

# Infrastructure Concession Regulatory Commission



**CONTRACT**

Legal and Regulatory Framework for PPPs

# Objectives of this Presentation



- The Legal Framework for PPP's in Nigeria
- The Regulatory Framework for PPP's in Nigeria
- The PPP Contract

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# The Legal Framework for PPPs



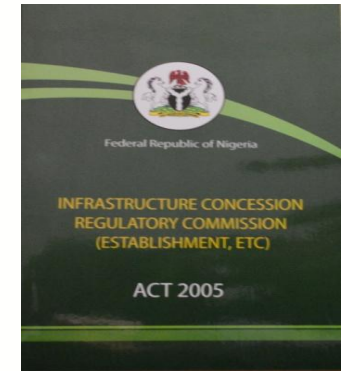
- The Infrastructure Concession Regulatory Commission (Establishment, etc) Act, 2005
  - Section 1 of the Act
  - The National Policy for Public Private Partnerships(N4P)
- The Laws establishing the relevant MDAs empowered by the ICRC Act (S.1) to enter into PPP contracts
- Sector regulations: in Nigeria there are sector regulators established by Acts for each sector; e.g. NERC, NESREA, e.t.c. the laws establishing these sectors form part of the legal framework for PPPs.
- Other relevant laws: which impact on various aspects of the PPP project e.g. CAMA, NIPC Act, CBN Act, e.t.c

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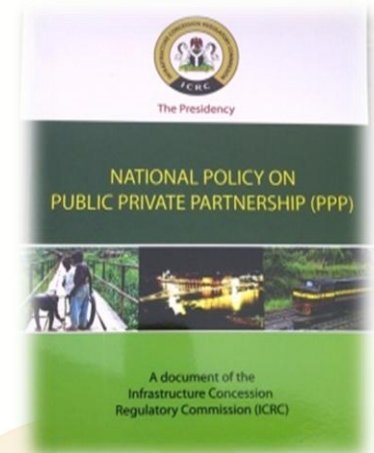
# The Legal Framework for PPPs



The **Infrastructure Concession Regulatory Commission Act (Establishment Etc.) Act 2005** is the principal legislation for the regulation of PPP contracts over Federal Government Infrastructure.



In 2009, the Federal Executive Council (FEC) approved a **National Policy on PPP** which aims to provide a conducive environment for private sector involvement in the delivery of infrastructure services in Nigeria.



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# The ICRC Act



- The Infrastructure Concession Regulatory Commission established under Section 20, ICRC Act
- **Functions and powers of the Commission; Sections 10,19, 20 & 34**
  - Power to inspect; **Section 10**
  - Provides general policy guidelines, rules and regulations. (Powers of the Board); **Section 19**
  - Take custody of every concession agreement; **Section 20 a.**
  - Ensure compliance with the provisions of the Act; **Section 20 b.**
  - Ensure efficient execution of any concession agreement or contract entered by the Federal Government; **Section 20 c.**
  - Power to make regulations; **Section 34**

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# The Regulatory Framework for PPPs



The Infrastructure Concession Regulatory Commission which has jurisdiction over infrastructure assets of the Federal Government:

1. Regulate Public Private Partnership (PPP) procurement by:
  - ✓ Guiding MDAs in structuring PPP transactions: **Pre- Contract regulation**
  - ✓ Taking custody of all executed agreements and ensuring compliance with the terms and conditions of such contracts: **Post Contract Regulation**
2. Issuing regulations and guidelines.
3. Capacity building and PPP support for MDAs
4. Collaborating with State Governments for a sustainable National PPP Framework.
  - Sector regulators for the relevant sector

