PUBLIC PRIVATE PARTNERSHIP CONSTRUCTION PROJECT DISPUTES IN NIGERIA

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Abstract

This research examines the possibility of operating a smooth Public Private Partnership (PPP) project for the entire concession period following financial closure, without recourse to litigation or arbitration for settlement of disputes by studying the causes and effects of disputes in construction projects procured in Nigeria using the PPP contracting route. The research design was by descriptive survey. Research instruments included both structured telephone and online interview methods conducted to measure the opinion of stakeholders in the Nigeria PPP market on the causes and effects of dispute in PPP operations. The findings of the study revealed a low adoption of PPP contracting route and a lack of synergy on the different ways the private sector participates in infrastructural development in Nigeria, thus, indicative of vulnerability to disputes especially in long term project partnership. The study concludes that the current mode of operation of PPP in Nigeria involves a multiplicity of financial arrangements between the private sector and the public sector with attendant risks of disputes. The study recommends an increased adoption of PPP contracting route, and a modification of a number of Nigeria PPP practices in line with global best practices.

Keywords: Causes, Effects, disputes, public- private partnership, projects

Introduction

Provision of infrastructure is mostly undertaken by the public sector and often financed through budgets and appropriation acts. In spite of strong commitments of most Governments to infrastructure provision in most countries, a wide gap exist in terms of meeting the quantity and quality of infrastructure required for sustainable socio-economic development principally due to shortage of public funds.

The causes of various challenges faced by the Nigerian construction industry are multidimensional. The conventional practice of separation of design from construction still prevails in the country. The current contract procurement practices in Nigeria are not in line with global trends and the country is not fully ready for adoption of best practices. There is unfortunately no national framework to check contractors' competence and professionalism in the conventional procurement routes, rather every agency of Government maintain at all levels, a contractors registration board and this has been abused and opened to corrupt practices, project abandonment, and litigations.

Private Public Partnership (PPP) is a strategic synergistic collaboration between the public sector consortium for the provision of public infrastructure services previously undertaken by the public sector but which is outsourced to a private sector consortium to undertake design, build, operate, maintain and manage the infrastructure for an agreed period of concession. The executor/financier recoups the cost of executing the project from charges paid by users of the facility for a negotiated period of time.

The Private Public Partnership (PPP) procurement route was introduced as an alternative procurement route as the conventional system was characterized by a 'group dispersal attitude', as the contractors do not accept responsibilities of managing the project beyond the execution phase.

Smyth and Edkins (2007) state that it is normal to anticipate that such synergistic partnership that is proposed to run for a lengthy period is often marred by occasional issues. Over the past 18 years, Public Private Partnership (PPP) has become a prominent procurement route in the UK with a number of projects having been successfully procured via this route. Many developing countries have now adopted this route also based on a perceived benefit of dependable service delivery through innovative solutions. In Nigeria, PPPs are used to fund several projects including roads (the Lekki Expressway), The District infrastructure developments (FCT, Abuja), and the new Lagos domestic terminal (MMA-2) (Oladapo, 2008).

The complicated contractual relationship among participants, benchmarking, cost of bids, public sector procurement issues among others are potential sources of disputes in PPP and research streams indicate that these causes are repetitive in the UK and other countries (Sheridan, 2011). The causes are not outside the control of owners, designers, contractors and end users. They depend largely on the initial strategic decisions taken on the project before commencement of design, construction works and operational services.

Parties under the PPP arrangement explore the possibilities of negotiation or use of mediators in event of disputes instead of making express provisions for the resolution of disputes by arbitration. Although most contracts prescribe appropriate dispute resolution or escalation approaches at times of conflicts, they however, do not offer required remedy to damaged relationships among parties after the settlement of disputes.

The traditional mechanisms of conflict resolution- litigation, arbitration, and the alternative dispute resolution procedures (ADR), all have associated costs and time (Love et al. 2010). Aside from the quantifiable losses associated with complex disputes in the industry, other non quantifiable losses can be loss of potential benefits as a result of unfair resolution of disputes.

