



CROSS RIVER STATE OF NIGERIA

LAW NO.6, 2010

A Law to establish the Cross River State Public Private Partnership Council; the Bureau of Public Private Partnership; to facilitate and regulate partnership between the Public and Private Sector in the planning, design, construction, operation and maintenance of infrastructure, goods and services in the State and for matters related thereto.

Long Title.

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Commencement.

The Cross River State House of Assembly enacts -

Enactment.

PART I

Establishment/Functions of Public Private Partnership Council

1. (1) There is established a body known as the Cross River State Public Private Partnership Council (in this Law referred to as "the Council").

Establishment of the Council.

(2) The Council is a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name.

2. (1) The Council shall consist of the following members -

Composition of the Council.

- (a) the Deputy Governor who shall be the Chairman;
- (b) the Attorney-General and Commissioner for Justice;
- (c) the members of the State Executive Council responsible for -
 - (i) Finance;
 - (ii) Economic advice and planning;
 - (iii) Investment promotion ; and
 - (iv) Public Procurement and Due Process;
- (d) three private individuals who are professionals with not less than twelve (12) years of active experience in any field of endeavour relevant to the work of the Council including economics, finance, business, engineering, accountancy, law, or architecture; and one person appointed on the recommendation of civil society organizations working on transparency issues in the State; all of whom shall be appointed by the Governor; and
- (e) the Director-General of the Bureau who shall be a Member and Secretary of the Council.

(2) The non-appointment of any particular member of the Council shall not invalidate decisions reached at any meeting, provided there is a quorum of members present at such a meeting.

(3) Save for the Director-General, no member of the Council shall have executive or full-time responsibilities in the Council or in the Bureau.

Functions of the
Council/PPP
Master plan.

3. The Council shall –

- (a) recommend policy in respect of public private partnerships to the State Executive Council;
- (b) review and forward public private partnership project proposals to the State Executive Council in accordance with this Law;
- (c) designate unsolicited project proposals as public private partnership proposals to be undertaken in accordance with this Law;
- (d) take custody of all public private partnership agreements entered into by Contracting Authorities and monitor compliance by the parties thereto;
- (e) facilitate the resolution of such disputes as may arise from time to time in the course of executing a public private partnership Agreement;
- (f) establish standards, procedures and regulations for the execution of public private partnership projects;
- (g) supervise the activities of the Bureau;
- (h) constitute as and when necessary, committees comprising persons drawn from its membership, the public and the private sectors with requisite technical experience to advise on specific public private partnership projects and act in the name of the Council in executing the functions hereby conferred;
- (i) meet with the State Executive Council, with the Governor presiding, at least once a quarter to present a report of the extent of progress to date on its action plan for the year and its proposed activity for the rest of the year;
- (j) carry out such other functions as the Governor may deem necessary for the due attainment of the objectives of this Law;
- (k) in consultation with the relevant public entities formulate for the State, and may from time to time modify, a public private partnership master plan (in this Law referred to as "the Master Plan") setting out the priorities and objectives of the State concerning public private partnerships;
- (l) identify specific projects, as contained in the Master plan, that are desirable, achievable, and viable for execution as public private partnership projects;
- (m) carry out public sensitization and beneficiary buy-in;
- (n) ensure that projects identified in the Master Plan-
 - (i) are procured and contracted in accordance with this Law, any other applicable law of the State and any Regulations made thereunder;
 - (ii) accommodate the public need;
 - (iii) take account of such urban, regional or development plans as may have been approved by the State Government;
 - (iv) raise the competitiveness of the State economy;
 - (v) encourage the physical development of the State;

(vi) take into consideration the State's investment priorities, its short and long term goals for the development of infrastructural facilities in a sustainable manner, and the current resources, project management capacity and efficiency of the private sector.

4.(1) Any member of the Council, not being an ex-officio member, save the Director-General, shall hold office for three (3) years in the first instance and shall be eligible for re-appointment for a final term of three (3) years. Tenure and Restrictions on Members.

