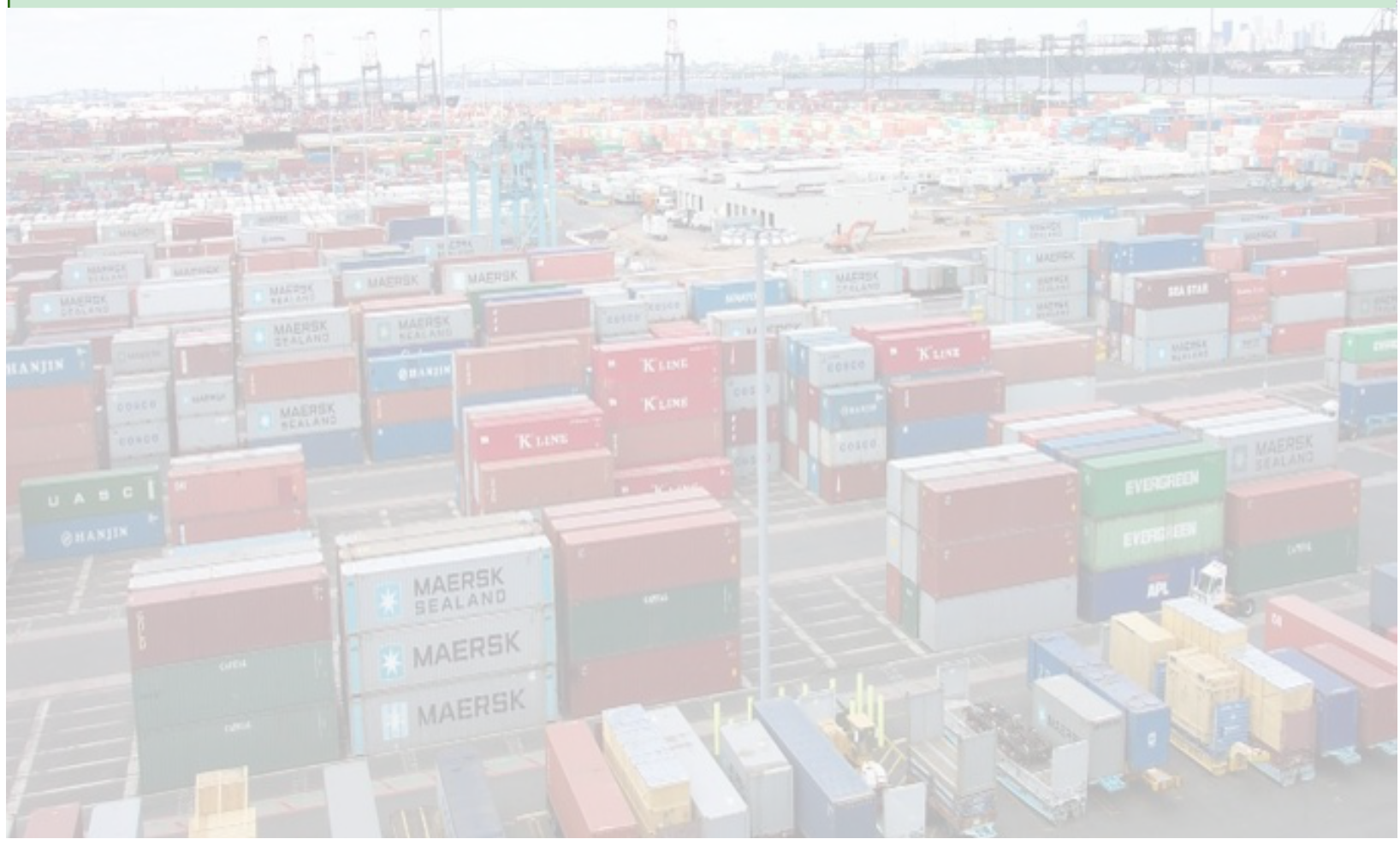


# INFRASTRUCTURE CONCESSION REGULATORY COMMISSION (ESTABLISHMENT, ETC) ACT 2005 (ACT NO. 18 OF 2005)



THE PRESIDENCY

## ICRC PUBLIC PRIVATE PARTNERSHIP REGULATIONS, 2014



*Short Title:*

**ICRC Public Private Partnership  
Regulations, 2014**

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# INFRASTRUCTURE CONCESSION REGULATORY COMMISSION (Establishment, Etc) ACT 2005 (Act No 18 of 2005)

[ 11th April, 2014 ]      **Commencement**

In exercise of the powers conferred on the Infrastructure Concession Regulatory Commission (“the Commission”) by section 34 of the Infrastructure Concession Regulatory Commission Act, 2005 (“the Act”) and all other powers enabling it in that behalf, the Commission with the approval of the President make the following Regulations:



## PART I APPLICATION AND SCOPE

### 1. Application

These Regulations apply to all Public Private Partnership (“PPP”) Projects undertaken by a Public Infrastructure Entity for the purpose of development and maintenance of public infrastructure assets and facilities and the provision of public utility and social sector services.

### 2. Exemptions from these Regulations

Any PPP project undertaken by any Public Infrastructure Entity of a State or local government which does not require a financial contribution or a sovereign guarantee from the Federal Government of Nigeria is exempted from the application of these Regulations.

### 3. Primacy of these Regulations

- (1) From the Effective Date of these Regulations, any guidelines or guidance notes previously issued by the Commission, other than the National PPP Policy, shall cease to have effect.

- (2) In the event of any inconsistency between the provisions of the Act and these Regulations the provisions of the Act shall prevail.

- (3) In the event of any inconsistency between the provisions of these Regulations and the National Policy on PPP the provisions of the Regulations shall prevail.

### 4. Application to Projects being developed prior to the Effective Date

- (1) Every PPP Project embarked upon by the Public Infrastructure Entity shall be subject to these Regulations from the effective date.

- (2) In compliance with sub-regulation (1), the Public Infrastructure Entity shall, within thirty days from the Effective Date, provide the Commission with a status report detailing the history and status of the PPP project.

- (3) Further to the requirement of sub-regulation (2) of this regulation, the

Commission may also request the Public Infrastructure Entity to provide such additional information as the Commission considers necessary and within such period as the Commission may determine.

- (4) The status report referred to in sub-regulation (2) of this regulation, shall include copies of all documents pertaining to the PPP project that are within the knowledge or possession of the Public Infrastructure Entity including copies of-
- (a) all PPP project proposals whether originated by the Public Infrastructure Entity or received as Unsolicited Proposals;
  - (b) all RFPs, Invitations for Expressions of Interest and Expressions of Interest;

- (c) all PPP Agreements with amendments, if any;
- (d) all relevant correspondence between the Project Proponent and every other bidder and the Public Infrastructure Entity;
- (e) minutes of all meetings between the Project Proponent and the Public Infrastructure Entity;
- (f) any pre-feasibility or feasibility studies, Outline or Full Business Cases and value for money studies prepared in relation to the PPP project; and
- (g) any other information or document that the Commission may request to enable the Commission to carry out its review of the PPP project.



## PART II INSTITUTIONAL AND CONTRACTUAL FRAMEWORK

### 5. Roles and Responsibilities of Institutions

- (1) The Commission shall be responsible for the coordination, facilitation and monitoring of PPP projects and PPP Agreements as elaborated in regulation 8 of these Regulations.
- (2) The Public Infrastructure Entity shall be responsible for the identification, prioritization, planning, negotiation, execution and implementation of PPP Agreements as elaborated in regulation 6 of these Regulations.
- (3) The Federal Executive Council ('FEC') shall be responsible for approving each

PPP project based on the Outline Business Case and Full Business Case for that project.

- (4) The Federal Ministry of Finance shall be responsible for -
  - (i) tracking, monitoring and managing contingent liabilities arising from PPP projects;
  - (ii) providing MDAs with technical support in negotiating financial aspects of PPP transactions;
  - (iii) ensuring that the proposed PPP is in line with the economic and fiscal policies of the FGN; and
  - (iv) determining whether Viability Gap Funding or other incentives will be

available for the PPP projects under consideration.

## 6. Public Infrastructure Entity

- (1) Any Public Infrastructure Entity engaging in the procurement of PPP projects shall, where appropriate, establish its own PPP unit.
  - (2) The PPP unit for the Public Infrastructure Entity shall -
    - (a) serve as a focal point for interaction with the Commission;
    - (b) facilitate decision making within the Public Infrastructure Entity and provide the sector specific technical inputs necessary for project implementation; and
    - (c) assist in creating the institutional capacity within the Public Infrastructure Entity necessary for project implementation and management.
  - (3) A Public Infrastructure Entity shall ensure the implementation of the provisions of these Regulations in the preparation, procurement and management of PPP Projects
    - (1) A Public Infrastructure Entity engaging in a PPP project shall establish for the Project -
      - (a) a Project Steering Committee
      - (b) a Project Delivery Team; and,
      - (c) a Tender Evaluation Committee.
    - (2) Where a Public Infrastructure Entity, having been engaged in an earlier PPP Project, had already established any of the Teams or Committees referred to in this regulation in respect of such earlier PPP project, the Public Infrastructure Entity may choose not to establish new Teams or Committees in respect of each new PPP project and may deploy the already established Teams or Committees to service subsequent
- PPP projects, unless where prevailing circumstances or the peculiarities of a new PPP project necessitate the establishment of separate Teams or Committees.
- (6) The Project Steering Committee shall in respect of each particular PPP project -
    - (a) be responsible for guiding and monitoring the activities of the Project Delivery Team and for providing strategic support to the Project Delivery Team;
    - (b) be chaired by the Minister or the Accounting Officer, as the case may be, and shall include, as may be applicable, a representative of each of the Ministry of Finance, the Commission as observer, other relevant agencies and the project director, who shall be the secretary, validate proposals, following recommendations from the Project Delivery Team, on the following issues:
      - (i) Terms of Reference for the Transaction Advisor(s)
      - (ii) Preferred procurement procedure
      - (iii) Outline Business Case and Full Business Case
      - (iv) Tender Documents
      - (v) Request for Proposals
    - (c) decide on any other issues of a strategic importance for a particular Project.
  - (7) The Tender Evaluation Committee shall be responsible for reviewing and evaluating the PPP project Proposals and selecting the preferred bidders.
  - (8) The membership and terms of reference of the Tender Evaluation Committee shall be determined by the Public Infrastructure Entity in line with the Commission's guidelines. The composition of the Committee shall be distinct from the composition

of the Project Delivery Team, but shall include one suitably qualified representative each from all relevant agencies, nominated by the administrative heads of such agencies, as well as such other technical, legal and financial experts appointed for that purpose by the Commission as shall enable the Commission achieve the objective of a fair, transparent and professional evaluation.

(9) A Public Infrastructure Entity shall carry out the responsibility relating to the preparation, procurement and management of PPP Project with complete probity in a fair and transparent manner.

