC, the MDA enters into a PPP contract with the Preferred Bidder.

4.1 Regulations governing PPP procurement at the Federal level

PPP procurement in Nigeria is governed by the following legislation:

- The Infrastructure Concession Regulatory Commission (ICRC) Act 2005;
- Public Procurement Act 2007; and
- Regulations issued by ICRC governing the PPP process

These laws and regulations set out the requirements for competition and private sector participation in all public procurement and also specify the necessary approvals required for PPP procurement. Through such legislation, the Government assures investors that all contracts completed in compliance with these laws are legal and enforceable, and that investors would be able to recover their expected return subject to compliance with the terms of the PPP contract.

The objectives of these laws are to,

- Ensure that public authorities are empowered to enter into agreements for the implementation of privately financed infrastructure projects and that they can contract public services functions to private companies;
- Ensure that the regulation and licensing of public service operators and operations is transparent, timely, and effective;
- Provide appropriate remedies for protecting the safety and integrity of public infrastructure from vandalism and other criminal activity;
- Ensure that there are no distortions created by existing tax, banking, company, or any other laws that would bias the investment decisions of public authorities for or against PPP as a procurement option, or would distort the commercial decisions of PPP investors, contractors, or operators;
- Provide for transparent, efficient, and competitive procurement procedures for PPP - type contracts that encourage innovation from bidders, and allow dialogue to optimise the allocation of risks between the contracting parties;
- Ensure that there is an effective dispute resolution process which can operate independently and in a timely manner to provide alternative procedures such as arbitration and expert determination;
- Ensure that the proposed institutional and financial framework for PPP is consistent with the corresponding legislation proposed or enacted in each State.

4.2 The Infrastructure Concession Regulatory Commission (ICRC) Act, 2005

This ICRC Act, 2005 governs the participation of the private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements.

The ICRC Act, 2005 permits the granting of PPP contracts or concessions by any Federal Government ministry, agency, corporation, or body.

Under the ICRC Act, 2005, the Government of Nigeria has established the Infrastructure Concession Regulatory Commission (ICRC) to develop the guidelines, policies, and procurement processes for PPP projects in Nigeria. The ICRC in collaboration with the States has established a framework for the development of infrastructure in Nigeria to accelerate the development of a market for PPP projects. The ICRC is governed by a governing board.

The functions of the ICRC include,

- Taking custody of every concession agreement made under the ICRC Act and monitoring compliance with the terms and conditions of such agreement;
- Ensuring efficient execution of any concession agreement or contract entered into by the Government;
- Ensuring compliance with the provisions of the ICRC Act;
- Performing such other duties as may be directed by the President, from time to time, and as are necessary or expedient to ensure the efficient performance of the functions of the ICRC under the ICRC Act.

The Board of the ICRC provides general policy guidelines relating to the functions of the ICRC and manages and supervises the policies of the ICRC. In general, the Board ensures the efficient performance of the ICRC by providing oversight and high-level guidance in accordance with the Act. Its role in monitoring compliance of both parties with completed agreements is described in Chapter 6.

Key provisions governing project implementation

The ICRC Act lays down the provisions governing implementation of PPP projects. Some of the key provisions are as follows:

- The Act includes an illustrative list of infrastructure to which it may be applied, but also allows the FEC to approve any other form of infrastructure and development project.
- The Act requires that the approved projects should follow a competitive procurement process that is openly advertised.
- The Act includes an obligation for the private sector operator (Project Proponent) to finance the infrastructure.
- The Act allows the Project Proponent to recover the investment made towards funding the project cost from the relevant MDA by the way of amortization payments.
- Project cost shall be duly authenticated by the relevant Ministry or government department and relevant qualified professional to determine the amount to be repaid by amortization.
- The term "Concession" does not imply that rights to any revenue stream from user charges are transferred to the private sector operator.
- No Federal MDA shall give any guarantee, letter of comfort or undertaking in respect of any concession agreement entered under the ICRC Act. However, if such a guarantee, letter of comfort or undertaking is to be given then the MDA requires the prior approval of the FEC.
- The ICRC and the Federal MDA shall have the power to inspect the project assets at anytime during the Concession period.

4.3 Public Procurement Act, 2007

The Public Procurement Act, 2007 established the National Council on Public Procurement (NPC) and the Bureau of Public Procurement (BPP) as the regulatory authorities responsible for monitoring and oversight of Public Procurement in Nigeria. Today, both the NPC and the BPP act as key stakeholders discharging important responsibilities at various stages of the PPP procurement process.

The Public Procurement Act has also harmonized the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for Public Procurement in Nigeria. The provisions of the Public Procurement Act, 2007 are applicable to the procurement of goods, works and services by,

- The Federal Government and all procurement entities;
- All entities not covered under the above point but which derive at least 35% of the funds appropriated or proposed to be appropriated for any type of procurement described in the Public Procurement Act from the Federation share of Consolidated Revenue Fund.

National Council for Public Procurement

Under the Public Procurement Act, 2007, a National Council for Public Procurement is established to perform the following functions related to PPP procurement:

- Consider, approve and amend the monetary thresholds for the application of the provisions of this Act by procuring entities;
- Consider and approve policies on public procurement;
- Approve the appointment of the Directors of the Bureau of Public Procurement;
- Receive and consider, for approval, the audited accounts of the Bureau of Public Procurement;
- Approve changes in the procurement process to adapt to improvements in modern technology;
- Give such other directives and perform such other functions as may be necessary to achieve the objectives of this Act.

Bureau of Public Procurement

In addition to the National Council for Public Procurement, an agency called the Bureau of Public Procurement was also established to perform the following functions:

- Formulate and get approved from the Council, the general policies and guidelines relating to public sector procurement;
- Publicize and explain the provisions of the Public Procurement Act;
- Subject to thresholds as may be set by the Council, certify Federal procurement prior to the award of contract;

- Supervise the implementation of establishment procurement policies;
- Monitor the prices of tendered items and/ or services and maintain a national database of standard prices;
- Publish the details of major contracts in the procurement journal;
- Publish paper and electronic editions of the procurement journal and maintain an archival system for the procurement journal;
- Maintain a national database of the particulars, classification and categorization of federal contractors and service providers;
- Collate and maintain in an archival system, all federal procurement plans and information;
- Undertake procurement research and surveys;
- Organize training and development programmes for procurement professionals;
- Periodically review the socio-economic effect of the policies on procurement and advise the Council accordingly;
- Prepare and update standard bidding and contract documents;
- Prevent fraudulent and unfair procurement and where necessary apply administrative sanctions;
- Review the procurement and award of contract procedures of every entity to which the Act applies;
- Perform procurement audits and submit such report to the National Assembly bi-annually;
- Introduce, develop, update and maintain related database and technology;
- Establish a single internet portal that serves as a primary source of all information on government procurement containing and displaying all public sector procurement information at all times; and
- Undertake institutional capacity building by conducting training workshops

Procurement procedure

Under the Public Procurement Act, to implement a project through the PPP route,

- The procuring entity invites bids from the bidders through an advertisement;
- Two credible persons, one from a private sector professional organisation and the other from a non-governmental organisation are invited by the procuring entity to be the observers in the procurement process;
- The bids received from the bidders are received and evaluated by the procuring entity according to the evaluation criteria developed by the procuring entity;
- The bidder offering the most favourable bid to the procuring entity is selected as the Preferred Bidder;
- The procuring entity obtains an approval from the relevant approving authority before entering into a contract with the Preferred Bidder;
- The unsuccessful bidders are debriefed about the selection of the Preferred Bidder;
- The procuring entity obtains a No Objection Certificate (NOC) from the Bureau and enters into a PPP contract with the Preferred Bidder.

4.5 PPP procurement at the State level

At the State level, only a handful of States have established their own legal and regulatory framework for PPP procurement. These have been described separately in other parts of this Manual.

To ensure effective implementation of a project through the PPP route, the Institutional framework is as important as the Legal and Regulatory Framework. The Institutional Framework governing PPP procurement at the Federal level is described in the following section.