(2) The restrictions on members of staff of the Bureau set out in Section 14 below shall apply with appropriate modifications to all members of the Council.

5. Any member of the Council appointed, pursuant to Section 2 subsection 1(d) and (e) shall be removed from office if the Governor determines that he: Vacation of Office.

- (a) is incapacitated by reason of infirmity of the mind or body;
- (b) is bankrupt or insolvent;
- (c) is convicted of a felony or any offence involving dishonesty or fraud;
- (d) is guilty of gross misconduct in relation to his duties;
- (e) is disqualified or suspended from practicing his profession in any part of Nigeria by the order of any competent authority made in respect of him personally;
- (f) dies in-office;
- (g) resigns his appointment by a notice under his hand addressed to the Governor; or
- (h) in the case of a person appointed under Section 2(1) (d), his nomination is withdrawn by the civil society organization that put him forward.

6. (1) Members of the Council shall be paid such allowances as is obtainable in the Public Service of the State. Remuneration of members of the Council.

(2) The Director-General of the Bureau shall be paid such salaries and allowances as the Governor may approve on the recommendation of the Civil Service Commission.

(3) The Governor may, subject to the approval of the House by a resolution, fix a special salary scale for certain category of staff not provided for by the public or Civil Service of the State.

7. (1) Subject to the provisions of this Law, the Council may make standing orders to regulate its proceedings at its meetings. Proceedings of the Council

(2) The Council shall meet as often as the due execution of its functions require but not less than once every quarter.

(3) The quorum for the meeting of the Council shall be six (6) members.

(4) At every meeting of the Council, the Chairman shall preside, but if he is absent and does not designate a member of the Council to chair the meeting, the members present at the meeting shall appoint one of their number to preside.

(5) The Council may co-opt such persons who are heads of public entities in the State deliberate on matters that concern their institutions; provided that such co-opted persons shall not have a vote at any meeting that they attend and they shall not count for the purpose of forming a quorum.

(6) Any issue for determination before the Council shall be determined by simple majority of members present and voting, provided that the Chairman shall have a casting vote in the event of a tie.

PART II

The State Bureau of Public Private Partnerships

Establishment of the Bureau.

8. There is established a body known as the Cross River State Bureau of Public Private Partnerships ("the Bureau").

Functions of the Bureau.

9. The Bureau shall be the secretariat of the Council and as such it shall have the responsibility on behalf of the Council to –

- (a) appraise, review, monitor, evaluate and recommend action to the Council on all PPP projects in the State;
- (b) interface with and provide technical assistance to Ministries, Departments, Agencies and specific Contracting Authorities throughout the life cycle of a PPP project;
- (c) build up and enhance the capacity of Government to design, implement, monitor and evaluate PPP projects;
- (d) be a centre of expertise for the promotion, development, and implementation of PPPs and develop and serve as a primary and definitive source of all information on PPP legislation, regulations, guidelines and standards applicable and in force in the State;
- (e) facilitate and provide full support to the private sector and serve as liaison between the private sector and government agencies and relevant authorities in regard to PPPs in the State;
- (f) undertake the formulation, development, periodic review and modification of the State PPP Master Plan;
- (g) facilitate the issuance or renewal of all public sector regulatory approvals for PPP projects in the State;
- (h) review, evaluate and recommend project proposals and feasibility studies and oversee the procurement process for PPP projects on behalf of the public sector;
- (i) recommend to the Council the extension, termination or renegotiation of PPP Agreements in force;
- (j) ensure that at the expiration of the term of a PPP Agreement, all parties hereto fully enjoy their respective rights and discharge their respective obligations in accordance with the said PPP Agreement;

- (k) issue quarterly progress reports on PPP Agreements in force to the Council and through the Council to the State Executive Council;
- (l) advise the Council on resolving disputes arising from all PPP Agreements to which the State is a party; and
- (m) carry out such functions in accordance with this Law as the Council may deem fit.

10. (1) The Governor shall appoint a Director-General of the Bureau who shall –

Director-General of the Bureau.