(10) The Project Delivery Team shall-

- (a) consist of representatives of all key departments or business units involved in the PPP project who shall be officials of sufficient seniority, with necessary decision-making authority;
- (b) be headed by a project manager of a directorate cadre,
- (c) provide overall guidance on the implementation of the proposed Project and have day-to-day responsibility for delivering the PPP project within the allocated budget and project timetable; and

(d) appoint the necessary PPP Project Advisors, as approved by the Project Steering Committee.

## **7. Projects involving Multiple Public Infrastructure Entities**

Where a PPP project involves more than one Public Infrastructure Entity, the concerned Public Infrastructure Entities shall select from amongst themselves the

lead Public Infrastructure Entity and all communications with or applications to the Commission in respect of that PPP project shall be made by or in the name of the lead Public Infrastructure Entity.

## **8. The Commission's responsibilities.**

(1) The Commission shall-

- (a) issue guidelines on the implementation of National PPP policy;
- (b) issue guidelines and guidance notes on the identification of PPP projects and programmes within the FGN's overall investment and infrastructure development strategy;
- (c) provide advice on the Value for Money assessment and affordability analysis of Projects that are being considered for development as PPP projects;
- (d) provide guidance notes to the Public Infrastructure Entity on developing an Outline Business Case for each Project, on the appointment of transaction advisers and on the development of the Full Business Case;
- (e) develop a communications strategy for PPP projects across the country involving public and private sector stakeholders;
- (f) provide technical assistance to Public Infrastructure Entities in the procurement of PPP projects including defining output requirements, payment mechanisms, risk allocation issues, evaluation criteria and draft contractual terms;
- (g) provide strategic and technical support to each Project Steering Committee for PPP projects;
- (h) prepare the recommendations on PPP Projects for FEC approval;
- (i) provide such technical and strategic support to Public Infrastructure Entities as Public Infrastructure

- Entities may request from the Commission in the period between completion of the PPP Agreement and financial close of the PPP project, or during the operational phase of PPP projects;
- (j) support Public Infrastructure Entities in the development and capacity building of Nodal PPP units: and
  - (k) work on the harmonization of the PPP policies and programmes of the Federal, State and Local Governments working with similar units in FGN Ministries, Departments and Agencies to ensure consistency of approach and a steady flow of PPP projects.
- (l) take custody of all PPP agreements;
  - (m) monitor the implementation of all PPP Agreements;
  - (n) provide guidelines on disclosure;
  - (o) provide oversight of existing PPP Agreements when necessary;
  - (p) enforce compliance of the Parties with the relevant PPP Agreements in accordance with regulations 33 to 36 of these Regulations; and
  - (q) coordinate and facilitate the mediation of other PPP dispute resolution interventions, in accordance with the provisions of the Act and of these Regulations with particular reference to regulation 40, and the provisions of the



## PART III

# DETERMINATION OF PPP PROJECTS

### 9. Identification of Projects

- (1) The Public Infrastructure Entity shall be responsible for identifying a potential PPP project.
- (2) The Project may originate from MDAs or through an Unsolicited Proposal.
- (3) A proposed Project qualifies to be undertaken through a PPP mechanism if it can be demonstrated that the project flows out of one of the following: -
  - (a) the Project involves the performance of a public function or provision of a service on behalf of the Public Infrastructure Entity;
  - (b) it is of greater benefit to the FGN to procure the Project by means of a PPP rather than through a traditional public procurement process;
  - (c) where the Public Infrastructure Entity is investing funds in the Project, it must have identified the applicable budgetary allocation, demonstrated how it intends to raise the necessary funds and the sources of such funding or identified whether and on what basis the Project should be eligible for Viability Gap Funding.
  - (d) the Project is viable and sustainable from project cash flows, grants, subsidies or other ancillary sources of income;
  - (e) the risks of the Project are identifiable and shall be allocated in such a manner that the Public Infrastructure Entity shall derive quantifiable benefits from passing on certain risks to the Project Proponent;
  - (f) any assets of the FGN that are to be contributed as part of the PPP project are available or can be made available before



the commencement of the PPP Agreement or can reasonably be acquired for the purposes of the PPP Agreement; and

- (g) such other criteria that the Commission may determine from time to time.

## 10. Prioritization of Projects

- (1) Once the Public Infrastructure Entity has a list of identified projects, it shall determine the relative priority of such projects taking into consideration the following criteria:
  - (i) Value for Money to the FGN;
  - (ii) importance of the Project to the FGN; and
  - (ii) the extent to which direct or contingent support must be provided to the Project by the FGN.
- (2) The Public Infrastructure Entity shall also determine in which, if any, of the Projects there is likely to be a Viability Gap and on what basis such a Project should be eligible for Viability Gap Funding.

## 11. Development and Approval of Outline Business Case

- (1) When a Public Infrastructure Entity has identified and prioritized a Project based on the criteria specified in regulations 9 and 10 of these Regulations, the Public Infrastructure Entity shall prepare an Outline Business Case for review by the Commission.
- (2) The Outline Business Case ('the OBC') shall be prepared in accordance with Annex 1 to these Regulations and adapted to the model Outline Business Case template issued by the Commission,

if any, and shall indicate whether the Public Infrastructure Entity considers that there is likely to be a Viability Gap in the Project and whether it should be seeking Viability Gap Funding ('the VGF') for the Project.

- (3) Within sixty days of the submission of the Outline Business Case to the Commission, the Commission shall issue to the Public Infrastructure Entity one of the following:
  - (a) a "Letter of Compliance" confirming that it considers that the Project meets the criteria for PPP set out in regulations 9 and 10 of these Regulations and, if applicable, confirming that the Project is eligible for VGF; or
  - (b) a letter remitting the Outline Business Case to the Public Infrastructure Entity and directing the Public Infrastructure Entity to make any suggested adjustments or modifications to the Outline Business Case or provide more information or clarification on the matters identified by the Commission before the Commission can issue a "Letter of Compliance"; or
  - (c) a letter of non-qualification stating that the Project does not meet the applicable criteria with stated reasons.
- (4) Where the Commission issues a "Letter of Compliance" to the Public Infrastructure Entity, the Public Infrastructure Entity shall submit the Outline Business Case to the FEC for approval, and if granted, the Public Infrastructure Entity may proceed with the procurement of the project.



## PART IV

# PROCUREMENT

### 12. Procurement Proceedings

- (1) Following approval by the FEC of the Outline Business Case, the Public Infrastructure Entity shall commence the procurement process in accordance with the procedure prescribed in this Part.
- (2) The procurement process for any PPP project approved in accordance with provision of sub-regulation(4) of regulation 11 of these Regulations, including the procurement of any sub-contracts or other project agreements relating to the PPP project, shall be subject to the provisions of the Act and these Regulations.
- (3) After the approval of the FEC has been obtained pursuant to the provision of sub-regulation (4) of regulation 11 of these Regulations, the Public Infrastructure Entity may proceed with the procurement in accordance with these Regulations.
- (4) Procurement process shall take one or more of the following forms -
  - (a) Competitive Bidding – a two-stage procedure as described in regulations 13 to 16 of these Regulations which shall be the default form of procurement proceeding for PPP projects;
  - (b) Non-competitive bidding as described in regulation 20 of these Regulation;
  - (c) Unsolicited Proposals, as described in regulation 21 of these Regulations; and
  - (d) In the case of PPP projects involving any funding sourced from International Finance Institutions, such additional procurement procedures as may be prescribed by such institutions; provided that such procedures conform to the extant rules and regulations.
  - (e) Direct Negotiation – In the case where the project presents evidence of propriety idea, content or solution, uniqueness of the project, compatibility with an existing service to achieve operational and cost efficiency, ownership of exclusive rights or presence of a single or very few suppliers. The Commission will recommend a direct negotiation under the guidelines of the ICRC.

### 13. Advertisement of Invitations for Expression of Interest

- (1) The Public Infrastructure Entity shall give notice of the proposed PPP project and shall send out Invitations for Expression of Interest including the minimum requirements set out in Schedule III to these Regulations.
- (2) The Invitations for Expression of Interest shall be published in at least three national newspapers having wide

circulation in Nigeria and any of the following:

- (a) on the website utilizing at least two platforms that are closely related and relevant to the proposed PPP projects;
  - (b) on the Public Infrastructure Entity's website or on a website specifically created for PPP projects by the Public Infrastructure Entity; or
  - (c) at least one widely circulated international business publication or magazine.
- (3) The form and content of the notice shall be approved by the Commission and the minimum response period for the submission of an Expression of Interest shall be six weeks from the date of the publication.
- (4) The Invitation for Expression of Interest shall state the criteria to be applied in selecting pre-qualified bidders.
- (5) A draft of the Invitation for Expression of Interest shall be submitted to the Commission by email and hard copy at least fifteen days before the proposed date of the publication.
- (6) The Public Infrastructure Entity may assume that the Commission has no objection to the draft notice if within ten days after the receipt of the notice by the Commission; the Commission has not provided any comments on the draft notice to the Public Infrastructure Entity.
- (7) The Public Infrastructure Entity shall provide the Commission with proof of compliance with the notice requirements specified in this regulation within ten days from the date the Invitation for Expression of Interest is notified.
- (8) Where the Commission finds that the notice requirements have not been complied with, the Commission reserves

the right to -

- (a) cancel or postpone the return date for the Expression of Interest;
- (b) request the Public Infrastructure Entity to commence the Expression of Interest process afresh;
- (c) request the Public Infrastructure Entity to cure identified defects in subsequent or additional publications; or
- (d) request the Public Infrastructure Entity to take any other steps or actions as the Commission may deem necessary.

#### **14. Selection of Pre-Qualified Bidders**

- (1) Interested Project Proponents shall submit Expressions of Interest in the manner stipulated by the Public Infrastructure Entity in the Invitation for Expression of Interest and including the minimum requirements set out in Schedule IV to these Regulations.
- (2) The Public Infrastructure Entity shall open and review all Expressions of Interest and select pre-qualified bidders for the RFP stage in accordance with the criteria set out in the Invitation for Expression of Interest and as approved by the Commission, and in accordance with Schedule III to these Regulations.

#### **15. Issuance of Requests for Proposals**

- (1) The Public Infrastructure Entity shall issue RFPs to the pre-qualified bidders.
- (2) The RFPs shall be based on the Outline Business Case as approved by the FEC which shall not contain any provision contrary to or materially deviating from the Outline Business Case.
- (3) The RFPs shall contain the following information, together with the minimum requirements set out in Schedule V to

these Regulations -

- (a) a request for bidders to submit technical and financial bids for the Project;
- (b) a draft PPP Agreement or such other relevant agreements proposed for the transaction or detailed term sheet of the agreement, specifying non-negotiable conditions and containing the minimum provisions for a draft PPP Agreement as set out in Schedule VI to these Regulations;
- (c) technical specifications, services levels and outputs, performance indicators and main requirements of the Public Infrastructure Entity for regulating and monitoring the services subject to the PPP Agreement regarding security, environment and social safeguards;
- (d) an Information Memorandum describing the PPP project;
- (e) complaints relating to the procurement proceedings for a PPP project shall be referred to the Commission for review;
- (f) a statement on the method and basis for comparison among bids and in cases where a scoring rather than a pass or fail evaluation system is chosen, the evaluation criteria and basis for technical and financial comparison among bids shall be specified, and the score given to each criterion and the method by which the chosen criteria is to be applied to evaluate the bids;
- (g) documents, forms and dates that need to be completed and submitted with the bid, indicating the time frame for the submission of the bid and all accompanying documents;
- (h) bid security value and calculation method for performance security; and
- (i) such other minimum requirements as are set out in Schedule V to these Regulations.