4.6 Institutional Framework/ Key Stakeholders in PPP Procurement

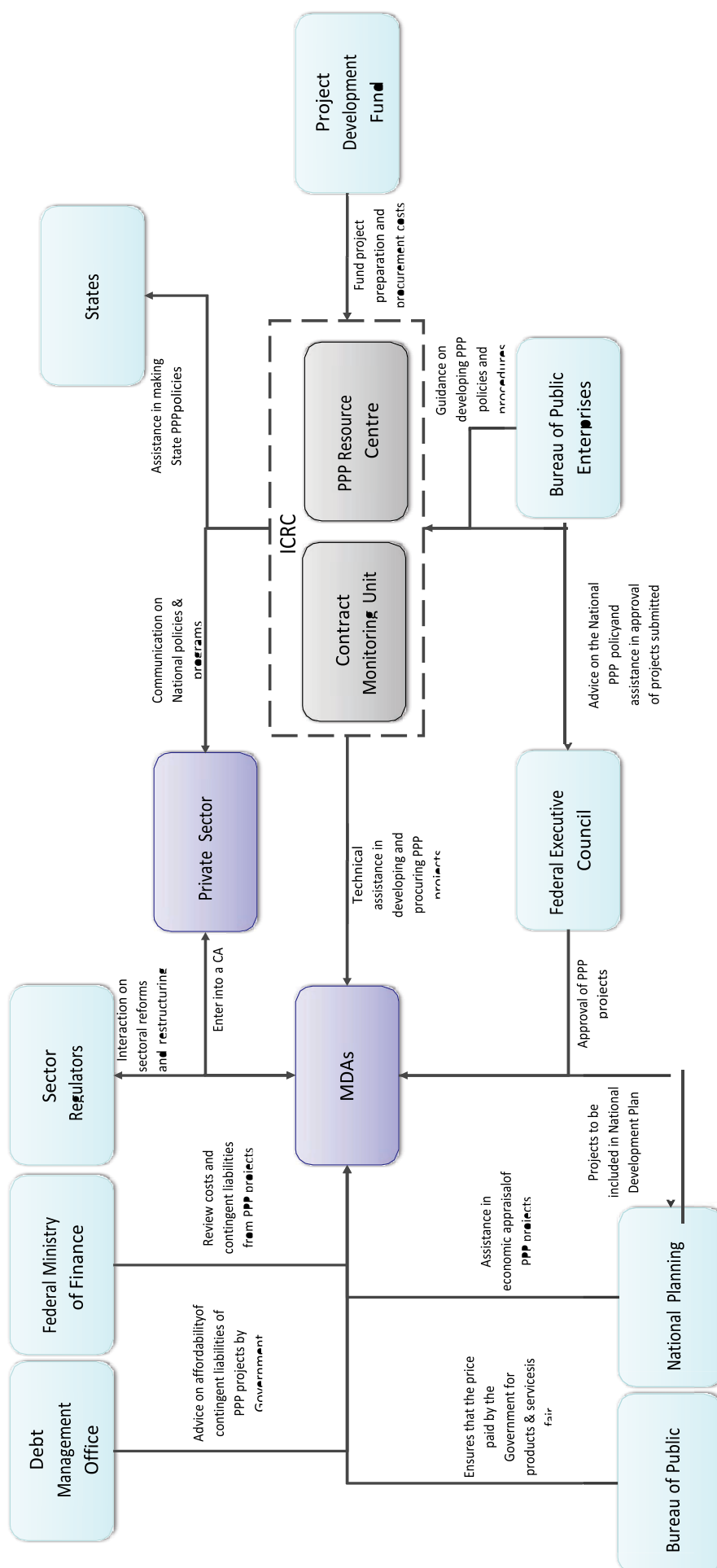
The Institutional Framework governing PPP procurement in Nigeria allocates specific roles and responsibilities to various entities within the Federal Government of Nigeria . The Framework ensures that all entities within the Federal Government that have specific responsibilities are involved in the project approval process and have access to appropriate guidance, training, expertise and resources to plan, procure and manage investments in PPP projects, taking account of value for money and long-term affordability of PPP projects, and any contingent liabilities that may be retained by the Federal Government.

The Institutional Framework ensures that Federal projects go through a rigorous appraisal procedure to establish the economic and financial viability of the projects before the project sponsor (MDA) begins a competitive and transparent procurement process.

The Institutional Framework encompasses guidance for the benefit of those States that propose to develop their own PPP policies and programmes, and sets up mechanisms to coordinate these. The Framework encourages the development of standardised documents where appropriate. It also facilitates communication between various State Governments and private sector contractors and investors interested in partnering with the public sector to deliver infrastructure assets and services on a PPP basis.

The figure below depicts the Institutional Framework governing PPP procurement in Nigeria detailing the various stakeholders involved and their roles and responsibilities within the Federal Government for planning infrastructure, allocating budgets, and managing fiscal risks.

Figure 12: Institutional Framework



- contract management framework, subject to the availability of resources.

CHAPTER FIVE

Standardization of Existing PPP Contracts & Bid Documents

For clarity and care of doing business, PPP contracts are supposed to be standardized so that all stakeholders can easily understand and apply the contents appropriately.

A model concession agreement is enclosed below as well as the clauses that are normally included:

Contents of Model Concession Agreement for National Highways in India

Part I: Preliminary

1. Recitals
2. Definitions

Part II: The Concession

3. Scope of the Project
4. Grant of Concession
5. Conditions Precedent
6. Obligations of the Concessionaire
7. Obligations of the Authority
8. Representations and Warranties
9. Disclaimer

Part III: Development and Operations

10. Performance Security
11. Right of Way
12. Utilities, Associated Roads and Trees
13. Construction of the Project Highway
14. Monitoring of Construction
15. Completion Certificate
16. Entry into Commercial Service
17. Change of Scope
18. Operations and Maintenance
19. Safety Requirement
20. Monitoring of Operations and Maintenance
21. Traffic Regulation
22. Emergency Medical Aid
23. Traffic Census and Sampling
24. Independent Engineer

Part IV: Financial Covenants

25. Financial Close
26. Grant/ (or Premium)
27. Concession Fee
28. User Fee
29. Revenue Shortfall Loan
30. Effect of Variations in Traffic Growth
31. Construction of Additional Toll way
32. Escrow Account
33. Insurance

34. Accounts and Audit

Part V: Force Majeure and Termination

35. Force Majeure

36. Compensation for Breach of Agreement

37. Suspension of Concessionaire's Rights

38. Termination

39. Divestment of Rights and Interest

40. Defects Liability and Termination

Part VI: Other Provisions

41. Assignment and charges

42. Change in Law

43. Liability and Indemnity

44. Rights and Title over Site

45. Dispute Resolution

46. Disclosure

47. Redressal of Public Grievance

48. Miscellaneous

SAMPLE CONCESSION AGREEMENT

BETWEEN

.....
(CONTRACTING AUTHORITY)

AND

(CONCESSIONAIRE)

CONCESSION AGREEMENT

THIS CONCESSION AGREEMENT (hereinafter referred to as "this Agreement") is made this [.....] day of []

BETWEEN

THE FEDERAL REPUBLIC OF NIGERIA represented by the Minister, Ministry of ... whose address is (the "Contracting Authority") which expression shall where the context so admits include its successors in title and assigns) and

- Limited, a registered under the laws of Nigeria with registered office at (the "**Concessionaire**") which expression..... shall where the context so admits include its sub-concessionaires, successors in title and assigns).

the Contracting Authority and the Concessionaire are hereinafter collectively referred to as the "**Parties**", and individually as a "**Party**"

WHEREAS:

A. The Contracting Authority was established inter alia to(**describe the objects of the Contracting Authority**)

B. The Contracting Authority has obtained the approval of the ICRC (this **Clause ensures that the Commission is involved in the process and that ICRC processes are complied with**) to grant a concession of the property described and delineated in (**describe the "project /Premises"**) and any additions and improvements made pursuant to this agreement are all here referred to as, the "Concession Property")

C. In accordance with the Infrastructure Concession Regulatory Commission (Establishment e.t.c) Act of 2005, the Contracting Authority advertised for tenders to(**design, finance, build, operate; state the objectives of the project**) for the Concession Term and transfer back of the Concession Property, and received competitive bids from certain interested parties;

D. The Concessionaire submitted the most technically and financially competitive bid which is also in accordance with the minimum technical requirements and has therefore been selected (to design, finance, build, and operate; **state the objectives of the project/ purpose of the relationship/partnership**) for the Concession Term and transfer back the Concession Property in accordance with the terms of this Agreement;

E. The Parties have agreed to enter into this Agreement, in order for the Concessionaire to be granted the right to; **(as shown below, briefly outline the Concessionaire's scope of operations)**

- (i) obtain possession of the Concession Property
- (ii) make specific improvements to the Concession Property;
- (iii) use and enjoyment of the Concession Property and improvements thereon for the term of this Agreement.
- (iv) undertake specific activities and provide specific services on terms and conditions herein contained

SAMPLE PPP CONTRACT CLAUSES

In structuring a PPP contract the following key clauses must be included in the contract.