(a) be the Chief Executive and Accounting Officer of the Bureau and Secretary of the Council, responsible to the Governor through the Council;

(b) be –

- (i) a graduate financial member of the Institute of Chartered Accountants of Nigeria or an equivalent professional body or a graduate of economic or business administration or finance or other related disciplines, with membership of a relevant professional body and having credible financial advisory and project finance experience;
- (ii) a legal practitioner, duly qualified to practice, with credible commercial transaction experience or an investment banker with project finance experience; or
- (iii) a person who has held a senior management position not below the rank of General Manager or equivalent in an infrastructure or network utility service company with a turnover during the immediately preceding three years of not less than N10 billion per annum; and

(c) have a minimum of twelve (12) years of cognate post-qualification work experience.

(2) The Director-General shall be in attendance at meetings of the State Executive Council at which public private partnerships or the activities of the Council or of the Bureau are to be discussed.

(3) The Director-General of the Bureau shall hold office for a term of four (4) years and may be re-appointed for a second and final term of four (4) years.

11. The Director-General shall cease to hold office if he –

Removal of the Director-General of the Bureau.

(a) resigns his appointment by a notice under his hand addressed to the Governor;

(b) becomes incapacitated by reason of infirmity of the mind or body;

(c) becomes bankrupt or make a compromise with creditors;

- (d) is convicted of a felony or any offence involving dishonesty or fraud by a court of competent jurisdiction;
- (e) is found to have indulged in acts of gross misconduct; or
- (f) is personally disqualified or suspended from practicing his profession in any part of Nigeria by the order of any competent authority.

Directors of the Bureau.

12. (1) There shall be appointed by the Civil Service Commission, on behalf of the Council from within or outside the civil and public services of the State, such number of persons known as "Directors" who shall each be responsible for such Departments in the Bureau as the Council may establish.

(2) The Directors shall be responsible for leading and administering the affairs of such Departments as may from time to time be established by the Council, on the recommendation of the Director-General.

(3) Each Director in the Bureau shall have a specific written job description assigned to him in regard to his Department, as may be recommended by the Director-General and approved by the Council under this Law.

(4) The Directors shall report directly to the Director-General and assist him in the day-to-day administration of the Bureau.

(5) The Directors shall possess a minimum of ten years cognate professional experience in law, accountancy, business management, engineering, finance or such other discipline as the Council determines to be relevant to the functions of the Bureau and shall be employed only after undergoing a rigorous, open, transparent and competitive process.

Staff of the Bureau.

13. (1) There shall be seconded to or employed by the Civil Service Commission on behalf of the Council such persons who shall be staff of the Bureau and known by such titles or ranks as the Council may determine and approved by the Governor.

(2) The staff of the Bureau shall include such persons trained in law, accountancy, economics, engineering, communication arts, finance, administration, personnel management and other disciplines who have such educational, professional and cognate qualifications as the Council may determine to be relevant to the functions of the Bureau.

(3) Staff of the Bureau shall be employed only after undergoing a rigorous, open, transparent and competitive process; provided, however, that a qualified person may be seconded to the Bureau to fill a specific post after it is established to the satisfaction of the Council that the regular employment process has not brought forward a person qualified for the said post.

(4) Remunerations, terms and conditions of service for staff of the Bureau shall be determined by the State Civil Service Commission.

(5) Members of staff on secondment to the Bureau shall be seconded for a period of time as approved by the State Civil Service Commission.

14. (1) The Official Secrets Act, Cap. 03, LFN 2004 shall apply with appropriate modifications to all staff of the Bureau who shall, before assuming office, sign a confidentiality agreement to observe strict discretion and secrecy with respect to all transactions of the Bureau.

Confidentiality of
Information and
Incompatible Activity.

(2) The members of staff of the Bureau shall be employed on full-time basis and as long as they are so employed they shall not –

(a) engage in any other paid activity in connection with any PPP award procedure ongoing at the time of his employment; or

(b) accept any form of payment, in cash or in kind, whether by way of gift, inducement, commission, allowance, salary or other remuneration, from any party involved in a PPP.