# The PPP Contract

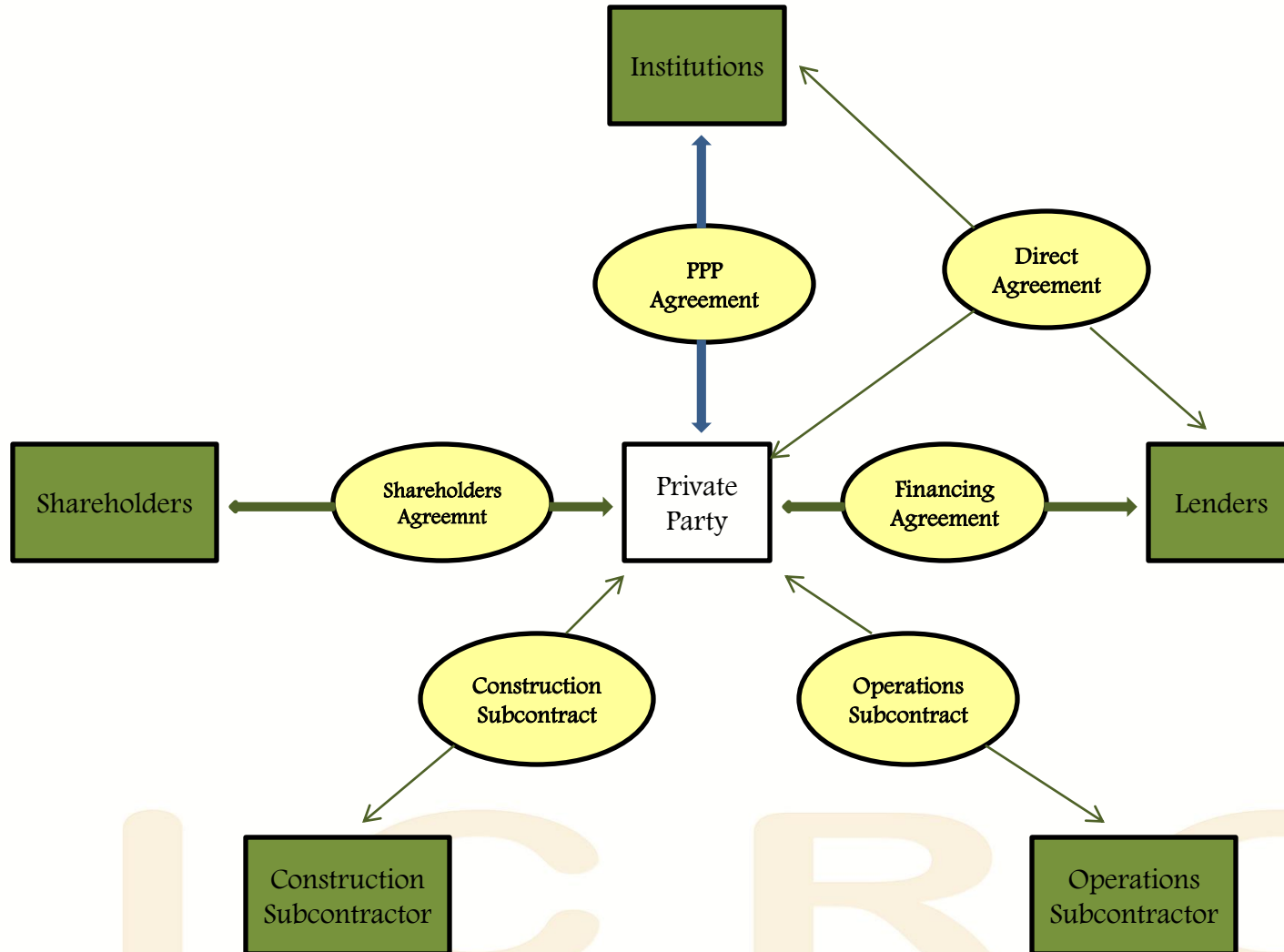


- A Public-Private Partnership is a contractual agreement between a public agency (federal, state or local) and a private sector entity.
- The terms of a PPP are set out in a contract to outline the responsibilities of each party and clearly allocate risk.
- The contract is a representation of the mutual agreement/ understanding between parties which is reduced writing which constitutes the contract document. The contract establishes obligations, duties and rights.
- A contract creates an obligation to perform (or not perform) a particular duty. A legally enforceable contract contains the elements of a contract.

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# The Contractual Structure of a PPP Project





# Elements of a Contract



- Each contractual party must be a "competent person" having legal capacity.
- The parties may be natural persons ("individuals") or juristic persons ("corporations").
- An agreement is formed when there is an "offer" and "acceptance". The parties must have an intention to be legally bound; and to be valid, the agreement must have both proper "form" and a lawful object.
- In countries using using English contract principles), the parties must also exchange "consideration" to create a "mutuality of obligation".

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# Key Clauses



## Parties to a PPP contract

- **Private Party:** to a PPP Agreement is typically a Special-Purpose Vehicle (SPV) incorporated in the Republic of Nigeria in accordance with the law for the sole purpose of exercising its rights and performing its obligations under the PPP Agreement;
- **Public Party:** which is an MDA of the Federal Government of Nigeria
- **Privity of contract and sanctity of contract**

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# Key Clauses



- Commencement and Duration
- Objectives of the relationship
- Project Governance Structure
- Scope of Work or Services
- Conditions Precedent
- Obligations of the Authority
- Obligations of the Private Party

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# Key Clauses



## Output Specification

- A distinctive feature of PPP projects is that their requirements are defined in terms of outputs rather than inputs. PPPs therefore involve fundamental changes in the way projects are prepared and in the information that the Authority needs to provide to private sector sponsors. While the typical set of feasibility studies used in the public procurement of projects focuses on inputs, PPP projects demand a clear set of output requirements and service quality standards, which will be reflected in the PPP contract.
- Specifies in clear terms the output or the service(s) expected to be provided by the Private Parties. These specifications should be based on quality or quantity as agreed by the parties.
- The scope and extent of the Project Deliverables are project-specific and will be based on the specific strategic and operational objectives which the Institution wishes to attain as reflected in its output specifications.