SN	CLAUSE
1	Definitions This specifies the meaning of the words and expressions used in the contractual agreement as mutually agreed by the parties.
2	Commencement and Duration This set of clauses specify the expected commencement date of the project or service, the duration of the project or service in months or years, and the expected completion date. It also highlights key milestones e. g. construction period if any. Section 6 ICRC Act provides that the duration of the contract is as specified in the contract itself.
3	Objective of the relationship This describes the purpose for which the relationship is entered into.
4	Project Governance Structure Describes the project governance structure, indicating specific roles for the MDA, the concessionaire, ICRC and other relevant bodies in managing the project.
5	Interpretation The Agreement should include provisions which present the agreed principles that will be used in interpreting the language, definitions and other terms used in the Agreement.
6	Conditions Precedent This outlines the conditions to be fulfilled before the project/agreement becomes effective. They are put in place to ensure that both parties have the legal and financial capacity to proceed with the relationship. e.g. achieving financial close. A number of events may need to happen before a concession agreement can come into effect, for example necessary regulatory approvals or signing of other project agreements or documents. Nevertheless, a conditions precedent is relatively unusual in a concession agreement. It is often for the signing and the financial close to be simultaneous. All the things that need to happen before or at the effectiveness of the agreement can happen before signing of the agreement (and therefore need not be included as things to be done in the agreement). The concession agreement is usually the subject of a condition precedent of other project agreements (for example a conditions precedent before the drawdown of a loan).
7	Concession Fees Payment made at intervals decided in the contract by the project proponent to the grantor. Section 7 (4) ICRC Act provides for payments by the project proponent to the Authority at intervals from proceeds realized for the implementation of the contract as provided in the contract. Section 9 ICRC Act establishes the Special Concession Account (SPA) into which the concession fees would be paid.

8	ICRC Fees These are payments made to the Commission of a percentage of the project's cost charged for all the Commission's regulatory roles. These fees are as approved by the Board of the Commission pursuant to powers conferred by Section 19 ICRC Act.
9	Inspection/ Performance Monitoring This provides for monitoring of operations by the Authority and the Commission. There must be a mechanism under the Contract which enables the Authority to monitor the Contractor's performance against the outputs specified by the Authority under the Contract so that the performance measurement system can operate effectively. It must also take into consideration the provisions of Section 10 ICRC Act which provides for the power to inspect given to the Commission and the Authority. Section 12 ICRC Act also grants power to the Authority to supervise the project.
10	Insurance requirements Provides security for the insurable matters within the ambit of the project. It may also include who is to insure, what is to be insured, how insurance money is to be applied in the event of any claim and the type of insurance company the policy is to be taken from. Section 7 (2) ICRC Act provides that the project proponent would undertake an appropriate insurance policy on the concession.
11	Variations Sets forth the right and procedures to be followed when either party to the PPP contract wishes to change any material portion of the contract. Section 11 ICRC Act prohibits arbitrary suspension, cancellation, stopping, cancelling or changing of a contract except in accordance with the ICRC Act.
12	Maintenance Provides for how the project asset is maintained, the frequency of any work to be done and the scope. Section 7(2) (b) Act provides that the project proponent shall undertake the maintenance and repair of the project asset during the tenor of the contract.
13	Project Site A description of the project site, with maps and any other relevant documents. In most PPPs that involve the construction of infrastructure, the Authority will make land (sometimes with existing buildings and infrastructure located thereon) available to the Private Party. During the Project Term the Private Party will manage the operation and maintenance of such land and infrastructure. Section 10 ICRC Act grants right of way to every project proponent in respect of any land or property bordering the project site for the proper implementation of the project.
14	Financial Close Security Specifies the amount of money that will be deposited by the concessionaire as security for attaining financial close. This amount is refunded to the concessionaire once financial close is achieved according to the agreement and forfeited otherwise.
15	Financing and refinancing Sets out the financing arrangement for the project and any refinancing procedures if the need arises.

16	Use of property Describes permitted use of the assets, including maintenance and alteration of the assets.
17	Obligations Authority's Obligations It provides general obligations of the Authority. These may include, for example, establishment of a tariff review commission, government incentives that may be applicable, handing over the project site and other areas in which the project proponent may expect support from the government and the conditions of such support. Private Party's Obligations This sets out the obligations of the private party in the PPP Agreement. It is also assumed that the Private Party will subcontract the Project Deliverables to the Subcontractors. This section deals with matters on general obligations, shareholding arrangement, finance arrangement, refinancing, use of insurance proceeds, uninsurable risks, information disclosure, public information, performance security. Obligations in respect of sectoral issues (for example, providing interconnection to services provided by other operators), and various reporting requirements to regulatory bodies may also be included in this section or in a separate section.
18	Movable Assets This clause regulates, as agreed by the parties, the management of movable assets that are part of the assets acquired for the purpose of implementing the PPP project.
19	Grantor and Concessionaire covenants This covers, in detail, what each party has undertaken and is expected to do throughout the subsistence of the relationship.
20	Intellectual property Describes the rights of each party to any intellectual property brought to the project or created during the project, including the steps to be taken to protect the intellectual property of contracting parties as well as third parties. e.g. IT software developers.
21	Documentation and Audits Specifies the amount of records to be kept, the frequency of audits, the responsibilities of the auditor and the audited and the content of the audit records.
22	Representations and Warranties Describes what representations and warranties each party is making in terms of the project.
23	Force Majeure This defines what constitutes Force Majeure as agreed by the parties, the notice to be given if it arises and the consequent effect of it. It also outlines the duty of each party to minimize delay and mitigate losses and other auxiliary matters.
24	Governmental action Describes the actions by government that may give rise to a change in the terms and conditions of the contract, and how these are effected e.g. Change in Law.
25	Default /Delay Provisions Describes what is and is not an excuse for a delay in construction or operations, and describes the remedies and penalties for such delay.



26	Termination Describes the conditions under which either party may terminate the contract, the processes to be undertaken in that regard, and the consequences to each party of a termination. This may also include length of notices and the amount of compensation in lieu of such notices.
27	Indemnities Describes how and under what circumstances either party may be called upon to compensate the other because of a given circumstance. These are used by the parties to guard against certain losses that may be incurred as a result of the other party's performance or non-performance of the Project Deliverables.
28	Governing Law and Dispute Resolution This provides for the law(s) that will govern the agreement. It also outlines the general conditions and steps to follow for adjudication of disputes that may arise in the course of the project. It provides for steps to follow, primarily amicable settlement before arbitration and litigation. The language to be used is also specified.
29	Warranties These are statements made by the parties that they are validly constituted, have the rights and powers to enter into the contracts, have entered no material litigation etc.
30	Miscellaneous provisions These are terms that do not generally fall into any of the categories listed above. They may include third party agreements, taxation, amendments, waivers, conflicts with other contracts and confidentiality.
31	Financial Model Which estimates the cash flows, the financial model is used to authenticate the project cost and amount accrued to the Federal Government.
32	Output and service specifications/ project deliverables The output specification is essentially, a brief for the PPP project. It is the core of the contract. It defines the Authority's requirements for the project. The authority has to be clear about what it wants to achieve and makes this explicit in the output specification. It specifies in clear terms the output and the service(s) expected to be provided by the concessionaire. These specifications should be based on quality or quantity as agreed by the parties. It sets out the deliverables from the project. The scope and extent of the Project Deliverables are project-specific and will be based on the specific strategic and operational objectives which the Authority wishes to attain as reflected in its output specifications. The Authority should ensure that the output specifications included in the RFP are clearly drafted and that the PPP contract makes provision for co-operation. The Authority should ensure that services provided by the private party are included.
33	Handback This should contain a procedure for hand back and time frame for this procedure, it should specify the transference and state of the assets. This clause should provide for a defect liability period, inspection of the facility by the Authority, an independent engineer and the private party. Also listing out the conditions for issuing a hand back certificate



34	Renewal This is inserted to leave open the possibility of renewing the contract; otherwise it should be left out. It specifies the terms for the renewal, a renewal period and procedures in the event of renewal. The clause should give the Authority the discretion to renew or not, based on the fulfillment of conditions e set out in the contract. Renewal must never be automatic. It should state the period of time before the expiry date of the contract where the private party notifies the Authority of its intention to seek for renewal and a period of response. This would then trigger renewal procedures. A renewed contract is a new contract.
35	Extension This clause grants an extension of time of the contract. It does not create a new contract but extends the duration of the existing contract. The extension is granted on the occurrence of certain events, which may give rise to a private party seeking for an extension. These events will be set out in the PPP contract, and relate to matters outside the control of the private partner. Allowing an extension of time in these circumstances enables the project to continue with the private partner remaining incentivized to complete the project. The role of the Authority is to ensure that the basis for granting such an extension meets the criteria in the PPP contract and in terms of compliance with the procedure set out in the contract.

IT IS AGREED as follows:

CLAUSE 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless the subject or context otherwise requires, the following definitions shall apply:

(Under this Section, specify the meaning of the words and expressions used in the Contract/Agreement as mutually agreed by the parties.)

1.2 Interpretation

(The Agreement should include provisions which present the agreed principles that will be used in interpreting the language, definitions and other terms used in the Agreement.)

- 1.2.1 The Annexes to this Agreement shall form an integral part hereof and references to Annexes shall be to Annexes to this Agreement unless otherwise stated.
- 1.2.2 The headings of Clauses to this Agreement and the Table of Contents are inserted for convenience of reference only and shall not in any way affect the interpretation of this Agreement.
- 1.2.3 References to any party or person referred to in this Agreement include references to its respective successors and permitted assignees.
- 1.2.4 The words "include", "includes", and "including" shall at all times be construed as if followed by the words "without limitation".
- 1.2.5 References to days, weeks, months and years are references to days, weeks, months and years of the Gregorian calendar.