- (1) In relation to paragraph (b) of sub-regulation (3) of this regulation, a minimum list of provisions for a draft PPP Agreement is contained in Schedule VI to these Regulations.

## **16. Submission of written questions and suggestions**

- (1) Pre-qualified bidders may submit written questions and suggestions to the Public Infrastructure Entity on all aspects of the RFP, including a mark-up of the draft PPP Agreement, within such time frame as may be specified in the RFP which shall not be less than thirty days prior to the final date for bid submission.
- (2) The Public Infrastructure Entity shall circulate questions and suggestions submitted by bidders to all the other pre-qualified bidders without disclosing the sources of the questions and suggestions.
- (3) The Public Infrastructure Entity may provide written responses to the questions and comments raised by the bidders as it may deem necessary, within a time frame specified in the RFP and shall submit copies of the responses to all bidders.
- (4) The Public Infrastructure Entity may convene Bidders' Conference to which bidders shall be invited and at which bidders may ask questions, and make comments and suggestion on all aspects of the RFP.
- (5) The Public Infrastructure Entity shall produce a draft final RFP for issuance to the prequalified bidders, incorporating as necessary the comments and observations of bidders on the RFP and shall forward same by electronic mail and in hardcopy to the Commission for review, at least ten days before the date on which the Public Infrastructure Entity proposes to issue the final RFP to the prequalified bidders.

- (6) The Public Infrastructure Entity shall assume that the Commission has no objection to the draft RFP after ten days of the receipt of the final draft with comments and observations of the bidders, where the Commission has not provided any comments to the Public Infrastructure Entity.
- (7) The Public Infrastructure Entity shall provide a secure physical or virtual data room to give qualified bidders access to all available information and documentation relevant to the due diligence process for the PPP project.
- (8) In addition to handling bidder enquiries and establishing a data room, the Public Infrastructure Entity may allow site visits.

#### **17. Submission of proposal and selection of Preferred Bidder**

- (1) Pre-qualified bidders shall submit technical, legal and financial proposals to the Public Infrastructure Entity in separate sealed envelopes and generally in the form and manner, and in accordance with the guidelines for bid submission stipulated in the RFP.
- (2) The minimum requirements for the PPP project Proposals are contained in Schedule IV to these Regulations.
- (3) The Tender Evaluation Committee shall review the proposals and select the preferred bidder in accordance with the procedure and weighted scoring set out in the RFP.
- (4) The technical and legal proposals shall be opened and scored first to establish whether they have met the minimum score required to pass the evaluation, as the context requires.

- (5) The Tender Evaluation Committee is entitled to reject any technical or legal proposals which do not substantially comply with or conform to the RFP, and variant bids will not be accepted.
- (6) The financial bids for the technical and legal bids which have reached the minimum score will thereafter be opened in the presence of the successfully qualified bidders or their representatives, prior to further evaluation.
- (7) The Preferred Bidder shall be the bidder that submits the most technically competent and financially viable bid from the combined evaluation of the technical and financial bids.
- (8) The criteria for establishing the most technically competent and financially viable bid shall be established in guidelines which shall be reviewed from time to time, by the Commission.

#### **18. Bidding by consortiums**

- (1) A bid may be submitted by a consortium of duly incorporated entities, provided that the consortium may not comprise more than four constituent entities that -
  - (a) no member of a consortium bidding for a PPP project may submit its own separate bid for the same project; and
  - (b) no member of a consortium bidding for a PPP project may be a member of another consortium bidding for the same project.
- (2) Where a bid is submitted by a consortium, the consortium shall nominate one of its members to be the lead member of the consortium, and all communications and correspondences with the Public Infrastructure Entity, as well as all other official communication in respect of the

Bid, shall be made on behalf of the consortium by or in the name of the lead member of the consortium.

- (3) A consortium may change its membership composition at any time prior to the submission of its bid proposals to the Public Infrastructure Entity, but may not change its membership after having submitted its proposals pending the evaluation of the bids and the selection of a Preferred Bidder.
- (4) A consortium selected as a Preferred Bidder may not change its membership after it has been so selected, or during the implementation of the PPP project, without giving a notice in writing to the Public Infrastructure Entity at least three months prior to the proposed effective date of the change in membership, and shall establish to the satisfaction of the Public Infrastructure Entity the circumstances that necessitate the change in the composition of the consortium.
- (5) A change in the membership of a consortium following its selection as a Preferred Bidder may be a ground for the Public Infrastructure Entity revoking the selection of the consortium as Preferred Bidder except the consortium can provide a replacement that is of equal competency to replace the vacating consortium.
- (6) A member of a consortium may not withdraw from membership of the consortium until after the expiry of two years following the completion of the construction phase of the PPP project, and not without obtaining the approval of the Public Infrastructure Entity to that effect, which approval shall not be given until the member has furnished an agreement signed by the other members of the consortium releasing such member from its obligations and appointing equally competent replacement to discharge the obligations under the consortium Agreement and the PPP Agreement.
- (8) Where a bid is submitted by a consortium, the consortium shall attach to its technical and financial proposals -
  - (a) a certified copy of the corporate documents of each member of the consortium or other proof of each member's incorporation as is customary in the relevant jurisdiction;
  - (b) a written statement from the consortium on its official stationery, listing the names and addresses of all the members of the consortium and stating that -
    - (i) it assumed joint responsibility with the members of the consortium for the legal obligations of the consortium under any PPP Agreement to which the consortium may become a Party;
    - (ii) it approves the participation of the consortium in the formation of such Special Purpose or Joint Venture vehicle with the Public Infrastructure Entity as may be necessary for the implementation of the PPP project;
    - (iii) it subscribes to and undertakes to comply with the provisions of these Regulations concerning bidding by consortiums; and
    - (iv) the withdrawal of any member of the consortium before or during the implementation of the PPP project, without an equally competent and acceptable replacement, may be a ground for cancellation of the PPP

Agreement by the Public Infrastructure Entity; and

- (d) a certified copy of the participation agreement between the members of the consortium (“the Consortium Agreement”) duly signed by each member of the consortium indicating, amongst other things, a description of the roles and responsibilities of each member of the consortium in the bid exercise, and the roles and responsibilities of each member of the consortium in the PPP project in the event that the consortium is selected as the Preferred Bidder.

## 19. Development and approval of Full Business Case

- (1) Following the approval of the Outline Business Case, the Public Infrastructure Entity shall commence the preparation of a Full Business Case for the project in accordance with the minimum requirements prescribed in Schedule II to these Regulations using the model of the Full Business Case template issued by the Commission, articulating the substantive framework for the PPP project.
- (2) The substantive framework referred to in sub-regulation (1) of this regulation shall form the basis for the final procurement, and guide the subsequent implementation of the Project.
- (3) Where the Public Infrastructure Entity proposes the use of Viability Gap Funding or other direct or contingent FGN support for a PPP project, the Full Business Case shall be subject to a costing assessment to be carried out by the Ministry of Finance setting the estimated basic costs for the Project where it is to be executed through public procurement by the Public

Infrastructure Entity using the costing tables for goods and services published by the Bureau of Public Procurement from time to time for the basic goods and services and thereafter applying additional factors as agreed from time to time between the Commission and the Bureau of Public Procurement to include issues such as life-cycle cost and opportunity cost.

- (4) The Full Business Case shall present the final technical, financial and economic details and specifications for the project, reflecting or incorporating the outcome of all the stages of the procurement process following the approval of the Outline Business Case from the pre-qualification to the receipt of proposals from pre-qualified bidders in response to the request for proposal, and shall also be accompanied by all project draft Agreements and all other relevant project documentations.
- (5) Following the selection of a preferred bidder or bidders for the project, the Public Infrastructure Entity shall submit the project Full Business Case to the Commission for review, and the Commission shall within sixty days of the receipt of the Full Business Case from the Public Infrastructure Entity review same and issue to the Public Infrastructure Entity with one of the following responses -
- (a) a “Letter of Compliance” confirming that it considers that the Full Business Case for the PPP project has been made and that the FBC shall be forwarded to the FEC for approval;
  - (b) a letter remitting the Full Business Case back to the Public Infrastructure Entity and directing the Public Infrastructure Entity to make necessary adjustments or modifications to the Full Business Case, or provide more information or

clarification on such matters identified by the Commission to enable the Commission make a proper assessment of the Full Business case; and

- (c) a letter indicating that the Commission does not consider that the PPP project is appropriate to be forwarded to the FEC for approval, with stated reasons which may include -
- (i) lack of merit in the Full Business Case;
  - (ii) legal, regulatory or contractual impediments;
  - (iii) risk allocation deficiencies; or
  - (iv) such other factors as the Commission may determine.

(6) Where the Commission has issued to the Public Infrastructure Entity a “Letter of Compliance” in accordance with sub-regulation (5)(a) of this regulation, the Public Infrastructure Entity may then forward the PPP project to the FEC for approval to proceed with the procurement of the PPP project.

(7) The Commission may at any time before issuing a “Letter of Compliance” under sub-regulation (5) (a) of this regulation refer the application and the Full Business Case to any agency of the FGN for review and recommendations.

## 20. Non-Competitive Bidding

(1) Notwithstanding the provisions in regulation 17 of these Regulations, where after notification of an Invitation for Expression of Interest or the issue of an RFP, only one Project Proponent submits an Expression of Interest or a proposal, the Public Infrastructure Entity shall review the submitted documents in accordance with the applicable criteria, and may -

- (a) undertake direct negotiation with the Project Proponent without going

through a full competitive bidding process as prescribed under these Regulations;

- (b) re-advertise the invitation for Expression of Interest in the manner specified under these Regulations; or
- (c) cancel the procurement process for the PPP project.

(2) Subject to the provisions of the Act on competitive bidding the Public Infrastructure Entity may embark on a direct negotiation with a Project Proponent when necessary, the Public Infrastructure Entity shall first obtain the approval of the Commission and comply with the guidelines for the direct negotiation process and required benchmarking of the Project as the Commission may determine.

(3) The Public Infrastructure Entity may enter into direct negotiations with a Project Proponent in the event of an emergency or in a case of national security or based on conditions in Section 12 (4e) or for an Unsolicited Proposal that does not meet the criteria set out in regulation 21(5) (a) of these Regulations, provided that it first obtains the approval to proceed on this basis from the President.

## 21. Unsolicited Proposals

(1) Project promoters may submit an Unsolicited Proposal with the OBC for a Project to the relevant Public Infrastructure Entity.

(2) The Public Infrastructure Entity shall review any Unsolicited Proposal with the OBC submitted to it having regard to the criteria applicable to justification and prioritization of projects initiated by a Public Infrastructure Entity as contained in these Regulations.