Studies also show that the cost of disputes in some cases is almost the same as the amount claimed, aside from its contribution to delays and low morale of workers as a result of distractions. It is also viewed that having appropriate practices and attitudes in place can prevent the causes of disputes at each stage of the project delivery process, depending largely on the strategies and participants.

Considering the growing acceptance of PPP as a contract procurement option in many parts of the globe, it is therefore valid to say that assessment can now be made to ascertain at what point or time issues are likely to arise and the implication of these issues on project performance and future projects especially in a developing economy such as Nigeria.

A major feature of collaborative working as contained in the UK/PFI guidance is the attraction of private sector participation in problem solving.

Statement of problem

The overwhelming demand for infrastructure of diverse purposes have created a need to involve the private sector in financing, constructing, and managing public infrastructures to check the flaws common in conventional project procurements. Unfortunately, the PPP practice in Nigeria is plagued by various issues caused by over reliance on ambiguous bespoke contracts and manipulated financial arrangements which exert pressure on the end users of the services provided by the private sector.

Theoretical framework and literature review

Procurement is the acquisition of goods and/ or services at the best possible total cost of ownership, in the right quantity and quality, at the right place for the direct benefit or use of government, corporations, generally via a contract (Wikipedia, 2008).

Capital project procurement traditionally involves the commissioning of design consultants to prepare designs and other project documents as basis for contract execution, with the participation of the contracting organization at the stage of project development. This practice is common in the commonwealth particularly, in the UK.

Oladapo(2008) posits that performance of projects based on the traditional route are often affected by inadequate funding as completed infrastructures lack a well structured operation and maintenance culture due to constrained financing. According to Oyediran (2008) citing Ashworth (1996), reforms on the traditional (conventional) procurement systems by clients became necessary as a result of the following:

i. Government intervention through committees, such as the Banwell Reports of the 1960s and more recently through the Department of the Environments and the Latham Report
ii. Pressure groups formed to encourage change for their members, most notably, the British Property federation
iii. International Practice Comparisons, particularly with the USA and Japan
iv. The influence of the Single European Market in 1992
v. The apparent failure of the construction industry to satisfy what is perceived needs of its customers , particularly in the way the industry organizes and executes its projects
vi. Influence of educational development and research
vii. Trends towards greater efficiency

viii. Rapid changes in information technology both in respect of office practice and manufacturing processes
ix. Attitudes among the professions
x. Clients' desire for single point responsibility

The choice of an appropriate procurement system is crucial to the success of projects. The procurement system establishes the roles and relationships which make up the project organization. It establishes the overall management structure and systems. It helps shape the overall values and styles of the project. The choice of procurement system is a crucial strategic element, requiring the establishment of the client's objectives and deciding the nature of the end product (Bennett and Grice, 2004).

According to BEDC (1988), the penalties of a poorly conceived, procured and badly run project are:

i. longer periods of project delivery with capital tied-up, incurring extra bank borrowing charges or loss of return;
ii. loss of business;
iii. greater uncertainty in managing business assets when opening dates or letting dates cannot be fixed;
iv. opportunities for the competition to get ahead.

Private Public Partnership (PPP) is a procurement option adopted by the public sector in delivering infrastructure projects in which funds for execution are considered outside their reach. In this procurement method, revenue is generated through a pool of funds often called unitary payments, or from users' charges or a combination of both for debt recovery and return on equity (Oladapo, 2008).

The basic mode of operation of the PPP is that revenue generated over an agreed concession period covers the capital and operating costs, and the balance providing adequate return on investment despite the environmental conditions and degree of risk.

The key features of fragmentation, conflict, changing roles, uncertainty over design liability and management responsibility combined with proactive and impatient clients make the choice of an appropriate procurement system for building projects both difficult and very important (Bennett and Grice, 2004).