CLAUSE 2

EFFECTIVE DATE AND DURATION OF CONCESSION PERIOD

This Clause specifies the effective date of the project or service, the duration of the project or service in months or years, and the expected completion date. It also highlights key milestones e. g. construction period if any.

CLAUSE 3

BASIC RIGHTS AND OBLIGATIONS OF THE CONCESSIONAIRE

3.1 Grant of the Concession Rights

(This states the exclusive right of the Concessionaire over the project and also mentions that the Contracting Authority shall ensure that no part of the Concession shall be granted to any other party. The Contracting Authority guarantees and assures that it hereby grants to the Concessionaire the exclusive right to the project)

3.2 Obligations of the Concessionaire

(This sets out the obligations of the private party in the PPP Agreement. It is also assumed that the Private Party will subcontract the Project Deliverables to the Subcontractors. This section deals with matters on general obligations, shareholding arrangement, finance arrangement, refinancing, use of insurance proceeds, uninsurable risks, information disclosure, public information, performance security. Obligations in respect of sectoral issues (for example, providing interconnection to services provided by other operators), and various reporting requirements to regulatory bodies may also be included in this section or in a separate section)

2.5 Concession Fees - Financial Obligations of the Concessionaire

(This is payment made at intervals decided in the contract by the Concessionaire to the Contracting Authority. These payments are from proceeds realized from the implementation of the contract. The intervals are also specified in the Agreement under this Clause)

For instance, “In consideration for the granting of the Concession Rights, the Concessionaire shall pay to the Contracting Authority the Concession Fees in installments made up of as follows:

The Fees to be paid to the ICRC may also be included under this Clause or a separate Clause.

CLAUSE 4

THE CONTRACTING AUTHORITY'S OBLIGATIONS AND RIGHTS

3.1 Obligations of the Contracting Authority

This Clause provides for general obligations of the Authority. These may include, for example,⁵⁸ establishment of a tariff review commission, government incentives that may be applicable, handing over the project site and other areas in which the project proponent may expect support from the government and the conditions of such support.

3.2 Rights of the Contracting Authority

The rights of the Contracting Authority may include the right to:

- (a) regulate and monitor the services rendered under Concession;
- (b) intervene in order to guarantee the adequate rendering services, whenever necessary;
- (c) be entitled to terminate the Concession Rights in the cases provided for this Agreement;
- (d) verify compliance with regulatory conditions for the services and the clauses herein;
- (e) make its best efforts to see that good quality service is carried out by the Concessionaire ; monitor users' requests and complaints;

(These rights would depend on the nature of the project and in accordance with the Agreement of the Parties)

CLAUSE 5 COMMENCEMENT

5.1 Conditions Precedent

This outlines the conditions to be fulfilled before the project/agreement becomes effective. They are put in place to ensure that both parties have the legal and financial capacity to proceed with the relationship.

This includes the Conditions precedent to the Obligations of the Contracting Authority and the Obligations of the concessionaire.

CONDITIONS PRECEDENT TO THE OBLIGATIONS OF BOTH PARTIES

In the event of conditions precedent to the obligations of both Parties, it may be stated thus, 'The obligations of the Contracting Authority and the Concessionaire to consummate the transactions contemplated by this Agreement shall be subject to fulfillment prior to the Effective Date of the following conditions:'

CONDITIONS PRECEDENT TO THE OBLIGATIONS OF THE CONTRACTING AUTHORITY

The obligations of the Contracting Authority to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment, prior to the Effective Date, of the following additional conditions (unless waived in writing by the Concessionaire:)'

CONDITIONS PRECEDENT TO THE OBLIGATIONS OF THE CONCESSIONAIRE

'The Obligations of the Concessionaire to consummate the transaction contemplated by this Agreement shall be subject to the fulfillment prior to the Effective Date, of the following additional conditions by the Contracting Authority (unless waived in writing by the Concessionaire:'

SATISFACTION OF CONDITIONS PRECEDENT, DATE OF ENTRY INTO FORCE

(This outlines the steps to be taken/process to be followed upon the fulfillment of the Conditions Precedent)

The Contracting Authority and the Concessionaire shall use their best efforts to procure the satisfaction of the condition's precedent specified in Clause ... as soon as practicable. Upon satisfaction of such conditions, the Contracting Authority shall issue a Notice of Approval.

Upon receipt of the Notice of Approval, the Contracting Authority shall (Parties should outline what should be done here)

If the conditions specified in Clause ... are not fulfilled or 'waived by mutual agreement of the parties within [six] months of the date of this Agreement, either party may terminate this Agreement immediately by notice and neither party shall be liable to the other for any damages or losses in respect thereof except that the Contracting Authority shall be entitled to draw the Bid Bond (or the equivalent amount of the Rehabilitation Bond if provided) if the non-fulfillment of the conditions precedent was due to the Concessionaire's failure to use its best endeavors or to proceed in accordance with the Tender.

Within three (3) business days after confirmation of the receipt of the Entry Fee by the Contracting Authority on the above-mentioned Escrow Account, the Contracting Authority and the Concessionaire shall sign the Concession Agreement.

CLAUSE 6 USE OF CONCESSIONED PROPERTY

_(This describes permitted use of the concessioned assets, including maintenance and alteration of the assets)

CLAUSE 7 MOVABLE ASSETS

_(This clause regulates, as agreed by the parties, the management of movable assets that are part of the assets acquired for the purpose of implementing the PPP project. It outlines the terms and conditions, upon the Effective Date, under which the Contracting Authority shall transfer, and the Concessionaire shall receive from the Contracting Authority, the Movable Assets).

CLAUSE 8 GENERAL OPERATIONS

This Clause covers a range of provisions. These Sub-clauses are:

- ✓ Obligation of Concessionaire to Perform Operations at completion of Construction,
- ✓ Standards of Performance,
- ✓ Duties of the Parties to Cooperate with each other to ensure the success of the project,
- ✓ Performance requirements,(this means that the Concessionaire shall use best efforts to develop, market and promote the commercial use of the Concession Property in order to achieve maximum utilization thereof in a manner which is consistent with this agreement, the Applicable Law and Prudent Industry Practices, and shall

ensure that operations meet new and improved industry standards and there is no decline in the standards of the Operations of any facility or part thereof of the Concession Property during the Concession Term and for a reasonable time thereafter)

- ✓ Labour (need to use qualified personnel)
- ✓ Concession Equipment

CLAUSE 9

CONCESSIONAIRE'S COVENANTS

- ✓ Insurance
(Provides security for the insurable matters within the ambit of the project. It may also include who is to insure, what is to be insured, how insurance money is to be applied in the event of any claim and the type of insurance company the policy is to be taken from.)
- ✓ Performance Bond
- ✓ Safety procedures
- ✓ Security systems
- ✓ Environment
- ✓ Emergencies
- ✓ Concessionaire's ownership structure
- ✓ Sub Agreements
- ✓ Commencement of Construction
- ✓ Project Design

CLAUSE 10

CONTRACTING AUTHORITY'S COVENANTS

- ✓ Cooperation
- ✓ Non interference
- ✓ Latent Defects
- ✓ Utilities
- ✓ Security
- ✓ Licences and Permits
- ✓ Recovery of Costs

CLAUSE 11

FORCE MAJEURE

(This Clause defines what constitutes Force Majeure as agreed by the parties, the notice to be given if it arises and the consequent effect of it. It also outlines the duty of each party to minimize delay and mitigate losses and other auxiliary matters)

Definition of Force Majeure

- a. For the purpose of this Agreement, "Force Majeure" means an event which is beyond the reasonable control of a Party, and which makes a Party's performance of its obligations hereunder impossible or so impracticable as reasonably to be considered impossible in the circumstances, and includes, but

is not limited to, war, riots, civil disorder, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are within the power of the Party invoking Force Majeure to prevent), confiscation by government agencies;

- b. Force Majeure shall not include (i) any event which is caused by the negligence or intentional action of a Party or such Party's Sub consultants or agents or employees, nor (ii) any event which a diligent Party could reasonably have been expected to both (A) take into account at the time of the conclusion of this Agreement and (B) avoid or overcome in the carrying out of its obligations hereunder
- c. Force Majeure shall not include insufficiency of funds or failure to make any payment required hereunder.

No Breach of Contract

The failure of a Party to fulfill any of its obligations hereunder shall not be considered to be a breach of, or default under, this Agreement in so far as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Agreement.

Measures to be taken

- a. A Party affected by an event of Force Majeure shall take all reasonable measures to remove such Party's inability to fulfill its obligations hereunder with a minimum of delay ;
- b. A Party affected by an event of Force Majeure shall notify the other Party of such event as soon as possible, and in event not later than fourteen (14) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible ;
- c. The Parties shall take all reasonable measures to minimize the consequences of any event of Force Majeure.