(3) Where the Public Infrastructure Entity determines that the Unsolicited Proposal with the OBC satisfies all applicable



criteria, provided that such Unsolicited Proposal relates to a project that has been included in the National Implementation Plan, where such plan is in place, it may submit the Unsolicited Proposal either in its original form or an improved version to the Commission together with a letter informing the Commission of its reasons for justifying and prioritizing the Unsolicited Proposal as a potential PPP project.

(4) The Commission shall review the submission of the Public Infrastructure Entity and shall within sixty days of the date of the Commission's receipt of such submission -

- (a) confirm to the Public Infrastructure Entity that the Unsolicited Proposal can be situated within the National Implementation Plan, if such plan is in place, and that the Outline Business Case that has been prepared in respect of the Unsolicited Proposal are consistent with the prescriptions of any project appraisal that had been made in connection with the subject matter of the Unsolicited Proposal, and shall authorize the Public Infrastructure Entity to proceed with the Unsolicited Proposal through the necessary procurement process;
- (b) request further information on the Unsolicited Proposal from the Public Infrastructure Entity or direct that further work be done on the Outline Business Case prepared in respect of the Unsolicited Proposal in order to determine whether the unsolicited Proposal is consistent with any approved project business case or project appraisal outcome and whether the Public Infrastructure Entity may proceed with the Unsolicited Proposal towards possible procurement; or

(c) inform the Public Infrastructure Entity that it does not find the submission consistent with the National Implementation Plan or that the business case for the project has not been made and that the Public Infrastructure Entity may not proceed with the Unsolicited Proposal.

- (5) Where the Commission confirms to the Public Infrastructure Entity that the Unsolicited Proposal meets the necessary requirements for submission to the procurement process, and that the Outline Business Case prepared for the Unsolicited Proposal complies with the provisions of regulation 12 of these Regulations, the Public Infrastructure Entity may proceed to submit the Unsolicited Proposal to an open and competitive procurement process in accordance with regulations 12 to 19 of these Regulations, as if the proposal was the outcome of a project appraisal conducted by the Public Infrastructure Entity.
- (6) For the avoidance of doubt, submission of an Unsolicited Proposal does not confer on the project proponent an automatic entitlement to the contract for the procurement of the project, and the Public Infrastructure Entity shall as far as possible follow the competitive bidding procedure for the procurement of Unsolicited Proposals. However, during the competitive process, the original proponent will be allowed to match the most responsive bid.
- (7) Further to the provisions of sub-regulation (7) of this regulation, the Public Infrastructure Entity shall adopt the following procedure to procure an Unsolicited Proposal as a PPP project -
  - (a) where the Public Infrastructure

Entity considers that-

- (i) the envisaged output of the PPP Project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the Project Proponent; and
  - (ii) the proposed concept or technology is not truly unique or new; it shall follow the procedure for open competitive procurement set out in regulations 12 to 19 of these Regulations and shall invite the promoter of the Unsolicited Proposal to participate in an open competition with other invited bidders for such procurement;
- (b) where the Public Infrastructure Entity determines that the PPP Project cannot be implemented without infringing on an exclusive intellectual property, trade secret or other proprietary right owned or possessed by the Project Proponent, or the Unsolicited Proposal is otherwise not suitable for a competitive procurement process, it shall submit the Unsolicited Proposal to the Commission, and the Commission and the Public Infrastructure Entity shall work together to determine the best modality for the procurement of the project;
- (c) where the Commission and the Public Infrastructure Entity agree that the Unsolicited Proposal may proceed towards procurement without full competitive bidding and without subjecting the project to a selection procedure as set out in regulations 12 – 19, the Commission may direct the Public Infrastructure Entity to obtain elements of comparison for the Unsolicited Proposal in accordance with industry best practices to provide for the Commission a benchmark against which the Commission may compare key elements of the Unsolicited Proposal;
- (d) where after the Public Infrastructure Entity has obtained and furnished the Commission with the elements of comparison and the Commission is satisfied that the Unsolicited Proposal meets the requirements for procurement as prescribed in these Regulations, the Commission may grant approval to the Public Infrastructure Entity to engage in negotiations with the proponent of the Unsolicited Proposal; and
- (e) where the Commission grants approval to the Public Infrastructure Entity to proceed with the Unsolicited Proposal towards procurement, the Public Infrastructure Entity shall enter into negotiations with the proponent of the Unsolicited Proposal as if it were a Preferred Bidder selected under regulation 14 of these Regulations, and shall follow the remaining procurement procedures prescribed by these Regulations following the selection of a Preferred Bidder.

## 22. Contract Negotiation and Finalization

- (1) After the selection of the Preferred Bidder by the Tender Evaluation Committee, the Public Infrastructure Entity shall issue a letter of award for the project to the selected Preferred Bidder after which the Project Delivery Team shall proceed to negotiate the draft PPP Agreement with the selected bidder.

- (2) The Project Delivery Team shall ensure that the terms of the final PPP Agreement, especially the risk allocation structure in the Agreement does not differ substantially from the draft PPP Agreement included in the Full Business Case and the RFP, and that any provisions specified as non-negotiable in the RFP are not altered.
  - (3) The minutes of any meetings between the Public Infrastructure Entity and the Preferred Bidder on the documentation for the finalization of the contract shall state the list of attendees, major issues discussed, agreements reached and points of disagreement and a copy of the minutes shall be furnished to the Commission within seven days after the date of such meetings.
  - (4) The Public Infrastructure Entity shall submit the draft execution copy of the PPP Agreement together with a summary of any changes made to the project documents specified in the RFP or changes to the Full Business Case to the Commission for review and, if the Commission confirms that the changes that have been made are as approved by the FEC, it shall approve that the PPP Agreement be forwarded to the Minister for execution on behalf of the Public Infrastructure Entity after clearance with the Federal Ministry of Justice.
  - (5) Where the Commission discovers that a material change has been made to the PPP documents or to the Full Business Case aside from the approved or prescribed changes by the FEC, the Commission shall provide a summary of areas of unauthorized alteration and recommend that the Public Infrastructure Entity rectifies the identified discrepancies and re-submit the draft PPP Agreement to the Commission for final clearance.
  - (6) For the purpose of this regulation, a material change, is any alteration in the PPP Documents that affects the rights, duties and obligations of the Parties, or materially affects the financial position or pecuniary gains of the Parties, or alters the Parties to the PPP Agreement, or re-allocates any risks in the project, or makes such other unauthorized changes that the Commission considers may impact on the successful and sustainable implementation of the PPP Agreement or substantially change the nature, design, structure, delivery schedule or other logistical details or parameters of the PPP Project.
- 23. Execution of PPP Agreement**
- (1) Upon the Public Infrastructure Entity receiving approval from the Commission to forward the PPP Agreement to the Minister, the Public Infrastructure Entity may forward the Agreement to the Minister for execution, and the Minister may execute the PPP Agreement on behalf of the Public Infrastructure Entity, and shall cause five original copies of the PPP Agreement to be signed by the Parties.
  - (2) The Minister may not execute the Agreement until he is satisfied that every requirement stipulated by these Regulations or by the PPP Agreement to be fulfilled by the Parties prior to the execution of the Agreement has been fulfilled, and it shall be the duty of the Public Infrastructure Entity to establish to the Minister that every condition precedent to the execution of the Agreement has been fulfilled.
- 24. Custody of PPP Agreements**
- (1) The Public Infrastructure Entity shall, upon the execution of a PPP Agreement by the Parties, furnish to the Commission

two executed copies of PPP Agreement as well as two copies each of all other Project Documents including -

- (a) all construction, operations, maintenance and service contracts;
- (b) any other relevant documentation relating to the PPP project; and
- (c) any amendments to the PPP Agreement.

- (2) Where at any time the question shall arise as to the authenticity of any copy of the PPP Agreement, the executed copies of the PPP Agreement deposited in the custody of the Commission shall be the valid and original version representing the terms of the Agreement between the Parties.



## PART V

# CONTRACT IMPLEMENTATION

### 25. Handover of Project Assets

- (1) After the PPP Agreement has come into force and financial close of the PPP project has been achieved, the Public Infrastructure Entity shall hand over to the Project Proponent or acquire for the PPP project such Infrastructure Facilities or other assets as may be required for the implementation of the project, within the time frame and in accordance with the conditions stipulated in the PPP Agreement, free from any encumbrances.
- (2) It shall also be the duty of the Public Infrastructure Entity to guarantee, and if necessary secure and transfer to the Project Proponent immediately upon the financial close of the Project, the Right of Way that will enable the Project Proponent to have unencumbered access to the Project site, and to develop or operate the Project assets and facilities without let or hindrance.
- (3) For the purpose of this Part, the term

“Right of Way” includes the right to unhindered ingress and egress, easement, legally granted access to a route regardless of land ownership or any other legality, a path or route that may be lawfully used or an exclusive right of passage over another person's land.

### 26. Responsibilities of the Public Infrastructure Entity

It shall be the responsibility of the Public Infrastructure Entity to -

- (a) take full responsibility for the success of the PPP project for the duration of the project;
- (b) comply with the disclosure guidelines of the Commission issued from time to time;
- (c) arrange a pre-handover inspection of all PPP assets at an appropriate time with representatives of the Project Proponent and the Commission in attendance;
- (d) procure a condition report of the assets prior to the handover of the assets to the Project Proponent and furnish a copy of

the report to the Contract Compliance Committee at least ten days prior to the hand over date, provided that the Public Infrastructure Entity shall endeavour as much as possible to ensure that evaluation of the assets upon which the report is based shall not have been done on a date earlier than 24 months prior to the hand-over date; and

- (e) ensure that the Project Proponent is granted unrestricted access and rights of way to all the Infrastructure Facilities and assets necessary to enable it to perform the PPP Agreement, and take responsibility for liaison with any Ministry, Department, Agency or Corporation whose approval may be required to grant the access or right of way required for the project.

## 27. Reports

(1) For every PPP project subject to these Regulations, the Public Infrastructure Entity shall prepare and submit to the Commission the following reports -

- (a) a first half - year report, which shall be due six months after the date of the PPP Agreement, and which shall give a status report on the PPP project including the state of financial close on the Project, the state of any ongoing construction, the state of the Infrastructure Facilities and other assets where applicable, expected dates for completion of all outstanding aspects of the PPP Agreement or unfulfilled conditions precedent;
- (b) a second half - year report, which shall be due one year after the date of execution of the PPP Agreement, and which shall give a further update on the PPP Project over the preceding six months and shall include references

to the matters listed in sub-regulation (1) (a) of this regulation;

- (c) an annual report which must be furnished to the Commission not later than one week after the anniversary of the execution date of the PPP Agreement, which shall be furnished annually thereafter at the same time for the duration of the PPP project;
- (b) copies of minutes of meetings between the Public Infrastructure Entity and the Project Proponent from the date of the PPP Agreement to the expiry or termination of the PPP Agreement, as may be requested for by the Commission, which shall be furnished to the Commission for entry in the Project Minute Book maintained by the Commission; and
- (c) the minutes shall be duly adopted by the parties in attendance and signed by the designated representatives of the Project Proponent and the Public Infrastructure Entity, with their names and designations duly printed on the minutes.