The mode of operation of PPP in Nigeria varies slightly with the practice in the United Kingdom and other developed economies. The major differences emanated from the multiplicity of financial arrangements between the private sector and the public sector. The following are common financial models for a PPP arrangement:

i. The Public sector could provide the funds and allow the private sector to build, manage and repay the Government based on agreed terms. This model was adopted in the tourism sector in the execution of Tinapa Business Resort, Calabar, South-South Nigeria.
ii. The Private sector could also source the funding for the design, build, manage and charge the end users directly for services provided without remitting anything to the Government but turnover the asset at the end of the concession period stated in the terms of contract. Terminal-2 of Murtala Mohammed Airport, Ikeja was financed using this model.
iii. In the aforementioned models, the lease agreement charges paid by the public sector

to the private sector as unitary charges for provision of quality service delivery are missing in the Nigerian version of the PPP. There is also the fear of outrageous charges by the private sector to the end users of the facilities.

Harris and McCaffer (2003) posit that the precise unitary charge period and amount is defined by the availability of quality service (output specification) and this is always spelt out in the contracts. Investment on PPP projects is based on the premise that the contractual provisions are legal instruments and that they are enforceable. If at a later stage , a party to the contract fails to abide by the terms and conditions or where the relevant agreement contains ambiguities such that its meaning is subject to multiple interpretations, there is the likelihood of a dispute situation.

Akintola et al. (2003) that dispute is not a common experience in the construction phase of PPP projects because of the pressure faced by works contractor and the SPV from the bank and investors. Fitzgerald and Duffield (2009) agrees that in most PPP projects, the works contractor may also be a shareholder in the SPV, as such, has an obligation to work diligently to protect his organisation's interest by delivering the project within time, cost and quality. The smooth operation of PPP projects depends largely on the initial strategic decisions taken on the project before commencement of designs, construction works and operational services.

Studies show that quite a number of Nigeria PPP practices require modifications and improvements if value for money and end user satisfaction is to be achieved. The issues requiring attention include the lack of appropriate expertise, poor public knowledge of the scheme, and a lack of private sector performance target. These are responsible for the inconsistency in risk allocation indices between parties.

Research also showed that private sector investors are skeptical about risking own capital considering the prevailing challenges in the nations economic, security and political systems. The pace of change from traditional design and construction fragmentations to PPP is slow. In spite of the benefits offered by PPP in developed countries, the level of acceptance in developing countries is relatively low. For example in Nigeria, most conceived infrastructure projects did not go beyond the appraisal process due to political bureaucratic bottlenecks (Gidado, 2010). This suggests lack of trust and confidence on the private sectors' knowledge efficiency in policy formulation among the public sector.

Developing countries should consider PPP for public asset and service delivery even when there is enough public funds, provided the economic benefits are higher than the economic cost and the challenges of the project arrangement (Kumaraswamy, 1997). The costs and issues are associated with conventional public procurements and may include additional cost from time overruns, overpriced tenders, poor design and ambiguity in contract documentation.

Based on Gidado (2010) study on the major barriers impeding successful implementation of PPP projects in Nigeria, the following were identified as key in various phases of the schemes; lack of access to credit securities, issues of withholding or delay in payments, inconsistence in facilities maintenance and management practice, high level lobbying and gratifying contract award syndrome, inefficient quality specifications, greed and conflict of interest, poorly equipped and inexperienced public sector participants, and lack of adequate procedures and operational guidelines.

Gidados' study also revealed opaque negotiation process characterized by political interests, inconsistency of public sector representatives, complicated procedures in obtaining foreign exchange, poor value management/ engineering system, importation barriers based on foreign policies, problems of managerial and technical competence, lack of transparency and accountability, weak judiciary, weak contract enforceability, weak implementation of the rule of law, inefficient appraisal systems, poor use of feedback systems, inefficient information and communication systems, lack of progress evaluation systems, poor knowledge capture, management and dissemination.

Although it is anticipated in theory that long term partnership can foster PPP relationships that are not characterized by disputes, there is however no empirical support that the formidability of the partnership will guarantee full proof to unexpected issues since every project is unique, more so the participants and the operating environments are uniquely different.