Termination

Upon the occurrence of such Force Majeure the parties shall enter into discussions to reach a mutually satisfactory agreement. If the parties fail to reach a mutually satisfactory solution within ninety (90) days of the commencement of such discussions, either party may issue a Notice of Intention to Terminate.

CLAUSE 12

DOCUMENTATION AND AUDIT

(Specifies the amount of records to be kept, the frequency of audits, the responsibilities of the auditor and the audited and the content of the audit records.)

- ✓ Maintenance of Books and Records: The Concessionaire shall prepare and maintain registers, books, records and other means of recording information in the quality and quantity required for facilitating efficient management and supervision of the Concession Property, for providing information to the Contracting Authority, and for informing the public and its customers of the quality and performance of its Operations.
- ✓ Records on the Concession Property: the Concessionaire shall prepare and maintain current records of the Concession Property in sufficient detail as required by the Contracting Authority to provide a full understanding of the location and state of the Concession Property. Such records shall be comprised of physical drawings, databases and calculation sheets along with historical records relating to their design, approvals, licenses/permits, construction, purchase, repairs, and maintenance, tests, including all works carried out as replacements, rehabilitation and maintenance, Physical plans for buildings and other structures shall clearly identify and describe the as built profiles, operating manuals, protocols and maintenance requirements, and records of staff shall indicate Nigerian and non-Nigerian staff.
- ✓ Copies of Records: The Concessionaire shall provide the Contracting Authority and the ICRC with copies of the foregoing records as requested by them from time to time.
- ✓ All other relevant reports and records as may be required by the Contracting Authority and/or the ICRC

CLAUSE 13

REPRESENTATIONS AND WARRANTIES

(Describes what representations and warranties each party is making in terms of the project.)

Concessionaire Representation and Warranties:

The Concessionaire represents and warrants that:

- (a) It is a Limited Liability Company duly organized and validly existing under the laws of the Federal Republic of Nigeria.
- (b) Its shareholders and itself are not in violation of any Applicable Law or judgment entered by any Government Authority, which violations, individually or in the aggregate, would affect its performance or any obligations under this Agreement. There are no legal or arbitration proceedings or any proceeding by or before any Governmental or Non-Government Authority, now pending or (to the best knowledge of the Concessionaire) threatened against the Concessionaire, its majority shareholders and or any one of its sub-concessionaires that if adversely determined, could reasonably be

expected to have a material adverse effect on the financial condition, operations, prospects or business, as a whole, of the Concessionaire and or sub-concessionaire, or its ability to perform under this agreement.

- (c) Neither the execution and delivery of this agreement, nor the compliance with the terms and provision hereof will conflict with or result in breach of, or require any consent under, the charter or by-laws of the Concessionaire, or any Applicable Law or regulation, or any order, writ, injunction or decree or any court, or any agreement or instrument to which the Concessionaire is party or by which it is bound or to which it is bound or to which it is subject, or constitute a default under any such agreement of instrument.
- (d) It has all necessary power and authority to execute, deliver and perform its obligations under this Agreement; the execution, delivery performance by the Concessionaire and or performance by all sub-concessionaires of the Concession under this agreement has been duly authorized by all necessary action on its part, or the part of the sub-concessionaires; and this Agreement has been duly and validly executed and delivered by the Concessionaire for itself and on behalf of all sub-concessionaires and constitutes a legal, valid and binding obligation of the Concessionaire and each sub-concessionaire enforceable in accordance with its terms.
- (e) It is financially solvent, able to pay all debts as they mature and possesses sufficient working capital and borrowing capacity to perform its obligations hereunder.
- (f) It has (i) carefully examined this Agreement, together with all Schedules or Appendices attached thoroughly and become familiar with their respective terms and provisions; (ii) investigated to its satisfaction all Applicable Laws, physical conditions and it can perform its obligations hereunder and; (iii) has the experience, human and material resources, qualification and capabilities to perform its obligations hereunder; and (iv) made all investigations and inspections that it deems necessary to perform its obligations hereunder, including without limitation investigations and inspections of the Concession Property.

Contracting Authority Representations and Warranties:

The Contracting Authority represents and warrants that:

- (a) It is a public authority duly constituted and validly existing under the laws of Nigeria authorized and qualified to undertake the Obligations it has acquired under this agreement
- (b) It is not in violation of any Applicable law or judgment entered by any Governmental Authority, which violations, individually or in the aggregate, would affect its performance of any obligations under this Agreement There are no legal arbitration

proceedings or any proceeding by or before any Governmental Authority, now pending or (to the best knowledge of the Contracting Authority) threatened against the Contracting Authority that will impede in any substantial way the execution of its obligations under this agreement,

- (c) Neither the execution and delivery of this Agreement, nor the compliance with the terms and provisions hereof will conflict with or result in a breach of, or require any consent under, any Applicable Law or regulation, or any order, writ, injunction or decree of any Court, or any agreement or to which the Contracting Authority is a party or by which it is bound or to it is subject, or constitute a default under any such agreement or instrument.
- (d) It has all necessary power and authority to execute, deliver and perform its obligations under this Agreement; the execution, delivery and performance by the Contracting Authority of this Agreement has been duly authorized by all necessary action on its part; and this Agreement has been duly and validly executed and delivered by the Contracting Authority and constitutes a legal, valid and binding obligation of the Contracting Authority enforceable in accordance with its terms.
- (e) It has obtained all approvals consents and authorizations that are required of it from any Governmental Authority under Applicable Law to consummate the transactions contemplated herein including the regulatory approvals and compliance with ICRC rules, paid ICRC fees already due, and agreed to pay ICRC annual fees and meet its other Contracting Authority requirements if any.
- (f) As of the Effective Date, it has good title to the Movable Assets and full legal right and power to transfer and deliver such Movable Assets to the Concessionaire in the manner contemplated by this Agreement. Upon delivery of such Movable Assets pursuant to the terms of this Agreement, the Concessionaire shall receive good title thereto, free and clear of all liens, other than the obligation to obtain any required authorizations or consents by a Governmental Authority in connection with the transfer of any such Movable Assets, if required.

CLAUSE 14
DEFAULT

(This Clause Describes what is and is not an excuse for a delay in construction or operations, and describes the remedies and penalties for such delay)

CLAUSE 15

TERMINATION

(Describes the conditions under which either party may terminate the contract, the processes to be undertaken in that regard, and the consequences to each party of a termination. This may also include length of notices and the amount of compensation in lieu of such notices.)

Termination. This Agreement may be terminated in any of the following ways:

- a) the expiry of the Concession Term;
- b) upon the occurrence of an Event of Default in accordance with Clause(...)
- c) upon the occurrence of an event of Force Majeure in circumstances described in Clause (...)

CLAUSE 16

HANDBACK PROCEDURES

(This should contain a procedure for hand back and time frame for this procedure; it should specify the transference and state of the assets. This clause should provide for a defect liability period, inspection of the facility by the Authority, an independent engineer and the private party. Also listing out the conditions for issuing a hand back certificate)

For Instance;

Within the first 14(Fourteen) days of the last year ending in the 30th year anniversary of Concession Term and its expiration, the Parties shall appoint a Hand back Committee made up of (...state the number) persons,... appointed by Contracting Authority and ... of whom shall be appointed by the Concessionaire and include persons in current management positions in the operations of the Concession for the purpose of taking inventory, evaluating the Conditions of the Concession Property, recommending measures if any required to be carried out by the Concessionaire to hand over the Concession property in good and optimum operating condition as required by this agreement, and to superintend the handover and extinguishing of Concessionaires rights over the Concession property in a manner to preserve the Concession Property in the best possible operating condition. The Committee shall by a simple majority vote appoint a chairman and adopt written procedures and a timetable to be followed by them relating to the transfer of the Concession Property on such termination. The findings of the inspection shall be recorded in a report which shall be signed by the Chair of the Hand Back Committee. The Contracting Authority

shall have the right, at its own expense, to take any measures during the last year of the Concession Term (or as the case may be, upon early termination) necessary to verify state of maintenance of the Concession Property and compliance by the Concessionaire to this agreement and to ensure the continuity of the performance of the Operations. Both parties shall in accordance with procedures to be adopted by the committee make representations and oversee measures including maintenance works required to be done by the Concessionaire to ensure the Concession Property is operating at an optimum level upon termination of the Concession and to fully and effectually transfer to the Contracting Authority or its nominee any existing contracts, arrangements, designs, records, rights, fixed or movable assets, machinery, benefits, knowledge, skills, operating manuals, protocols, handbooks, procedure guides, checklists deployed remotely or directly in the operation of the Concession Property, owned by the Concessionaire, a sub-concessionaire or accruing from third parties to the Concessionaire or a sub-concessionaire regarding the Concession Property .

