

## Lagos State Public Private Partnership

11 August, 2011

### Introduction

On 24 June 2011, the Lagos State Government passed into law the Public Private Partnership Law 2011 (PPP Law). The PPP Law which is the State Government's latest attempt to further refine the legal framework for public private partnerships, expressly repeals the Lagos State Roads (Private Sector Participation) Authority Law 2007 (the PSP Law).

It should be noted that the first attempt of the Lagos State Government towards the creation of a legal framework for public private partnerships was in 2005 with the enactment of the Lagos State Roads, Bridges and Infrastructure (Private Sector Participation) Development Board Law (LSR Law). This was followed in 2007 by the PSP Law which repealed the LSR Law, and more recently by the PPP Law in 2011.

A major feature of the PPP Law is that it establishes the office of Public Private Partnerships (the Office), which is also the procuring entity for the purpose of the Lagos State Public Procurement Law.

Other features of the PPP Law include:

- Expansion of the objectives and functions of the Office.
- Requirement for the Ratification of Concession Agreements by the House of Assembly before implementation.
- Approval by the House of Assembly of sums to be charged as toll or user fees.
- Appeal against the decision of the Office to the Lagos State Public Procurement Agency.
- Increase of fine payable upon conviction for the refusal to pay service charge or toll to ₦100,000.00 or six months imprisonment.

### Office of Public Private Partnerships

The PPP Law establishes the Office as a body corporate with perpetual succession and a common seal. The Office may sue and be sued in its corporate name and may hold and dispose of any movable or immovable property.

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The Office is to be governed by the Public Private Partnership Governing Board (the Board) comprising of six members: the Chairman; the Director General; and four other members, all appointed by the Governor of Lagos State (the Governor). In contrast to this, the erstwhile PSP Law established the Lagos State Roads (Private Sector Participation) Authority with a larger board of twelve members, also appointed by the Governor.

The primary objective of the Office has been expanded under the PPP Law, thus moving away from the major focus of the PSP Law, which was the development of road infrastructure and facilities, to a much wider spectrum involving almost every form of infrastructure conceivable. Under the PPP Law, the primary objective of the Office is to develop public infrastructure or public assets and provide social amenities and other facilities through public private partnership in the state. Public infrastructure is defined as including public facilities and amenities including roads, bridges, highways, rail lines, water transportation facilities, public water works, housing, electric power stations, hospitals, recreational parks, motor parks, waste disposal facilities, amusement centers and any other infrastructure or amenities for public use.

The powers of the Office include amongst others, power to:

- grant concessions to private investors for the design, construction, operation, management, control, maintenance, rehabilitation and financing of public infrastructure or public assets in accordance with the Lagos State Public Procurement Law;
- negotiate with prospective private partners;
- inspect and monitor concessionaires to ensure compliance with the terms of any concession agreement;
- designate a public infrastructure or public asset as one to which a service charge, user fee or toll may be payable and to specify the condition for the use of such infrastructure or asset; approve the service charge, user fee or toll to be paid on any concessioned property.

## **Procurement**

Under the PPP Law, one of the functions of the Office is to initiate procurement of Public Private Partnerships for the development of public infrastructure and public assets by conducting pre-qualification process for private investors willing to enter into public private partnerships with the State based on requests for expressions of interest. The Office is also responsible for determining the frame work for the engagement of consultants, specialists and advisers for public private partnerships.

*The PPP Law defines public assets to include the right of use of any property or economic opportunity of a public nature or arising from the use of public property.*

All expressions of interest by private investors willing to enter into public private partnerships with the State, are subsequently to be evaluated by the Office which will issue a preferred mandate in accordance with the provisions of the Lagos State Public Procurement Law. The PPP Law also provides that the Office shall be the procuring entity for the purpose of the Lagos State Public Procurement Law and shall comply with the intendment of the Lagos State Public Procurement Law. The PPP Law also authorizes the Office to carry out emergency procurements in accordance with the provisions of the Lagos State Public Procurement Law.

It is important to note that hitherto, under Schedule 2 of the PSP Law, Procurement Procedures for Concession Agreements were amply set out. However with the coming into force of the PPP Law, instead of duplicity of provisions on procurement, the PPP Law simply requires compliance with the provisions of the Lagos State Public Procurement Law. Under the PPP Law, the Office is empowered to give letters of procurement, comfort or undertakings in respect of any private partnership or concession agreement. However, in terms of guarantees, the PPP Law prohibits provisions on the requirement of financial guarantees from the State, Ministry, Department or Agency from being contained in any Public Private Partnership Agreement. Rather, only provisions for indemnities or undertakings which are given in the ordinary course of business may be included in a Public Private Partnership Agreement.