Davies (2001) outlines the main aspects of the operation of the PPP that could easily trigger off conflicts if constantly overlooked are;

i. charges in interest rates and value for money

ii.instruction and pricing of omitted or extra works caused by project scope changes

iii.diversification of business interest and vision

iv.differences in the interpretation of the same fact by client/executor on account of

vagueness of contract agreement

v. inconsistency in service delivery

Leiringer and Schweber (2010) states that the mechanism for the resolution of disagreements and conflicts in construction projects are provided in the Conditions of Contract, however, due to the intricacies involved in streamlining responsibilities in such long term partnering contract detailed delineation and streamlining of these responsibilities are often overlooked due to anxiety of parties to get the project started.

Bayard (2010), Fenn et.al. (1997) cautioned against optimistic dispositions of the strategic partners on such sensitive issues that could easily determine the success or failure of the partnership. Cheung and Yiu (2006) opined that unresolved issues at formation level of the partnership may escalate and become a threat that could terminate the strategic partnership at construction, commissioning and management phases and recommend a prompt resolution of all sensitive issues likely to mar the success or lead to the termination of the partnership.

In Nigeria, the diversity of rules for negotiation and commissioning of PPP projects is beginning to boomerang and the effects alarming. This situation is becoming increasingly worrisome as financiers/investors continue to suffer avoidable losses caused by sudden termination of such partnership.

PPP approach is however, undertaken within an established institutional, legal and regulatory framework (Oladapo, 2008).

Methodology

The research employed a descriptive survey in investigating the possibility of operating a smooth PPP for the entire concession period and achieving financial closure, without recourse to litigation or arbitration for settlement of issues in the Nigeria PPP market. Information gathering was by primary and secondary sources. The research instruments included structured telephone and online interviews which measured the opinion of stakeholders in the Nigeria PPP market on the causes and effects of dispute in PPP operations. The respondents, in this case population of interest involved senior representatives from private sector consortium including senior debts facility providers(the banks), insurance brokers, bond investors, and facility managers. These respondents collaborate to negotiate fund, construct and maintain PPP projects over agreed period of concession. The interview segment uncovered precautionary methods and mechanisms for ameliorating identified issues and how these issues can be avoided in future projects.

Findings

i. There is a low adoption of PPP contracting route and a lack of synergy on the

different ways the private sector participates in infrastructural development in

Nigeria, thus, indicative of vulnerability to disputes especially in long term project

partnership.

ii.The maintenance of contractors registration board by agencies of Government at all levels led to contract procurement abuses, corrupt practices, project abandonment, and litigations.

iii. The causes of various challenges faced by the Nigerian construction industry are multidimensional. Studies also show that aside from the low adoption of PPP contracting route, quite a number of Nigeria PPP practices require modifications and improvements if value for money and end user satisfaction is to be achieved.

iv. The Study revealed that the mode of operation of PPP in Nigeria, varied slightly with the practice in the United Kingdom and other developed economies.The major differences emanated from the multiplicity of financial arrangements between the private sector and the public sector.

v. The effects of various issues confronting operations of PPP in Nigeria include the inability of the public sector to properly articulate and present a comprehensive statement of User's requirement that would provide a useful guide at the design stage while reducing the syndrome of design modifications at construction phases.

vi. The study revealed that adoption of the PPP procurement option would to a large extent give rise to loss of gratification often accruing to Government officials charged with the responsibility of initiating projects and soliciting expression of interest from investors for the execution of public sector procured projects.

Conclusion

The study concludes that the mode of operation of PPP in Nigeria involved a multiplicity of financial arrangements between the private sector and the public sector with attendant risks of disputes. The issues requiring attention in the mode of operation of PPP in Nigeria include lack of appropriate expertise, poor public knowledge of the PPP scheme, and a lack of private sector performance target as these were found to be responsible for the inconsistencies in risk allocation indices between contracting parties.

Recommendation

1. Increasing the awareness and level of adoption of the PPP contracting route for the

provision of public infrastructure services previously undertaken by the public

sector.

2. Creation of access to credit securities for PPP operators.

3. Dealing with all issues relating to withholding or delay in payments.

4. Development of facilities maintenance and management policy with proactive

implementation plan.

5. Development of an effective national regulatory framework to provide practicing

guidelines for all the states and establishments.

6. Extension of the operations of the Infrastructure Concession Regulatory

Commission (ICRC) beyond the national level to the state and other

establishments.

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