Continuity of Operations

The Concessionaire shall ensure smooth continuation and provision of the Operations throughout a Termination Period until the effective date of termination whether arising from a Notice of Termination or expiration of the Concession Term. The Parties agree to minimize disruption of the Operations performed by the Concessionaire during a Termination Period. To achieve this the Concessionaire undertakes to do the following during the termination period or such period agreed by the Parties or deemed necessary by the Contracting Authority whether or not arising from earlier termination of the Concession or from the expiration of Concession Term:

The Contracting Authority may request that:

- (a) its staff should be trained on the project, or**
- (b) that the Concessionaire should fully disclose information relating to any and/or all aspects of the Operation of the Concession property that the Contracting Authority may require or**
- (c) That the Concessionaire should allow continuation of critical staff in operation of the Concession Property on terms of their current employment for a period of not less than one year to ensure a smooth operations immediately after handover.**

CLAUSE 17

INTELLECTUAL PROPERTY

(Describes the rights of each party to any intellectual property brought to the project or created during the project, including the steps to be taken to protect the intellectual property of contracting parties as well as third parties)

In the event the intellectual rights are required from third parties, the Concessionaire shall abinitio ensure all intellectual property and similar rights and licenses are obtained under terms that allow full novation to the Contracting Authority or his nominee in case of termination of this agreement or its expiration, such agreements shall abinitio permit the reproduction,

translation, use and deployment by the Contracting Authority or its nominee for the purpose only of continuation of operations upon termination of Concession or expiration of concession term if required.

CLAUSE 18 **COMPENSATION**

(This clause describes the Compensation due to either party upon termination by Force Majeure or what is due each party upon event of the other party's default)

CLAUSE 19 **INDEMNITIES AND LIABILITIES**

(Describes how and under what circumstances either party may be called upon to compensate the other because of a given circumstance. These are used by the parties to guard against certain losses that may be incurred as a result of the other party's performance or non-performance of the Project Deliverables.)

CLAUSE 20 **GOVERNING LAW & DISPUTE RESOLUTION**

(This provides for the law(s) that will govern the agreement. It also outlines the general conditions and steps to follow for adjudication of disputes that may arise in the course of the project. It provides for steps to follow, primarily amicable settlement before arbitration and litigation. The language to be used is also specified.)

A Standard Clause of this nature may look like this:

Governing Law: This Agreement shall be governed by, construed and enforced in accordance with the laws of Nigeria, excluding any provisions of conflicts of law that would cause the laws of another jurisdiction to apply.

Disputes: Any dispute, controversy or claim arising out of or in relation to or in connection with this Agreement and the activities carried out hereunder, including without limitation any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement (each a "Dispute") shall first be referred to a Dispute Adjudication Board (DAB) described in the clause below and failing resolution, shall be exclusively and finally settled pursuant to a Binding Arbitration process.

Dispute Adjudication Board (DAB). The Parties shall jointly appoint a Dispute Adjudication Board (DAB) not later than 14 days after a Party gives notice to the other Party in writing of its intention to refer a dispute to a DAB in accordance with this agreement. The DAB shall comprise three suitably qualified and independent persons (the members). The Party declaring a dispute shall in his notice

appoint a qualified professional as member, the other party shall within seven (7) days of receipt of the notice appoint one qualified professional as member. The Parties shall consult both members, following which the two members shall appoint the third member within seven days of appointment of the second member. This third member shall act as chairman. If either Party fails to nominate a member of a DAB of three persons by such date stated above or the appointed DAB members fail within the stated period to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or the Parties fail to agree upon the appointment of a replacement person within 14 days after the date on which a member or one of the three members declines to Act or is unable to act as a result of death, disability, resignation or termination of appointment, then the Director-General of ICRC shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. The remuneration of the three members shall be mutually agreed with both parties in writing at the time of appointment. Each Party shall be responsible for paying one-half of the agreed remuneration of the three members. A replacement shall be appointed if a member of the DAB is unable to act as a result of death, disability, ill health, resignation or termination of appointment. The appointment of any member will be terminated by mutual agreement of both Parties, but not by either party acting alone. The replacement shall be appointed in the same manner as the replaced person was required to have been appointed. The DAB shall adopt a procedure for its determination of the dispute, which shall include hearing both parties and physical inspection, testing of works or machinery etc. when necessary. The DAB shall determine the dispute within [21 Twenty One]days. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire on the day the DAB has delivered to both parties its decision in writing on the dispute referred to it or on expiration of time stipulated above for its decision. Parties may agree to appoint one or more standby DAB to serve during the Construction period or Termination Period. A decision of the DAB must be signed by at least two of its members. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below.

Binding Arbitration: If the parties cannot resolve the Dispute in accordance with the procedure outlined above, then any party may submit such Dispute to arbitration by notice to the other parties. Such arbitration shall be governed by the Rules of Arbitration of the International Chamber of Commerce, as in effect on the date of such notice. The arbitral tribunal shall consist of three (3) arbitrators. The party initiating the arbitration shall provide written notice to the other party of the arbitrator that it nominates. Within fourteen (14) Days of the receipt of such notice, the other party shall provide to the initiating party a written notice identifying the name of the second nominated arbitrator, with the understanding that if such nomination is not made within such ten (10) Days period, then the International Court of Arbitration of the International Chamber of Commerce (the “ICC Court”) shall make such appointment. Within (10) Days of the date of the appointment of the second arbitrator, the two arbitrators shall be appoint the third arbitrator, with the understanding that if the two arbitrators are not able to agree on third arbitrator within such ten (10) Day period, then the third arbitrator shall be appointed by the ICC Court. All three of the arbitrators shall be experienced in contracts of a similar nature to this Agreement, and all three individuals shall also be proficient in the written and

spoken forms of the English Language. The arbitration proceedings shall be conducted and all related communications shall be in the English Language. The arbitration shall be final and binding upon the parties. The parties hereby waive, to the extent permitted by Applicable Law, any right to appeal or to review of such an award by any court or tribunal. Any award may be entered in any Court having jurisdiction for purposes of enforcement. The arbitral tribunal shall presumptively award legal fees and arbitral costs to the winning party, but the arbitral tribunal shall retain the right to make such other equitable allocation with regard to such fees and costs as it may determine. However, where all the parties are Nigerian, then the Arbitration Rules set out in the Arbitration and Conciliation Act shall apply. The arbitration shall be held in Abuja, Nigeria.

Mutual Consultation:

Parties may try to resolve disputes by mutual consultation prior to notifying the other for appointment of a DAB. If either Party believes that a Dispute exists, it may deliver a notice to the other party requesting that the Dispute be referred to the senior management of the parties. Any such notice shall include the names of the senior management of the party nominated to attempt to resolve the Dispute, and a schedule of their availability during the twenty one (21) day period following the date of the notice. Within seven (7) days after receipt of a notice pursuant to the preceding sentence, the other party shall provide a notice to the party nominated to attempt to resolve the Dispute, and a schedule of

their availability during the remainder of the twenty one (21) day period following delivery of the notice, the nominated members of the senior management of the parties shall meet as frequently as possible, and shall attempt in good faith to use best efforts to resolve the Dispute within twenty one days of the first notice. Notwithstanding this provision either party may without mutual Consultation or at any time during or after these mutual consultations exercise its right to settlement by a DAB.

CLAUSE 21**WAIVER OF SOVEREIGN IMMUNITY**

To prevent undue liability to the Federal Government and its assets, the Federal Ministry of Justice has recently directed that all Sovereign immunity Clauses be drafted thus:

The Contracting Authority hereby irrevocably and unconditionally agrees that, to the extent that it, or any of its assets has or may hereafter acquire any right of immunity, whether characterized as sovereign immunity or otherwise, from any legal proceedings, whether in Nigeria or elsewhere, to enforce any liability or obligation related to or arising from this Agreement, including, without limitation, immunity from service of process, immunity from jurisdiction or judgment of any court or tribunal, immunity from execution of a judgement, and immunity of any of its property from attachment prior to any entry of judgment, and or from attachment in aid of execution against a judgment, it hereby expressly and irrevocably waives any such immunity, to the extent permitted by Applicable Law, and agrees not to assert any of such right or claim in any such proceedings, whether in Nigeria or elsewhere, provided that consular, diplomatic, public buildings and property in foreign jurisdiction of the Contracting authority, Central Bank of Nigeria, the Nigerian National Petroleum Corporation and the Nigerian Sovereign Investment Authority dedicated to governmental use and not intended for use for commercial purposes, and any military assets belonging to the Government of the Federal Republic

of Nigeria, shall in all cases be exempted from a process of suit or execution arising from or in connection with a dispute.

CLAUSE 22 MISCELLANEOUS

(These are terms that do not generally fall into any of the categories listed above. They may include third party agreements, taxation, amendments, waivers, conflicts with other contracts and confidentiality.)

Amendments: No change, amendment, or modification of this Agreement shall be valid or binding upon the parties hereto unless such change, amendment, or modification shall be in writing and duly executed by both parties hereto. Both parties agree to use their best efforts and in good faith to negotiate and reach reasonable terms if any issue requires such understanding.