(2) Emergency reports shall be provided by the Public Infrastructure Entity to the Commission within seven days of the Public Infrastructure Entity having notice of -

- (i) any act, default or omission on the part of a Party to the PPP Agreement likely to jeopardize the success of the PPP Project;
- (ii) any breach of a covenant by a party which has subsisted for over thirty days;
- (iii) a notification from a party requesting the other party to remedy a breach;
- (iv) any notice from a lender that suggests a possibility (even if remote) of a lender exercising its Step in Rights or Right of Substitution under the PPP Agreement;
- (v) a notification of any actual or intended

- change in the composition of the consortium membership;
- (vi) a request for variation or amendment of the PPP Agreement in any respect whatsoever;
- (vii) where applicable, any changes or request for changes in toll, user tariffs or calculation thereof or any intention to implement a new tariff or toll structure;
- (viii) any refusal, neglect or omission on the part of a Project Proponent to carry out remedial work prior to the hand back of any of the Assets; and
- (ix) such other matters as the Commission may from time to time determine.

(3) At the end of every year, the Commission shall prepare an Executive Summary of the PPP Project Status Report, highlighting any salient portions of the report as may give a clear picture of the status of the PPP projects, and publish same in at least three National Newspapers widely circulated in Nigeria.

(4) All reports issued by the Commission, or received by the Commission in connection with any PPP project, except reports and information that the Commission considers commercially sensitive or otherwise classified information or material, shall be published by the Commission on its web site.

## 28. Initial Construction Works

In circumstances where the PPP Agreement requires the Project Proponent to carry out a preliminary construction work, initial renovation or maintenance on any of the Infrastructure Facilities or other assets, the Public Infrastructure Entity shall ensure that -

- (a) the works are carried out in a timely and expeditious manner;
- (b) any penalty or liquidated damages for delays in the completion of the PPP Agreement is duly enforced; (c)

- mitigation measures are pursued; and
- (d) periodic site inspections are carried out and the Commission is invited to participate in an inspection at least on a quarterly basis during the construction period.

## 29. Hand-back

(1) In a PPP Agreement that requires the transfer or hand-back of Infrastructure Facilities to the Public Infrastructure Entity upon expiration or earlier determination of the PPP Agreement, the Project Proponent shall hand - back all the Infrastructure Facilities and other assets identified in the PPP Agreement upon the expiry or sooner determination of the PPP Agreement.

(2) The Public Infrastructure Entity shall, not later than thirty-six months prior to the hand-back date specified in the PPP Agreement, establish an internal Hand-back Steering Committee charged with the following responsibilities -

- (i) engage with the Project Proponent in the process of winding down its operations and its preparations for the hand-back;
- (ii) determine the state of the assets and any remedial work that may be required by the Project Proponent in accordance with the PPP Agreement or expected expenditure from the FGN in this regard;
- (iii) the Hand-back Steering Committee shall prepare a report within six months of its establishment and a copy of the report shall be furnished to the Commission;
- (iv) make recommendations at least Twenty-four months before the expiry of the PPP Agreement, as regards the process for the re-bid of the PPP project provided any such re-bid shall follow the Commission's Regulations for the time being in force; and

- (v) to ensure that the Project Proponent carries out all remedial works as required under the PPP Agreement; and
- (2) In circumstances where the PPP Agreement is terminated or determined

sooner than the duration specified in the PPP Agreement, the Public Infrastructure Entity shall secure the assets involved in such a manner as to avoid value attrition, and ensure that the Project Proponent does not engage in asset-stripping.



## PART VI

# CONTRACT MANAGEMENT, REGULATION AND ENFORCEMENT

### 30. Amendment of PPP Agreement

- (1) Where the parties to a contract propose an amendment to a PPP agreement, they shall forward a letter of no objection to the amendment to the Commission prior to the approval of the Federal Executive Council if the proposed amendment -
  - (a) materially affects the rights, duties and obligations of the Parties;
  - (b) materially affects the financial position or pecuniary gains of the Parties;
  - (c) alters the Parties to the PPP Agreement;
  - (d) re-allocates any risks in the project; or
  - (e) makes any other changes that the Commission considers material to the successful and sustainable implementation of the PPP Agreement or to materially change the parameters of the PPP Project.
- (2) The proposal for amendment shall state the exact amendments required and the justifications for the proposed amendments.

### 31. Inspection of Project Site

- (1) Upon giving reasonable notice to the

Public Infrastructure Entity and to the Project Proponent, officials of the Commission or such other persons authorized by the Commission may conduct an inspection of the PPP project site in order to:

- (a) verify statements made in any reports to the Commission;
  - (b) assess progress of work or the status of the PPP project; or
  - (c) for any other reason permitted under these Regulations or under the Act.
- (2) Prior to, during or after the inspection, the officials or other agents of the Commission may request and make copies of any document that is or ought reasonably to be in the possession of the Public Infrastructure Entity or Project Proponent and shall be empowered to take photographs or take samples of relevant materials during the inspection.
  - (3) Where the inspection identifies any irregularity, the Commission shall issue a notice to the relevant party requesting the rectification of the irregularity within a fixed period.
  - (4) Where the party identified in the notice issued by the Commission under

regulation 31(3) of these Regulations fails to comply with the request within the stated period, the Commission may exercise its powers as set out in regulation 35 of these Regulations.

### **32. Power of the Commission to demand and examine records**

- (1) The Commission may at any time, subject to reasonable notice, examine the records and affairs of, or request for information from any Entity that is a party or sub-party to a PPP Agreement covered by these Regulations, including the Public Infrastructure Entity, and pursuant to its powers of inspection hereby granted, the Commission may appoint a reputable firm of Chartered Accountants, an auditor, or other experienced and suitably qualified professionals, to inspect or investigate, as the case may be, the books of accounts, records, documents or affairs of the Entity.
  - (2) An Entity whose affairs are being inspected and every director, officer and employee responsible for the management of the affairs of the entity shall produce to the inspecting officer such books, accounts, records and other documents in their custody or control and furnish the inspecting officer with such statements and information relating to the Entity's activities as the inspecting officer may require within such period as the inspecting officer may specify.
  - (3) An Entity being inspected shall allow the inspecting officer to have access to its premises or any premises occupied by any other person on its behalf and also extend facility for examining any books, records, documents and computer data in its possession and provide copies of documents or other materials which, in the opinion of the inspecting officer, are relevant for the purposes of the inspection.
- (4) The inspecting officer shall examine and may record the statements of any director, officer or employee of the Entity.
  - (5) Every director, officer or employee of the Entity being inspected shall co-operate fully with the inspection officer in the course of the inspection in such manner as the inspecting officer may require.
  - (6) The Commission shall recover from the Entity such expenses, including fees paid to the auditor or other professionals, as may be incurred by it for the purposes of inspecting the books of accounts and other records and documents of the Entity, provided that the Commission shall only recover such fees and expenses from the Entity if the Commission was compelled to undertake the inspection as a result of a default by the Entity in filing any required returns to the Commission, or if the Commission discovers through its subsequent examination of the records of the Entity that such returns as were filed by the Entity are fraudulent, defective or misleading.
  - (7) An Entity that fails or neglects to comply with any request or stipulation in accordance with the provisions sub-regulation (6) of this regulation shall be liable to such disciplinary measures as the Commission may impose or recommend pursuant to regulation 35 of these Regulations.

### **33. Notification of irregularities**

- (1) Where the Commission finds any irregularities or non-compliance with a PPP Agreement in the implementation of any stage of the PPP project or where either the Public Infrastructure Entity or the Project Proponent omits or neglects to perform any covenant in the PPP Agreement which the Commission deems critical to the success of the PPP project, the Commission may at anytime send a



written notification to the Public Infrastructure Entity or the Project Proponent.

- (2) The notification shall contain -
  - (a) details of the irregularities;
  - (b) recommendations for eliminating the irregularities; and
  - (c) a given period within which to remedy the irregularities.
- (3) Where the defaulting party fails or refuses to remedy the irregularities within the given period stated, the Commission may impose or recommend disciplinary measures in accordance with regulation 35 of these Regulations.

#### **34. Petition by a Project Proponent**

- (1) A party to a PPP Agreement may petition the Commission where its rights under the PPP Agreement have been threatened by a Public Infrastructure Entity in any of the following ways -
  - (a) arbitrary suspension, stoppage, cancellation or variation in a manner not in accordance with the PPP Agreement;
  - (b) a refusal or delay of a right of way or easement in respect of any land or property near to or bordering the project site or facility as may be reasonably necessary for the proper implementation of the PPP project; or
  - (c) a failure or an unreasonable delay by the Public Infrastructure Entity in performing its duties or obligations under the PPP Agreement such that the success of the PPP project is threatened.
- (2) A petition filed by a Project Proponent shall include -
  - (a) the reference number and details of the PPP project;

- (b) the specific actions by the Public Infrastructure Entity and the effect of the actions on the PPP project; and
- (c) the financial implications or other adverse impact of the actions complained of, if any, on the PPP project or for the Project Proponent.

- (3) The Commission shall review the petition and where it finds fault and breach, it shall issue a letter to the defaulting party requiring it to remedy the breach.

#### **35. Disciplinary Action by the Commission**

In the event that the Commission issues a notification to a party to a PPP Agreement regarding an irregularity under regulations 31, 32 or 33 of these Regulations, or in the event that a Party fails to comply with requests from the Commission for information or for site inspections, or fails to notify the Commission in accordance with these Regulations, the Commission may -

- (a) notify the President, the Minister or the Accounting Officer of such breach or irregularity;
- (b) recommend to the President, the Minister or the Accounting Officer the suspension or replacement of officers or other personnel of such Public Infrastructure Entity, where the Public Infrastructure Entity is liable;
- (c) notify the relevant sector regulators, where applicable; or
- (d) ensure that such irregularity, breach or failure to cooperate is taken into account in the subsequent periodic review of the PPP Agreement.

#### **36. Step-in Rights of Public Infrastructure Entity**

- (1) Under the circumstances contained in the PPP Agreement, the Public Infrastructure

Entity shall have the right to temporarily take over the operation of the PPP project for the purpose of ensuring the effective and uninterrupted delivery of the services being or to be provided under the PPP Agreement in the event of failure by the Project Proponent to perform its obligations and to rectify any breach

within a reasonable period of time after having been given notice by the Public Infrastructure Entity to do so.

- (2) This right is in addition to any step-in right that may be given to lenders to the PPP project under the PPP Agreements.