# Key Clauses



## Force Majeure

- Force Majeure relates to the ability of a party to excuse itself from performance of the party's contractual obligations where performance has become difficult or impossible due to abnormal or unforeseeable circumstances events that are not the fault of either party and which the party pleading force majeure could not avoid despite the exercise of due care.
- Force majeure includes acts of god, war including civil war, revolution, riot, civil disturbance, cyclone, flood, earthquake, volcanic eruption, tidal wave and nuclear accident. The way the force majeure clause is drafted should carefully be considered in the context of the country and the project involved.
- Force majeure can be “relief events” or “compensation events” in concession agreements.
- Consequences of Force Majeure can be relief, compensation or modification

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# Key Clauses



## Step In Clause: Authority step in

- Step-in occurs when the government Authority elects to assume all or some of the Private Party's obligations for a period of time where the party is unable to fulfill its obligation. Situations in which government may exercise its contractual rights to step-in include:
  - a) Preventing or mitigating a serious risk to:
    - i. The environment
    - ii. Public health
    - iii. The safety of the people or property
  - b) Guaranteeing continuity of service
  - c) Discharging a statutory duty; and
  - d) Otherwise dealing with a default by the Private Party under the contract.
  - e) Emergency

Lender's step-in gives lenders the ability to rescue a project if the private partner has defaulted by taking remedial action before the Authority terminates the contract. It typically involves appointment of a suitable substitute Private Party.

# Key Clauses



## Termination

- Expiry of term
- Voluntary by Authority taking into account;
  - flexibility;
  - public interest,
  - fair compensation and
  - market confidence
- Default
  - This occurs when either party is at fault; the party in default does not fulfil its obligation under the PPP contract. Compensation or any termination payments and penalties for breach are as provided in the contract.

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# Key Clauses



## Alternate Dispute Resolution

- The PPP contract should specify a procedure for handling disputes under the terms of the PPP contract. A dispute resolution clause will set out that the parties will submit to dispute resolution in the event of any conflict. The most suitable method/s of dispute resolution would be adopted by the parties.
- The most common types of ADR for civil cases are mediation, settlement conferences, neutral evaluation, negotiation, fact finding, and arbitration.

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# Key Clauses



## Hand Back Clause

- This clause shall specify the conditions in which the Project Assets shall be handed back to the Authority upon the termination or early termination of the project. It also shall specify an inspection procedure for checking the condition of Project Assets prior to handing them back to the Authority.
- If the conditions of the Project Assets are not in a state as required in the Contract, then remediation procedures shall be agreed upon in this PPP Contract before handing those Assets back. The conditions of the Project Assets and the procedures for remediation are dealt with on a project-by-project basis.

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# Key Clauses



## Performance Monitoring (contract management)

The PPP contract should clearly set out:

- the level of performance entailed by the required output specification;
- the means by which the Institution is able to monitor the Private Party's performance against such required level; and
- the consequences for the Private Party of a failure to meet the required level.

## Setting the Performance Level

- In order to encourage innovation and optimise risk transfer, the PPP contract should specify the required performance level through output specifications and not required inputs (that is, the manner of the Services delivery).

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# Key clauses



## Level of performance to achieve Outputs

- Reflects contract provisions & includes:
  - Reporting obligations
  - Performance management system to review quality management system
  - Government officials responsible for monitoring
  - Estimate of resources government will require
  - Performance monitoring systems
  - Knowledge management throughout the project duration is key'
  - Role/Obligations of each party should be well defined in a Responsibility Matrix

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# Key Clauses



- Consequences for Not Meeting Service Levels
- Monitoring should provide basis for measuring performance against outputs
- Failure to meet outputs dealt with per contract
  - Formal warnings
  - Penalty deductions
  - Step-in rights
- Should be implemented to achieve positive response

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# Key Clauses in a PPP contract



- Parties
- Commencement and duration
- Objectives of the relationship
- Scope of work
- Conditions Precedent
- Obligations (Authority's and Private Party's)
- Output specification
- Performance Monitoring
- Force Majeure
- Termination
  - Default
  - Expiry of term
- Step-in Clause
- Alternative Dispute Resolution
- Hand back Clause
- Project Documents
- Boiler plate provisions: variation, notices, severability, confidentiality, assignment, indemnity, jurisdiction, waiver, counterparts, e.t.c.
- Schedules

# Disclosure of PPP Contract Information



## GOAL

Design and implement clear and concise guidance for systematic disclosure of PPP projects and contract information

## OBJECTIVES

- Ensure that *stakeholders*, especially private sector investors are well informed on important features contained in the contract agreement (such as contracting parties, services expected to be provided and the time frame)
- Effectively use the public to monitor the developments and the implementation of project by engendering public awareness and support to act as another form of checks and balances in the system

## Expected Outcome

- Achieve buy-in and acceptance of PPPs by public and private sector stakeholders through increased public awareness of the benefits of PPP for public infrastructure delivery
- Strengthen private sector confidence in PPPs by institutionalising a process that will project the Commission's core values of transparency, accountability and fairness in PPP procurement process



# Legal and Regulatory Structure for a PPP contract



All PPP's involving Federal Govt.  
Ministries, Depts. & Agencies

- ICRC
- ICRC Act and Regulations
- Sector related laws e.g NERC, NPA, NIMASA, etc

Other related Laws and Regulations

CAMA, DMO, CBN, NIPC, etc

Land Use Act, etc

Final Approval

The Federal Executive Council



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