(3) Each member of staff of the Bureau shall disclose all investments or interests, held either directly or through any third party, in a private entity that is participating in any ongoing PPP award procedure under this Law.

(4) In the event of a violation of any of the above restrictions, and regardless of any other penalties, the person in violation of these restrictions shall be subject to the disciplinary measures established in any applicable rules or regulations including the Public Service Rules or amendment or re-enactment thereof in force in the State for the time being.

(5) The restrictions contained herein shall remain in force for one year after such a person has formally ceased to be a member of staff of the Bureau.

15. The Bureau may engage the services of such consultants, transaction and technical advisers as the Council may approve.

Appointment of
Consultants.

PART III

Public Private Partnership Initiative, Agreement, Project and Stages of Approval

16.(1) There is established for the State a partnership initiative between the public sector and private parties for the planning, designing, financing, developing, constructing, providing, operating and maintaining of infrastructure and the supply of goods, services and facilities in the State (in this Law referred to as "public private partnership or PPP").

PPP Initiative/
Agreements

(2) Where a public entity wishes to undertake a public private partnership, it shall be undertaken and implemented through a contract with a private party procured in accordance with the provisions of this Law.

(3) A public entity may enter into a further contract (hereafter called an "Ancillary Agreement") with a third party or with a private party in order to enable an agreement for that public private partnership to be undertaken and implemented; provided that such Ancillary Agreements are executed in accordance with this Law.

(4) Where a special purpose vehicle (hereinafter called "SPV") enters into a PPP, only limited liability companies incorporated under CAMA shall hold equity therein and all third parties shall hold shares in that SPV in accordance with CAMA, the documents incorporating the SPV and any relevant provisions of the PPP Agreement.

Objectives of Public
Private Partnerships.

17. The objectives of public private partnerships in the State are to –

- (a) facilitate private sector investment in the provision of new and rehabilitated infrastructure and other public assets;
- (b) release financial resources for investment in necessary social services;
- ✓(c) develop more reliable public services by deploying private sector skills in project financing, risk management, project planning and the use of new technologies and thus ensure greater value for money in the provision of public infrastructure and services;
- (d) act as a catalyst for the implementation of the State Economic Blueprint, the State Vision 2020 Document and subsequent socio-economic initiatives;
- (e) strengthen institutional governance in the State by improving public sector management skills and accountability in the construction, rehabilitation and provision of infrastructure and services in the State; and
- (f) provide a clear, transparent, and well-defined legal, regulatory and institutional framework for enhancing investment by, and transferring project risk in providing infrastructure and services in the State to the private sector.

Application of PPP.

18. As from the commencement of this Law, any project for the provision of infrastructure and services using public assets owned or controlled by the State that meet the eligibility criteria established herein may be executed as PPPs under the provisions of this Law.

Non-Application of
PPP.

✓ 19. Notwithstanding Section 18, this Law shall not apply to the provision of infrastructure and services relating to urgent public need or a state of emergency as determined by a resolution of the House of Assembly passed upon presentation and debate of an address by the Governor.

Registration of PPP
Project.

20. (1) Where a relevant institution or prospective Contracting Authority intends to implement a project as a public private partnership, the Accounting Officer of that Contracting Authority or in the absence of the Accounting Officer, any person acting in that capacity, shall apply to the Council to register a Public Private Partnership Proposal as a Solicited Project Proposal (in this law referred to as the "Proposal") with the Bureau.

(2) The Council shall register a proposal if it –

- (a) is specified in the Master Plan;
- (b) revalidates the pre-feasibility study submitted by the Contracting Authority with its application or inclusion;
- (c) contains information on the expertise in the Contracting Authority to proceed with the project and a detailed profile of the members of its project team and the project management arrangements for undertaking the project;

- (d) gives the details for the appointment of a transaction adviser if the Contracting Authority deems this necessary; and
- (e) demonstrates payment of the applicable registration fee in accordance with relevant regulations made under this Law.