Assignment: This Agreement may be assigned to other parties only upon the prior written consent of the non-assigning party hereto, such consent not to be unreasonably withheld. Any assignment which derogates from the grant within this Agreement shall be void. When duly assigned in accordance with the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the assignee; any assignment not in accordance with the provisions of this Clause shall be void and without force or effect.

Sub-Contracting: The parties may engage any contractor or sub-contractor possessing the requisite skill, expertise, finance and or capability to perform some, but not all, of its obligations under this Agreement **PROVIDED** that the party engaging the sub- contractor shall, at all times, be solely responsible for the action and omissions of that sub-contractor.

Survival: All rights accrued prior to the termination of this Agreement shall survive its termination.

Entire Agreement: The terms and provisions contained in this Agreement (including the Schedules and Appendices) constitute the entire agreement between the parties with respect to the subject matter hereof.

Confidentiality: Each of the parties, their employees, contractors, consultants and agents, shall hold in confidence all documents and other information (including this Agreement) whether technical or commercial supplied to it by or on behalf of the other party relating to the financing, design, construction, insurance, operation, maintenance and management of the project/service in the course of this Agreement, and shall not publish or otherwise disclose or use the same for its own purposes otherwise than as may be required in accordance with Applicable Regulations or to perform its obligations under this Agreement. This Clause shall not apply to information:

(a) already in the public domain otherwise than by breach of this Agreement ;



- (b) already in the possession of the receiving party before it was received from the other party in the course of this Agreement and which was not obtained under any obligation of confidentiality ; or
- (c) obtained from a third party who is free to divulge the same and which was not obtained under any obligation of confidentiality.

Notices: Any notice, request, document, or other communication required or permitted under this Agreement may be given in any manner provided herein to the address or number provided below and shall be deemed effective as indicated: (a) if in writing and delivered in person or by courier, on the date it is delivered; (b) if sent by electronic or facsimile transmission, on the date that the sender receives written confirmation of such receipt by the recipient, **provided** that where a copy is sent in accordance with clause (a) or (b) above; or (c), if sent by certified or registered mail (airmail, if overseas) or the equivalent return receipt requested), on the date that mail is delivered unless the date of such delivery or receipt, as applicable, is not a business day in the place of such delivery or receipt, or such communication is delivered or received, as applicable, after the close of business on a business day in the place of such delivery or receipt, in which case such communication shall be deemed given and effective on the next business day in the place of such delivery or receipt following such day. Notices shall be given as follows:

- (a) For the Contracting Authority;

Attention: Managing Director/CEO (Name)

Telephone:

Facsimile:

- (c) For the Concessionaire:

Attention: Managing Director (Name)

Telephone:

Facsimile:

No Waiver: Any failure of any party to enforce any of the provisions of this Agreement or to require compliance with any of its terms at any time during the term of this Agreement shall in no way affect the validity of this Agreement, or any part hereof, and shall not be deemed a waiver of the right of such party thereafter to enforce any and each such provision.

Severability: The invalidity of one or more phrases, sentences, clauses, or articles contained in this Agreement shall not affect the validity of the remaining portions of this Agreement so long as the material purposes of this Agreement can be determined and effectuated

Further Assurances: The parties agree to provide such information, execute and deliver any such instruments and documents and to take such other actions as may be necessary or reasonably requested by the other party that are not inconsistent with the provisions of this Agreement and that do not involve the assumptions of obligations other than those provided for in

this Agreement, in order to give full effect to this Agreement and to carry out the intent of this Agreement.

Schedules: All schedules are fully and expressly incorporated into this Agreement.

Counterparts: This Agreement may be executed in any number of counterparts or duplicates, each of which shall be an original, and such counterparts or duplicates shall together constitute one and the same Agreement.

SIGNED, SEALED AND DELIVERED BY THE WITHIN NAMED Honourable Minister for and on behalf of the Contracting Authority

Name:

Signature:

In the presence of:

Name:

Designation:

Signature:

THE COMMON SEAL OF THE WITHIN NAMED CONCESSIONAIRE

was hereto affixed

(seal)

In the presence of:

[•]

Director

[•]

Secretary

Model Bidding Documents

5.1. Request for Qualification (RFQ)

- The objective at the RFQ stage is to pre-qualify bidders to be selected for the PPP Project. The RFQ stage becomes essential in cases where
 - ✓ The number of potential bidders is high in which case undertaking the RFQ stage, would reduce the number of bidders eligible to submit the bid, and in turn reduce the number of bids that would need to be evaluated by the Public Sector Agency
 - ✓ The cost of preparation of the bids might be substantial- for instance in case of projects where the bidder needs to take a view on the likely traffic, undertake some form of technical examination etc. in which case only the more suitable bidders should need to incur the cost of preparation of the bid
 - ✓ Execution of the project being bid requires technical and/ or financial expertise or experience in which case only those bidders which have the requisite expertise are allowed to bid
- Conceptually the RFQ document should provide a background of the project, description of the Bidding Process, eligibility of applicants for qualification, contents of the application for qualification, qualification criteria, due date and other instructions
- The following box provides the table of contents of the Model Request for Qualification document issued by the Ministry of Finance, Government of India.

Model Request for Qualification for PPP Projects- Contents

1. Introduction

- 1.1. Background
- 1.2. Brief description of the bidding process
- 1.3. Schedule of the bidding process

2. Instructions to Bidders

2A: General

- 2.1. Scope of application
- 2.2. Eligibility of applicants
- 2.3. Change in composition of consortium
- 2.4. Number of applications and cost thereof
- 2.5. Site visit and verification of information

2.6. Acknowledgement by applicant

2.7. Right to reject/ accept all or any application

2B: Documents

2.8. Contents of the RFQ

2.9. Clarifications

2.10. Amendment of RFQ

2C: Preparation and submission of bids

2.11. Language

2.12. Format and signing of applications

2.13. Sealing and marking of applications

2.14. Application due date

2.15. Late Applications

2.16. Modification/ substitution/ withdrawal of applications

2D: Evaluation Process

2.17. Opening and evaluation of applications

2.18. Confidentiality

2.19. Tests of responsiveness

2.20. Clarifications

2E: Qualification and Bidding

2.21. Short listing and notification

2.22. Submission of bids

2.23. Proprietary data

2.24. Correspondence with the bidders

3. Criteria for Evaluation

3.1. Evaluation parameters

- 3.2. Technical capacity for the purposes of evaluation
- 3.3. Details of experience
- 3.4. Financial information for the purpose of evaluation
- 3.5. Short listing of applicants

4. Fraud and corrupt practices

5. Pre-Application conference

6. Miscellaneous

Appendices

I. Format for Application

- Annex I: Details of Applicant
- Annex II: Technical Capacity of Applicant
- Annex III: Financial Capacity of Applicant
- Annex IV: Details of Eligible Projects
- Annex V: Statement of Legal Capacity

II. Format of Power of Attorney for signing the Application

III. Format of Power of Attorney for Lead Member of Consortium

IV. Format for Joint Bidding Agreement for the Consortium

5.2. Request for Proposal (RFP)

- The objective at the RFP stage is to select a preferred bidder based on an objective, comprehensive and transparent selection process. This is a critical phase for obtaining the best value for money by the Public Sector Agency. The purpose of the PPP Policy and the guidelines to be issued under it is to ensure standard and uniform RFP documents across PPP projects in various sectors to mitigate the risks arising out of improper design and contents of the RFP document.
- Conceptually the RFP document should provide a background of the project, description of the Bidding Process, eligibility criteria for the bidders, contents of the bid, due date and other instructions. Usually a bid security is requested from potential bidders to prevent frivolous bids, and the RFP document prescribes the quantum and form of the bid security.
- Internationally the contents of RFP documents are on similar lines, with sectoral and geographical customization. The following box provides the table of contents of the Model Request for Proposal document issued by the Ministry of Finance, Government of India

Model Request for Proposal for PPP Projects- Contents

1. Introduction

- 1.1. Background
- 1.2. Brief description of the bidding process
- 1.3. Schedule of the bidding process

2. Instructions to Bidders

2A: General

- 2.1. General terms of bidding
- 2.2. Change in composition of bidding consortium
- 2.3. Change in ownership
- 2.4. Cost of bidding
- 2.5. Site visit and verification of information
- 2.6. Right to accept or reject any or all bids

2B: Documents

- 2.7. Contents of the RFP
- 2.8. Clarifications
- 2.9. Amendment of RFP

2C: Preparation and submission of bids

- 2.10. Format and signing of bids
- 2.11. Sealing and marking of bids
- 2.12. Bid due date
- 2.13. Late bids
- 2.14. Contents of the bid

2.15. Modification/ substitution/ withdrawal of bids

2.16. Rejection of bids

2.17. Validity of bids

2.18. Confidentiality

2.19. Correspondence with Bidders

2D: Bid Security

2.20. Bid security

3. Evaluation of Bids

3.1. Opening and evaluation of bids

3.2. Tests of responsiveness

3.3. Selection of bidder

3.4. Contacts during bid evaluation

4. Fraud and corrupt practices

5. Pre-Bid conference

6. Miscellaneous

Appendices

- I. Letter Comprising the Bids
- II. Bank Guarantee for Bid Security
- III. Power of Attorney for signing of Bid
- IV. Power of Attorney for Lead Member of Consortium
- V. Guidelines of the Department of Disinvestment

- The key aspect of this stage is defining the bid evaluation criteria. The bid evaluation criteria fundamentally are based on only two sets of parameters- financial and technical. Financial parameters are forms of the following:
 - ✓ The payout by the government agency/ users during the contract period- Whichever bid request the lowest payout would be the preferred bidder
 - ✓ The inflows to the government agency during the contract period- whichever bid offers the highest inflow to the government agency would be the preferred bidder
 - ✓ Lowest contract period

One of the above parameters is modified and customized for use in every PPP project. For example the parameter of lowest payout by the government agency/ users during the contract period can be modified as lowest tariff offered to users, lowest capital grant, lowest net present value of subsidy/ grant, lowest annuity to the government agency etc. The highest inflows to the government agency can be modified as highest revenue share, highest premium, highest lease rental etc. The lowest contract period is essentially a form of the first parameters- lower the contract period, lower is the total payments made by the user/ government agency during the whole contract period

Technical parameters are modifications or combinations of criterion like suitability of design, technology proposed, environmental impact, experience of the bidder etc.