## PART VII ETHICS AND GOOD GOVERNANCE

### 37. Compliance with ethical practice

- (1). All public officers, consultants, private parties, contractors and other persons involved in the PPP procurement or management of the PPP Project shall subscribe to the code of conduct contained in Schedule VII to these Regulations;
- (2). The provisions of Schedule VII to these Regulations do not address every possible situation that may arise and not a substitute for the responsibility of the Public Infrastructure Entity to:
  - (a) exercise sound judgment;
  - (b) act with high standards of moral integrity; and
  - (c) abide by all applicable laws.
- (3). The provisions of Schedule VII are intended to -
  - (a) confirm the signatory's commitment to the prescriptions contained in Schedule VII to these Regulations;
  - (b) provide guidance in respect of ethical dilemmas faced in an increasingly complex operational environment;
  - (c) provide a referral for disciplinary or prosecuting procedures where a person is found guilty of fraud or corruption; and
  - (d) serve as a public commitment by the Public Infrastructure Entity to the highest standards of ethical and professional conduct in the evaluation of Bids.
- (4) Any Officer or employee of a Public Infrastructure Entity signatory of the Form prescribed in Schedule VII to these Regulations shall be in breach thereof if he -
  - (a) contravenes or fails to comply with any provision of the Schedule; and
  - (b) when declaring interests, willfully gives incorrect or misleading details.
- (5) In any of the cases referred to in sub-regulation (4) of these regulations, the officer or the employees shall be liable for disciplinary action in accordance with the

provisions of the relevant Public Service Rules and Regulations and may also be liable for criminal prosecution.

(6).The Accounting Officer of the Public Infrastructure Entity may, suo moto or on a complaint being made by any person, investigate any alleged breach of Schedule VII by a person and may withdraw such person from participation in the project development, procurement and management proceedings during the investigation and thereafter.

(1) For the purpose of this regulation – **“relative”** in relation to an individual, means the spouse, son, daughter, brother, sister, father and mother who may be expected to influence, or be influenced by, that individual;

**“member”** means a person appointed by the Public Infrastructure Entity into Project Management Team or Tender Evaluation Committee in relation to the Tender proceedings, either as the chairman, or as an ordinary member, for purposes of participating in the conduct of any part of the Tender proceedings on behalf of Public Infrastructure Entity;

**“privileged or confidential information”** means any information -

- (a) determined by the institution to be privileged or confidential;
- (b) discussed in closed session by the Bid evaluation panel;
- (c) which if disclosed would violate a person's right to privacy; and
- (d) declared to be privileged, confidential or secret in terms of any law.



## PART VIII

# MISCELLANEOUS

### 38. Right of Complaint

- (1) A Project Proponent aggrieved with the Public Infrastructure Entity over the way or manner in which any PPP project is being or has been procured, or regarding any aspect of the procurement process, or any decision or action of the Public Infrastructure Entity, shall be entitled to bring a complaint to the Commission in respect of the grievance.
- (2) A complaint by a bidder against a Public Infrastructure Entity shall first be submitted in writing to the accounting officer who shall:
  - (a) within 30 working days from when the bidder first became aware of the circumstances giving rise to the complaint or should have become aware of the circumstances, whichever is earlier; and
  - (b) on reviewing a complaint, the accounting officer shall make a decision in writing within 20 working days indicating the corrective measure to be taken if any, including the suspension of the proceedings where he deems it necessary and giving reasons for his decision.
- (3) The Commission shall develop guidelines for handling such complaints, subject to the provisions of these Regulations.

### 39. Mediation

- (1) The Commission may in appropriate circumstances, upon a request by either the Public Infrastructure Entity or the Project Proponent, in accordance with the provisions of the Act, or of these Regulations mediate in a dispute between a Public Infrastructure Entity and the Project Proponent.
- (2) Mediation's proceedings handled by the Commission shall be coordinated by the Contract Compliance Centre of the Commission.
- (3) A party to any dispute in which the Commission is a mediator reserves the right to accept or reject the Commission's determination on the issues in dispute; provided that once all the parties to the dispute have indicated their acceptance of the terms of settlement by appending their signatures to the terms of the settlement reached, no party shall have the right to subsequently challenge or reject the decision, and the terms of settlement shall be incorporated into the PPP Agreement which shall become binding on all the parties.
- (4) In the event that any party to a mediation by the Commission rejects the Commission's decision on the issues, such a party may declare a dispute under the PPP Agreement and may activate the dispute resolution provisions in the PPP Agreement; provided that no party shall activate the dispute resolution mechanisms provided in the PPP Agreement, whether arbitration or

litigation, without first serving the Commission and the Public Infrastructure Entity, and any other parties to the PPP Agreement, a three-month notice in writing of its intention to declare a dispute.

#### **40. Non-disclosure of information**

- (1) Every officer or employee of the Commission shall maintain confidentiality in respect of any document or information which he may possess or have knowledge of, whether in the course of any examination or investigation conducted pursuant to any provision of the Act or these Regulations or in the course of his official duties.
- (2) Without prejudice to the provisions of sub-regulation(1) of this regulation, an officer or employee of the Commission may disclose any information or produce any paper or documents under the following circumstances -
  - (a) when expressly required to so under any law, rule or regulation in force in Nigeria,
  - (b) when expressly authorised by the Commission to disclose such information or produce such paper or document; and
  - (c) when served with a subpoena from a court or tribunal requiring the disclosure of such information or the production of such paper or document by a court of competent jurisdiction; provided that any officer or employee of the Commission served with a subpoena to produce a paper or document or disclose any information shall promptly inform the Commission of the service of the subpoena, the nature of the information required, the document sought, and any other circumstance which may bear upon the

desirability or otherwise of making available such information, paper or document.

#### **41. Disclosure of Classified Information or Material**

- (1) Except where otherwise expressly required by law or extant rules and regulations no document filed with the Commission shall contain any information which has been classified by an appropriate Ministry, department or agency of the FGN as secret, controlled or otherwise restricted information not meant for public consumption or for publication to unauthorized audience. However, the Commission may disclose salient features of the contract to the public.
- (2) The Commission may protect from disclosure, any information in its possession which may require classification in the interest of national security or foreign policy, pending the determination by an appropriate Ministry, department or agency of the FGN as to whether or not such information should be classified.
- (3) Where a document, statement, report or information is omitted pursuant to (1) above, there shall be filed in lieu of such document, statement, report or information, a statement from the Public Infrastructure Entity, to the effect that such document, statement, report or information is classified or that the status thereof is awaiting determination.

#### **42. Special Purpose Vehicle and Incorporated Joint Venture Companies**

- (1) The Public Infrastructure Entity and the Project Proponent may establish a Special Purpose Vehicle (SPV) in the form of an Incorporated Joint Venture Company or

companies for the purpose of implementing the PPP Agreement.

(2) Where the Public Infrastructure Entity is a shareholder in a Special Purpose Company or any company jointly owned by the Public Infrastructure Entity and the Project Proponent pursuant to the PPP Agreement and in furtherance thereof, the following rules shall apply -

- (a) the shares of the Public Infrastructure Entity in the Incorporated Joint Venture Company shall be held in the name of a Special Purpose Company established by the Public Infrastructure Entity for that singular purpose;
- (b) all Agreements between the Public Infrastructure Entity and the Project Proponent shall be signed by both the Special Purpose Company and the Public Infrastructure Entity; and
- (c) the PPP Agreement between the Public Infrastructure Entity and the Project Proponent shall clearly articulate the respective rights and obligations of the shareholders of the Special Purpose joint venture, without prejudice to the provisions of the Memorandum and Articles of Associations of the company filed in accordance with the provisions of the Companies and Allied Matters Act, 2004.

#### **43. Stakeholder Communication and Management**

- (1) The Public Infrastructure Entity and the Project Proponent shall adhere strictly to best practices in stakeholder communication and management.
- (2) Every technical proposal submitted in response to an RFP shall contain a Stakeholder Communication and Management Plan ("SCMP").

(3) The SCMP in its final form, after any amendments, shall be annexed to the PPP Agreement with a specific clause in the PPP Agreement making the adherence to the SCMP an obligation of the Project Proponent.

(4) The Project Proponent shall within fourteen days of signing the PPP Agreement appoint a Stakeholder Liaison Officer who shall take responsibility for implementing the SCMP.

#### **44. Public Disclosure Requirements**

The Public Infrastructure Entity shall within 30 days of signing the PPP Agreement publish in at least one national newspaper and in one newspaper in circulation within the project host community, and on the PPP website, the major highlights of the PPP Agreement shall be as follows -

- (a) the Parties to the Agreement;
- (b) a brief on the rationale for the project;
- (c) the type of PPP whether it is a lease, concession or any other forms of PPP arrangement;
- (d) a summary of the financial obligations of the Project Proponent;
- (e) the Government's financial obligation, if any;
- (f) a summary of agreed service levels and output specifications;
- (g) the duration of the PPP Agreement;
- (h) the identity, designation and contact details of a contact person within the Public Infrastructure Entity who shall have the responsibility for providing answers to questions and making clarifications on issues relating to the PPP;
- (i) identity and contact details of the Project Proponent's appointed Stakeholder Liaison Officer; and
- (j) such other facts and information as the Commission may determine.

#### 45. Fees chargeable by Commission

- (1) Pursuant to the provisions of the Act, the Commission may charge fees from the Project Company in return for services it delivers relating to the preparation and development of a PPP project and during the lifetime of a PPP project.
- (2) The Commission shall, subject to the approval of the Board, determine the specified percentage of fees and the method of payment.
- (3) The Commission may also charge fees from the Project Company in return for services it provides for monitoring compliance of the Parties with a PPP Agreement, as the Commission may from time to time determine.
- (4) All payments to be made pursuant to the provisions of sub - regulations (1), (2) and (3) of these regulations shall be payable to the Commission's Concession Account.
- (5) The Commission shall maintain and publish a scale or schedule of the fees chargeable for its services in connection with the PPP Project, and shall make same available to Entities bidding for PPP projects.
- (6) The Commission shall from time to time determine and publish a schedule of fees chargeable for transactional payments, registration fees, and other fees in respect of its administrative functions and responsibilities under these Regulations.