### **Service Charge, User Fees and Tolls**

The Office is empowered to by way of regulation, specify the service charge, user fee or tolls payable to the concessionaire in respect of designated public infrastructure or public assets, and the conditions under which members of the public will access the use of public infrastructure or public assets. A concessionaire may also propose service charges, user fees or tolls for the approval of the Office. Concession agreements executed in accordance with the PPP Law are be deemed to constitute a valid service charge, user fee or toll regulation. Concession agreements are required to set out the procedure, circumstances and formulae by which service charges, user fees or tolls to be charged by the concessionaire shall be calculated, varied or adjusted, which provisions are to be observed and fully implemented. However in the event that such provisions are declared invalid, void or unenforceable, or where no provision is made in the concession agreement, the concessionaire has the right to make an application to the office from time to time for an adjustment or variation of the service charge, user fee or toll.

*Any company that the Office enters into Private Public Partnership agreement with must be a company registered under the Companies and Allied Matters Act.*

### **Special Purpose Vehicles**

*The Office is empowered, subject to the approval of the Governor to form limited liability partnerships or limited liability companies for the purpose of financing public private partnerships projects or facilitating such projects.*

*Service Charge, User Fee or Toll means any fee, charge, levy, due or compensation payable in relation to the use of a public infrastructure or asset by any person.*

The Office is empowered to vary or adjust or require the adjustment of any service charge, user fee or toll charged by a concessionaire in accordance with the provisions of the PPP Law or as may have been agreed and incorporated into the concession agreement.

## House of Assembly

A new introduction in the PPP Law is the provision of specific roles for the State House of Assembly in Private Public Partnerships. The House of Assembly must approve three important items under the PPP Law; (x) concession agreements; (y) designation of public infrastructure or public asset as user fee or toll generating assets; and (z) approval of the amount to be charged as user fee or toll. In this vein, the PPP Law provides that all concession agreements entered into by the Office must be presented before the House of Assembly for ratification before implementation.

Further, where the Board designates any public infrastructure or public asset, road, bridge or highway within the State as public infrastructure or public assets with respect to which user fee or toll shall be payable, such designation shall be subject to the approval of the House of Assembly. The House of Assembly is also required to approve the amount of money that may be charged by any private or public operator with respect to any public infrastructure, public asset or amenity as toll or user fees prior to such charge being effective.

## Appeals

Where a concessionaire is dissatisfied with any omission or decision or exercise of power by the Office, the concessionaire may appeal against the decision or exercise of the power to the Lagos State Public Procurement Agency.

This is without prejudice to the dispute resolution provisions of the concession agreement and any other right of recourse available at law. This is a departure from PSP Law where appeals could only be made to the Executive Council of the State through the office of the Attorney General of the State. An appeal against the decision of the Executive Council could also be filed at the multi-door courthouse of the Lagos State High Court.

## Offences and Penalties

The PPP Law prescribes a stiffer monetary fine for conviction for any offence. For instance, where a person fails or refuses to pay a service charge, user fee or toll in accordance with the PPP Law, regulations or terms of a concession agreement, such a person is liable on conviction to a fine of one hundred thousand naira (₦100,000.00) or six months imprisonment. This is in contrast to the previous fine of five thousand naira (₦5,000.00) imposed under the PSP Law.

*A concession agreement is defined as any agreement between the Government and any person, firm, company or limited liability partnership for the construction, maintenance, operation or management of public infrastructure, assets and facilities over an agreed period of time including but not limited to:*

- *Design, Build, Operate and Transfer agreements;*
- *Build, own, operate and transfer agreements;*
- *Rehabilitate, operate and transfer agreements;*
- *Joint development agreements and;*
- *Operation and maintenance agreements.*

*Without prejudice to any terms as to dispute resolution, or any right or recourse available at law, an aggrieved concessionaire may appeal to the Lagos State Procurement Agency.*

The PPP Law also empowers a person employed to collect service charge, user fee or toll to: (x) refuse a defaulter the use of the public infrastructure or asset; or, (y) require such defaulter to vacate the public infrastructure or asset; or, (z) where necessary, call for the assistance of law enforcement agents.

The PPP Law also makes a defaulter liable to arrest and to have his vehicle impounded until payment of the unpaid toll, the prescribed fine and demurrage has been made to the appropriate authority. The vehicle may also be impounded pending the trial for the offence.

### **Power to make Regulations**

The Office is empowered to make regulations subject to the Regulations Approval Law to:

- Designate a public infrastructure or public asset as on to which a service charge, user fee or toll may be payable;
- Establish fair and general conditions designating who, when and how the public infrastructure or public asset may be used and from whom service charge, user fee or toll may be collected and;
- Give effect to any provisions and purposes of the PPP Law.

### **Conclusion**

The enactment of the PPP Law is evidence of the fact that Lagos State Government is fast recognising the vast advantages of Public Private Partnership as an important and indispensable tool towards turning Lagos State into a megacity.

The requirement that the House of Assembly ratify or sanction all Concession Agreements though, may appear disadvantageous where the House refuses to sanction the concession. However, a positive affirmation of the concession by the House will show transparency on the part of the State Government and give comfort to the Concessionaires.

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