- The Public Sector Agency shall select either a financial evaluation (Least Cost Method) or a combination of financial and technical evaluation (Quality cum Cost Based Selection) based on its requirements as mentioned in the PPP Policy Statement. Internationally both types of approaches are used. The following table presents the evaluation approaches across different countries

CHAPTER SIX

Conclusion

CONCLUSION

Public-private partnerships (PPPs) are an important tool for governments seeking to expand and improve the provision of infrastructure and other social services for their citizens. As such, they can help to boost economic growth and development. PPPs have been used in developed countries in a wide range of sectors, and they are increasingly being seen as part of the menu of solutions to the lack of infrastructure service provision in developing countries. However, PPPs can fulfill this role only if they appropriately combine the interests of the two partners—that is, the interests of the government in expanding and improving services for citizens that are sustainable and achieving value for money and the interests of private investors in obtaining a reasonable return on their investment for the risks they are being asked to bear. Engaging in successful PPPs requires policy makers who have foresight and vision in deciding how the PPP program fits with their broader development agenda. Preparing and managing PPP projects take time, resources, and specific skills. Bringing sound PPP projects to the market and establishing an enabling environment that will contribute to their long-term sustainability are particularly important. Investors are highly selective, and financial resources have become increasingly scarce in this post-crisis world. Citizens have also become more vocal in demanding rapid, concrete results and tangible evidence of improvements in the delivery and quality of public services.

This report provides a road map of the tasks for governments in developing countries interested in tapping the potential of the private sector to advance their development agenda through the use of PPPs. It highlights the dimensions—legal, financial, commercial, technical that need to be tackled at different points of the PPP process, from laying the framework, to a project's inception, and eventually to ensuring that the required service is actually delivered over the duration of the contract. The guide introduces the reader to the substantive discussions on the options available to policy makers seeking to address each dimension of the PPP process and the issues that are likely to be raised at each stage, providing case study examples of how these obstacles have been overcome. It highlights the benefits of taking a program, rather than a project by project, approach wherever possible. It shows that a PPP is not just a financial transaction: with its focus on better risk allocation over the long term, it can be a more efficient procurement tool available to governments for the delivery of a public service. PPPs usually involve a radical shift in approach to the way public services are procured and delivered. However, the impact of this change can often be underestimated by governments and the private sector. The guide aims to provide a realistic view of what is involved so that these changes are better understood and managed earlier on.

In addition to the “what,” the guide provides an understanding of the “how” of PPPs in infrastructure. Specific institutional arrangements need to be made to translate political will into an actual program of PPP projects that will be well received by investors and the public at-large. The book examines the various options open for making those arrangements, such as appointing interagency commissions or creating separate public sector PPP units. It also describes how other broader tools and institutions, such as PPP laws or regulatory entities, are needed to ensure the long-run success of PPPs: the importance of understanding their impact on the transaction at hand at an early stage of project preparation, their role in ensuring the coherence and consistency of the PPP program, and their role in providing clarity in the rules over the lifetime of the project.

That said, implementing successful PPPs ultimately relies on the abilities of the individuals tasked with making them work. The availability of specific skills needed to prepare, launch, and manage PPPs can represent a major implementation challenge in developing countries. How to address this issue will depend on the degree of economic and institutional development of the country, and the solutions will vary accordingly. Governance of the process is key. In building this road map, this guide also highlights at each stage the types of skills that are needed, the kinds of advisers required, and how they should be managed to complement and strengthen the government team. Having the right mix of skills is vital to the credibility of the program. It also strengthens the negotiating position of the government vis-à-vis the private sector and facilitates consultations and communication with the public at large on the benefits of developing a strong PPP program and in ensuring that the right projects get implemented.

Partnerships between the public and private sector can make a significant contribution to improving the living standards of citizens and enhancing the competitiveness of the economy. The case study presented in chapter 5 illustrates some of these achievements using the Manila Water Company as an example and how, over 13 years, the company achieved substantial improvements in services and an increase in coverage to 98 percent of the concession area. In chapter 1, the example shows how combining private participation and increased competition in Colombian ports in the 1990s led to dramatic improvements in service performance.

To reap the benefits of PPPs involves a careful and complex preparation process—and often patience—as final results may take time to materialize after the contract has been signed. The actual terms of those contractual agreements and the changes needed to create an enabling environment will depend on the country, the sector, and often the specific transaction. At the same time, the steps needed to get there are always the same: they constitute a frame of reference, a necessary point of departure for countries to succeed with their PPPs. The present guide aims to present this framework as a whole and to highlight the requirements, the options, and the challenges that governments are likely to face in developing the framework so that a successful PPP program can be implemented and the benefits for both partners—public and private—can be fully realized.

CHAPTER SEVEN

Relevant Literature

Relevant Literature

APMG International: *“The PPP Guide”*. The guide is intended to assist PPP professionals in learning best practices in PPP development and management. It is referred to as the book of knowledge on PPPs. The guide is aimed to help PPP practitioners achieve the title “Certified PPP Professional” under the auspices of the APMG PPP Certification Program.

APMG International: *“Glossary”*. This is a glossary of terms that are commonly used in PPP projects. Many of the definitions used in this reference tool come originally from the APMG glossary.

Department of Economic Affairs, Ministry of Finance of India: *“Guidelines for Post-Award Contract Management for PPP Concessions”*. The PPP Cell under the Infrastructure Division drafted this comprehensive post-award contract management toolkit to assist contract manager in regional governments. The guide provides detailed guidance on all contract management issues, challenges, and best practice.

EPEC: European PPP Expertise Centre. *“Managing PPPs during their contract life, Guidance for sound management”*. This document is useful when considering setting up the team and also when considering how to manage service performance.

EPEC: European PPP Expertise Centre. *“Report on Termination and Force Majeure Provisions in PPP Contracts”*. This document explains different methods for calculating compensation for Procuring Authority default and voluntary termination.

EPEC: European PPP Expertise Centre. *“Termination and Force Majeure Provisions in PPP Contracts”*. This document sets out the termination provisions most commonly used across Europe, how they have developed over time and their rationale.

EPEC: European PPP Expertise Centre. *“The Guide to Guidance. How to Prepare, Procure and Deliver PPP Projects”*. This guide seeks to identify the “best of breed” guidance currently available from PPP guidelines worldwide and selected professional publications. It was also used to show the different forms of refinancings.

OECD International Transport Forum: *“The Renegotiation of PPP Contracts: An Overview of its Recent Evolution in Latin America”*. This document includes a description of the

different causes for initiating the renegotiation by the Procuring Authority or by the Private Company.

The World Bank: *“Good Governance in Public-Private Partnerships, A Resource Guide for Practitioners”*. This document provides guidance on governance in PPPs, with an emphasis on Latin America, and was particularly

useful in understanding approaches to dealing with Project Company financial difficulties.

The World Bank: *“Guidance on PPP Contractual Provisions, 2017 Edition”*. This manual is an update on the earlier 2015 edition based on user feedback. The objective of this guide is to assist Procuring Authorities with obtaining a better and more comprehensive understanding of PPP

contractual provisions, highlighted also in the 2015 edition.

UK HM Treasury PPP Policy Note: *“Early Termination of Contracts”*. The purpose of this note is to set out the

budgeting, accounting and fiscal implications of a voluntary termination of a PPP contract by a Procuring Authority, as well as the review and approval process that should be followed.

UNECE: United Nations Economic Commission for Europe. *“Public Project Partnership. Contract Management Manual”*. This manual defines international best practice and is intended to provide the foundation for the design, development, and operation of PPP contract management systems by governments. It was mentioned in the transition period from financial close to construction section.



THE PRESIDENCY

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