#### 46. Direct Negotiation

- (1) The Public Infrastructure Entity shall enter into Direct Negotiation (DN) with a Project Proponent on the recommendation of the Commission where:
  - (a) the service is only available from a particular supplier or proponent or the proponent has exclusive rights in

respect of the service, and no reasonable alternative or substitute exists; or

- (b) the service proposed is novel and original to the proponent that no other person has used or even thought of it before.
- (c) the procuring entity applies this Act for services that concerns national security, and determines that Direct Negotiation is the most appropriate method of procurement;

#### 47. Definitions and Interpretations

In these Regulations, the following words and phrases shall have the following meanings-

**“Act”** means the Infrastructure Concession Regulatory Commission Act, 2005;

**“Capital Cost”** means the total full reasonable cost of developing a PPP project and making it operational, including but not limited to project design cost, site investigation costs, land acquisition costs, material costs, construction costs and equipment costs;

**“Commission”** means the Infrastructure Concession Regulatory Commission established pursuant to the Act;

**“Effective Date”** means the date on which these Regulations shall enter into force;

**“Entity”** means a Corporate entity or company engaged in a PPP Project as a party to the PPP Agreement or in any other capacity whatsoever, or desirous of participating in a PPP Project;

**“Expression of interest”** means the response submitted by a potential investor on the basis of an Invitation for Expression of Interest;

**“Letter of Compliance”** means a certificate issued by the Commission, confirming that the PPP project has met the Outline Business Case requirements;

**“Letter of Compliance”** means a certificate issued by the Commission, confirming that the PPP project has met the Full Business Case requirements;

**“FEC”** means the Federal Executive Council;

**“FGN”** means the Federal Government of Nigeria;

**“Financial Contribution”** means such funds appropriated or proposed to be appropriated by the FGN as its counterpart funding for, or contribution to, a PPP project that is to be partially funded by private sector funding, and shall include debts taken on by the FGN to meet its contribution or counterpart funding obligations;

**“Full Business Case”** or **‘FBC’** means the final project framework that the Public Infrastructure Entity is required to prepare under Regulation 19, for subsequent approval by the FEC, articulating the final details and specifications for the PPP project, which framework shall form the basis for the final procurement, and guide the subsequent implementation, of the Project;

**“Infrastructure Facilities”** means facilities and systems that are used directly or indirectly for the provision of public infrastructure, public utility or social sector services to the general public;

**“Invitation for Expression of Interest”** means an invitation issued to a potential investor or contractor pursuant to the procedures specified in these Regulations to express interest in participating in a PPP project;

**“Minister”** means the Minister of the relevant Public Infrastructure Entity;

**“National Infrastructure Plan”** means the National Infrastructure Plan in force from time to time, as prepared by the National Planning Commission and approved by the FEC;

**“Outline Business Case”** or **“OBC”** means the project framework that the Public Infrastructure

Entity is required to prepare under Regulation 11 articulating the initial analysis and projections for the project in terms of technical details and financial estimates of the project, and the methodology for project implementation, which framework shall form the basis for the procurement process for the Project;

**“Party”** means a party to a PPP Agreement;

**“PPP Advisor”** means any company, firm or individual providing any consulting or advisory services to any Public Infrastructure Entity or Project Proponent in respect of a PPP project;

**“PPP Agreement”** means the Contract or agreement entered into between a Public Infrastructure Entity and a Project Proponent or Preferred Bidder for implementation of a PPP Project, with all its recitals, schedules and any amendment made thereto from time to time, setting forth the terms and conditions for the implementation of the PPP project;

**“PPP Policy”** means the National Policy on Public Private Partnership approved by the FEC and issued by the Commission;

**“PPP Programme Steering Committee”** means the Infrastructure Technical Working Group or such other economic working group of the Economic Management Team of the FGN as the President may determine;

**“PPP Proposal”** means a proposal made by a bidder for a PPP project in response to an RFP;

**“Project Proponent”** means any private person or body corporate that has contractual responsibility for implementation of a project under a PPP Agreement whether or not such a person or company initiated the project or was invited to assume such responsibility;

**“Project”** means the design, construction, development, or operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;



**“Public Infrastructure Entity”** means any government Ministry, Department, Agency, public authority or statutory body within Nigeria that has the power to enter into a PPP Project Agreement for the implementation of an infrastructure Project or the provision of an infrastructure facility, public utility or social sector services;

**“Public Private Partnership”** or **“PPP”** means the legal relationship between a Public Infrastructure Entity and a private entity, i.e., the Project Proponent, for the implementation of a public sector service Project in the form of the provision of public assets or public services, regardless of the duration of the investment being made or the management being undertaken; where there is a clearly defined risk allocation arrangement between the Public Infrastructure Entity and the private entity; and where the private entity receives performance linked payments benchmarked to specified and pre-determined performance standards verifiable by the Public Infrastructure Entity; and for the avoidance of doubt, PPP projects may involve all aspects of public infrastructure and utility services, including, but not limited to, ports, roads, airports, railways, power, water and sanitation, solid waste management, education, health, industrial estates, housing and tourism sectors;

**“Request for Proposal”** or **“RFP”** means the Tender Document prepared and issued by a Public Infrastructure Entity in accordance with Schedule V, being a process document solicited by the Public Infrastructure Entity from qualified bidders requesting for proposals for a PPP project;

**“Special Purpose Vehicle”** means a company established and registered in Nigeria, for the purpose of implementing a PPP project;

**“Step - in - Rights”** means the rights of the Public Infrastructure Entity as set forth in regulation 36 of these Regulations;

**“The President”** means the President and Commander in Chief of the Armed Forces of the Federal Republic of Nigeria;

**“Unsolicited Proposal”** means any proposal relating to the implementation of a Project that is not submitted in response to a request or solicitation issued by a Public Infrastructure Entity within the context of a PPP project selection procedure;

**“Value for Money”** or **“VfM”** means the assessment that the provision of a public function or service under a PPP Agreement results in a net benefit to the FGN, assessed in terms of 'whole life' costs, price, quality of improvement, adaptation of Infrastructure Facilities, risk transfer or a combination thereof; and a VfM assessment is therefore a broad based cost-benefit assessment whereby the value of the project is assessed not only on basis of the lowest cost price at which the project can be procured and the services are delivered but also taking into account a mix of such factors as quality, resource use, fitness for purpose, timeliness, maximum efficiency, effectiveness and convenience;

**“Viability Gap”** means a shortfall between the expected Total Capital and Operating Costs of the PPP Project and the expected maximum Total Revenue that will accrue to the Project Proponent from the Tariffs charged or from the payments, if any, made to the Project Proponent by the Public Infrastructure Entity or by users; and

**“Viability Gap Fund”** or **“VGF”** means a fund managed by the Federal Ministry of Finance for the purpose of funding Viability Gaps in PPP projects.

#### **48. Citation**

These Regulations may be cited as the Infrastructure Concession Regulatory Commission (Public Private Partnership) Regulations, 2014.

# SCHEDULE I

## MINIMUM REQUIREMENTS FOR OUTLINE BUSINESS CASE

The minimum required content of the Outline Business Case to be prepared by the Public Infrastructure Entity in accordance with regulation 12 of these Regulations shall be as follows -

- (1) A description of the policy context and business need;
  - (2) Cost benefit analysis including non-quantifiable costs and benefits;
  - (3) Summary of the Value-for-Money Analysis outcome;
  - (4) The Methodology/Approach applied for Value-for-Money Assessment;
  - (5) An evaluation of the options for meeting the project objectives;
  - (6) Identification of the preferred procurement route based on value for money and the feasibility or desirability of using PPP;
  - (7) Analysis of the project risks and mitigation measures;
  - (8) Description of the proposed risk allocation and contract terms;
  - (9) Affordability analysis, including a cash flow model of estimated costs and returns for a PPP contractor and consequent annual payments to or by the authority;
  - (10) Sensitivity analysis to the key input variables.
-

# SCHEDULE II

## MINIMUM REQUIREMENTS FOR FULL BUSINESS CASE

- (1) Executive Summary
- (2) Project background
- (3) Scope of work
- (4) Project objectives; summary of strategic context, service development priorities, relevant performance indicators and current levels of service, present resource use, expected future demand
- (5) Cost benefit analysis of preferred service delivery option and summary of other options considered in the OBC
- (6) Description of Environmental and Social Impact Assessments and all recommended mitigation measures, Resettlement Action Plans
- (7) Summary of project risk analysis and proposed allocation of risks between public and private sectors
- (8) Work plan
- (9) Contract duration/tenor
- (10) Project description and associated capital (including land acquisition, compensation, and mitigation costs) and operating/maintenance costs, environmental and social mitigation costs, and residual values of the assets
- (11) Summary of procurement process and results of the bid evaluation, value for money, and affordability analysis
- (12) Full draft contract and associated technical and financial schedules and investment plans
- (13) Proposed contract management, project monitoring, and post-project evaluation arrangements;
- (14) Staffing and succession plan
- (15) Concession award parameters (VGF, Premium, etc.)
- (16) Contractual obligations of the concessionaire and grantor
- (17) Procedure for handing over of site to concessionaire
- (18) Mechanism for concession monitoring and supervision
- (19) Concession review and renegotiation
- (20) Safety and environmental requirements
- (21) Operations and Maintenance requirements including minimum service performance standards
- (22) Concession termination procedure
- (23) Force majeure
- (24) Mechanism for disputes resolution.

# SCHEDULE III

## MINIMUM CRITERIA FOR SELECTION OF PRE-QUALIFIED BIDDERS

- (1) Any Candidate for prequalification as a bidder, whether the Candidate is a Consortium or a member of a Consortium, will be excluded from tendering in the following circumstances:
  - (a) the Candidate is in a state of involuntary liquidation or winding up, or has terminated its activities;
  - (b) a petition for involuntary liquidation or winding up has been filed for the Candidate;
  - (c) the Candidate has been convicted for an offence under an irrevocable judgment which affects the professional integrity or legal person of the Candidate;
  - (d) the Candidate has not fulfilled its statutory obligations for the payment of taxes or other contributions to the country where it is established;
  - (e) the Candidate has made a material false declaration in supplying the information requested as part of the prequalification process.
- (2) The Candidate (in the case of a Consortium also all Consortium members) must provide audited accounts for the number of years specified in the Prequalification Documents, and meet any stated requirements for a minimum annual gross turnover.
- (3) The Candidate can provide evidence in the form of a letter of intent from an internationally renowned financial institution with regard to the issuing of a bank guarantee if required, and to the value specified, in the Prequalification Documents.
- (4) The Candidate provides evidence that it meets the minimum requirements specified in the Prequalification Documents for relevant technical expertise and resources, and project experience. This should be taken as general guidelines noting the criteria should include the under listed including elements of the scope of work taken from the Terms of Reference (TOR) and Expressions of Interest (EOIs) and already approved.
- (5) The evaluation criteria for selection of the pre-qualified concessionaire are dependent on the nature of project but must provide details of the firm such as:
  - (a) The firm's profile;
  - (b) Ownership structure;
  - (c) Track records of past/similar assignments undertaken;
  - (d) Experience in the environment/region e.g. Sub-Saharan Africa;
  - (e) Financial capability of the firm;
  - (f) Evidence of Statutory compliance such as business registration documents, tax clearance certificates, and financial statements; etc
  - (g) Evidence of joint venture in the case of consortia where applicable; and
  - (h) CVs of Key staff (in the case of technical proposals).

# SCHEDULE IV

## MINIMUM REQUIREMENTS FOR INVITATIONS FOR EXPRESSION OF INTEREST AND FOR EXPRESSIONS OF INTEREST

### 1. Invitation for Expression of Interest

The advertisement for the Invitation for Expressions of Interest should include:

- ▶ a brief description of the project
- ▶ the role that will be played by the successful private sector partner
- ▶ the number of companies that will be shortlisted and receive the Request for Proposals
- ▶ the location and deadline for submissions
- ▶ the expected format of submissions
- ▶ a contact name
- ▶ an address where the full RFEI document can be obtained.

2. As a general rule, potential partners in the process should have between 30 and 60 days from the date of the advertisement to prepare their submissions.

### 3. Expression of Interest

To ensure quality and to reduce the time required in the evaluation process, submissions from interested parties need to be kept brief. Generally, they should include the following information:

- ▶ A clear understanding of the scope of the project and the Public Infrastructure Entity's needs
- ▶ A profile of the potential partner making the application (If the partner is to be a consortium formed for the purpose of providing a proposal, each person or firm in the consortium should provide information on its principal business and the length of time that it has been in operation.)
- ▶ Identity and contact details of the contact person for the Project Proponent
- ▶ A statement of financial stability (that can be evaluated on a pass/fail basis)
- ▶ A statement of financial capability including access to capital (debt and equity) and proposed equity and debt structure for the project company and, in the case of a consortium, capital commitments of each member of the consortium
- ▶ A statement of performance capability that includes an overview of overall experience, experience in similar projects, senior management expertise,
- ▶ Profiles of the principal non-management personnel that will work on the project, highlighting their respective fields of expertise and cognate experience,
- ▶ Methodology for the project
- ▶ References .

# SCHEDULE V

## CONTENT FOR REQUEST FOR PROPOSALS (RFP)

The Request for Proposals (RFP) issued by the Public Infrastructure Entity in accordance with Clause 16 of these Regulations shall include the following-

- a) Formal request/invitation for pre-qualified bidders to submit technical, legal and financial bids for the Project
- b) Introduction: Background to the Project
- c) The bidding process and the Schedule of the Bidding Process
- d) Documents comprising the RFP as itemized in Clause 16 above
- e) Guidelines for Preparation and submission of Bids
- f) Provisions for bidding by Consortiums including guidelines for Change in Consortium members and permitted circumstances for change in consortium members
- g) Provisions relating to conflict of interest in bidding for the project
- h) The cost of Bidding and the Cost of the RFP Document
- l) Provisions relating to Site visit by the Private Entity and performing their own feasibility studies on the PPP Project
- j) Guidelines and time frame for Pre-qualified bidders to submit written questions and suggestions to the Public Infrastructure Entity on the RFP (which may be include or be in the form of a mark-up of the draft PPP Agreement)
- k) Provisions relating to clarifications and response by the Public Infrastructure Entity to queries raised by bidders
- l) Provisions relating to amendment of the RFP
- m) Format of signing , sealing or marking and submissions of Bids
- n) Provisions relating to late submissions of Bids after the specified time
- o) Provisions relating to modification, substitution or withdrawal of Bids already submitted
- p) Circumstances that may lead to disqualification of Bids
- q) Circumstances that may lead to permanent disqualification of Bidders
- r) Circumstances leading to rejection of Bids
- s) Methodology for evaluation of Bids
- t) Procedure to be adopted for selecting the Bidder
- u) Time limit for issuing the Letter of Award and execution of PPP Agreement.

# SCHEDULE VI

## MINIMUM CONTENT FOR PPP AGREEMENT

The PPP Agreement and ancillary agreements shall contain clear and detailed descriptions of the rights and obligations of the Parties and should include the minimum following provisions:

- (1) Scope of the services and description of the related project assets
- (2) Conditions of delivery of the service
- (3) Extent of exclusivity if any, and impact of competing services
- (4) Identification of Assets to be used and/or created and/or rehabilitated
- (5) Ownership or property rights over assets and transfer of ownership on construction and on termination
- (6) Applicable norms and standards
- (1) Allocation or sharing of risks between the parties and their consequences, including performance standards and penalties and liquidated damages for breach of such standards
- (2) Term and conditions for extension of term
- (3) Drop dead date for reaching financial close
- (4) Permitting requirements and related obligations
- (5) Project Company income and payment conditions
- (6) Compliance with socio-economic and environmental obligations
- (7) Compliance with employment and labour laws
- (8) Status of the workforce
  - (a). Expatriate employees
  - (b). Local employees
- (9) Sub-contracting – what is permitted before seeking approval of Public Infrastructure Entity
- (10) Project company capital and financial ratios
- (11) Transfer of controlling interest in the project company – limitations thereon and moratorium period [at least 2 years following construction period] before interests in the project company may be transferred
- (12) Reporting on accounting, finance and service conditions
- (13) Design, Construction and Maintenance of project assets and facilities.
- (14) Conditions for use of the project assets
- (15) Description and details of the Project Site and restatement of the obligation of the Public Infrastructure Entity to guarantee the Project Proponent has necessary 'Right of Way' for unencumbered access to the Project site and assets.
- (16) Project Implementation Schedule

- (17) Performance criteria guarantees and related penalties
- (18) Temporary step-in by Public Infrastructure Entity of the infrastructure services
- (19) Insurance requirements
- (20) Taxes, royalties and levies applicable to the project
- (21) Taking Security
  - a. Conditions for attachment liens, securities and mortgage on assets created or rehabilitated
  - b. Conditions for attachment liens and securities on current and future income streams of the Project Company, bank accounts, insurance policies, etc
  - c. Conditions for attachment liens and securities on the shares of the Project Company
- (22) Change in economic circumstances/ hardship conditions/ periodic review process
- (23) Relationship with a sector regulator, where applicable, and consequences of regulatory decisions on the PPP Agreement
- (24) Provision for transition arrangements, where applicable, of certain functions and powers of the Public Infrastructure Entity under the PPP Agreement to a sector regulator.
- (25) Amendments to the PPP Agreement
- (26) Definition and allocation of rights and obligations of the respective parties in the project.
- (27) Assignment of rights and obligations by the Parties to third parties
- (28) [where applicable] Lender rights, including:
  - a. Over real assets
  - b. Step in rights
- (29) Early termination and consequences
  - a. By sovereign decision
  - b. In case of Force majeure; Events that would be deemed as Force Majeure.
  - c. In case of default of the Project Proponent; Developments that would be deemed Public Infrastructure Entity's events of Default
  - d. In case of default of the Public Infrastructure Entity; Developments that would be deemed Project Proponent's events of Default
- (30) Partnership obligations and related procedures
- (31) Dispute resolution
  - a. National or international arbitration and forum
  - b. Applicable law on procedure and on substance and on enforcement
- (32) Tariffs and User Fees [where applicable]
  - a. Right to levy fees for service
  - b. Initial schedule for Tariff,
  - c. Conditions for change or adaptation of the Tariff,



- (39) Public Information
    - a) Information on the operation of the service, performance and service levels.
    - b. Information on the rights and obligations of end users
  - (40) Royalty payment/ lease fee/ concession fee for the use of public assets including land
  - (41) Construction or rehabilitation of the infrastructure:
    - a. design approval
    - b. acceptance of the works
  - (42) PPP special purpose accounts:
    - a. General conditions of Public-Private Partnership special purpose accounts (including specifications for amortization, reserves, provisions, financial ratios, etc.)
    - b. Financials and other indicators
  
  - (43) Default and remedies
    - a. Special rights and remedies for the Public Infrastructure Entity
    - b. Special rights and remedies for the Project Proponent
  
  - (44) Provisions for early termination of the Contract.
  - (45) Provisions for Handover of Project Assets (by Public Infrastructure Entity to Project Proponent) upon financial close of the project and coming into effect of Project Agreement
  - (46) Provisions for Hand-Back of Project Assets (by Project Proponent to Public Infrastructure Entity) and project exit by Project Proponent, at expiry of Concession tenure or upon earlier termination of Contract; handover plans prior to termination
  - (47) Indicative period (time frame) for execution of the Agreement and identification of conditions to be fulfilled by the parties, precedent to execution of the Agreement.
  - (48) Recognition and acceptance by the Parties of the Powers of the Commission over the project and the parties thereto, including the power to examine the records of the project and the parties thereto, and to appoint auditors to audit Project Proponent's books of account.
  - (49) Approvals, clearances, consents and permissions to be obtained by the parties.
-

## SCHEDULE VII

### FORM OF UNDERTAKING ON SOUND ETHICAL PRACTICE IN RELATION TO PPP PROJECTS

I, [insert name of person], acting in my capacity as member of the Project Management Team or Tender Evaluation Committee for the [specify role of the person in the procurement proceedings] for [insert Tender details and number, if any] hereby undertake –

1. To act at all times with loyalty, honesty, integrity and in the best interests of the Government and the general public.
  2. To diligently perform the duties of a member strictly in accordance with the PPP Rules, and in accordance with all relevant instructions given by the Public Infrastructure Entity.
  3. To properly prepare for and attend each meeting of the procurement proceedings.
  4. To recognize the public's right to access to information in the interests of administration of justice.
  5. To take the utmost care in ensuring that there is reasonable protection of the records of the Public Infrastructure Entity and all documentation created or maintained under the PPP Rules and Regulations.
  6. Not to misuse the position or privileges of a member, or privileged or confidential information obtained as a member.
  7. To carry out duties with the skill and care expected from a person of knowledge and experience, and to exercise due judgment.
  8. Not to unfairly discriminate against any Project Proponent.
  9. Not to abuse the position of membership of the Project Management Team, Tender Evaluation Committee or any other Committee connected with the preparation, procurement and management of PPP Projects, to promote or prejudice the interest of any entity.
  10. To give the Public Infrastructure Entity and Approving Authority [if required specify the same] all the information and explanations it requires to carry out their functions.
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11. To report to the Public Infrastructure Entity any case of fraud, corruption, nepotism, mal-administration and any other acts which constitute an abuse of office or which are prejudicial to the public interest, arising during the Tender proceedings.
  12. To declare, diligently, accurately and honestly in the declaration of interest, all personal or business interests and to willingly abide by any decision of the Public Infrastructure Entity to withdraw as a member of Project Management Team or Tender Evaluation Committee.
  13. Not to make any false or misleading entries into the records of the Tender Proceedings.
  14. To make no contractual commitments relating to the PPP Project, to any Project Proponent, on behalf of the Public Infrastructure Entity.
  15. To proactively protect privileged or confidential information of the Public Infrastructure Entity from theft, unauthorized disclosure or inappropriate use.
  16. Not to disclose matter related to the Tender Proceedings, unless expressly authorized by the Public Infrastructure Entity.
  17. Not to request, solicit or accept any reward, gift or favour in return for deciding in a particular way on any matter, or for disclosing privileged or confidential information.
  18. To disclose immediately to the Public Infrastructure Entity any attempted inducement or offers that may be construed as aimed at influencing or directing the evaluation of the Project Proponent.
  19. Not to vote at, attend or participate in any other way in any meeting or hearing in relation to any matter in the procurement proceedings, if any interest prevents the carrying out of members' functions in a fair, unbiased and proper way in accordance with the provisions of this Schedule.
  20. That, the breach of this Schedule or any provisions of the PPP Rules and Regulations shall not preclude the institution of criminal proceedings pursuant to applicable law against me.
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## EXPLANATORY NOTE

*(This note does not form part of these Regulations but is intended to explain its purport)*

These Regulations provide for a legal, institutional and regulatory framework to effectively and efficiently carry out the objectives of regulating Public Private Partnerships (PPP) Projects under the Infrastructure Concession Regulatory Commission Act. These Regulations also governs the procurement process for PPP Projects that are subject to the Act and applies to State and Local Government PPP Projects that require a financial contribution or contingent support from the Federal Government.



# ICRC'S STRATEGIC OBJECTIVE

*To mobilize and accelerate private investments in national infrastructure by enabling the Federal Government of Nigeria through her Ministries, Departments, and Agencies (MDAs) to establish and implement effective Public Private Partnerships (PPPs).*

## **INFRASTRUCTURE CONCESSION REGULATORY COMMISSION (ICRC)**

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