21. The Bureau shall within two weeks of registering a proposal assess and present it to the Council with its recommendations as to whether or not to proceed with it as a PPP project.

22. (1) The Council shall consider the reviewed proposal along with the Bureau's approval for the PPP project to proceed to the next stage.

Review of Proposal/
First Stage Approval.

(2) If the Council approves of the proposal, it shall immediately issue an "in-principle" approval for the PPP project to proceed to the next stage.

(3) The giving of an "in-principle" approval, which shall be called a First Stage Approval, shall be communicated by the Bureau to the Contracting Authority.

(4) The Contracting Authority shall within six months, after being communicated to by the Bureau, undertake and complete a detailed feasibility study and submit it to the Bureau.

23. The feasibility study shall research into and provide details of all project issues, including

Feasibility Study.

- (a) the project's comparative advantage to the State in terms of value for money, affordability, transfer of risk to the private sector, social impact, employment generation and improvement in the living standards of citizens of the State;
- (b) a consideration of the policy context in which the project is undertaken, a needs analysis and a full environmental impact assessment of the proposed project within its immediate locality in particular and the State in general, if necessary;
- (c) the role of the Contracting Authority in the project and the specific functions to be considered in relation thereto;
- (d) expected input and deliverables by the private sector;
- (e) the extent to which the functions to be undertaken by the project shall be efficiently performed by the private sector;
- (f) a financial model that reasonably applies various assumptions and sensitivities to all anticipated project costs and revenues, the factors that may affect them and the expected rates of return therefrom;
- (g) the most appropriate PPP option by which the Contracting Authority may implement the project; and
- (h) the capacity of the Contracting Authority to effectively undertake whatever obligations are conferred on it and, where this is deficient, measures that may be taken to ameliorate such deficiency.

Second Stage
Approval.

24. (1) The Bureau shall –

- (a) undertake an assessment of the feasibility study submitted to it and within six weeks present it to the Council with its recommendations, for review and decision; and
- (b) notify the Contracting Authority of the presentation of the feasibility study to the Council and the Council's decision thereon.

(2) The Council's approval of the feasibility study shall also authorize the prospective Contracting Authority to proceed to the next stage.

(3) This approval, which shall be called a Second Stage Approval, shall be communicated by the Bureau to the prospective Contracting Authority within one week of being given.

Contract Award.

25. (1) Upon receiving a Second Stage Approval, the Contracting Authority shall consult the Council to secure its concurrence with the proposed financial terms and risk allocation provisions of the draft PPP Agreement to be included in the Request for Proposals.

(2) The Contracting Authority shall, with the assistance of the Bureau –

- (a) draw up a contract award plan setting out the actions to be taken, the persons or entities responsible therefore and a time frame within which it expects to achieve the execution of a Public Private Partnership Agreement ;
- (b) select and design an equitable, transparent and cost effective Contract Award Procedure to be stated in the Request for Proposals, which procedure shall be stated in detail in the Request for Proposals; and
- (c) draw up a draft PPP Agreement.

(3) The content of the various optional contract award procedures and the matters to be provided for in a Request for Proposals shall be more particularly stated in the Regulations made by the Council.

Third Stage Approval.

26. The Council shall after a review of the contract award plan, the draft Request for Proposals and the draft PPP Agreement, issue a Third Stage Approval for the Contracting Authority to proceed with the procurement process.

Collaboration with
Related Agencies.

27. The Contracting Authority and the Bureau shall identify all public entities whose support or participation shall be necessary to execute the contract award plan and they shall ensure that such a public entity is aware in advance of the supportive role it will be required to play, the precise deliverables required of it and the timeframe within which such deliverables must be available.

Approval of Contract
Award Documents.

28. (1) The Contracting Authority shall, for the purposes of Section 25 above, prepare and submit all draft contract award documents, including pre-qualification notices, Request for Proposals, statement of evaluation criteria, evaluation sheets and the draft PPP Agreement, to the Bureau for the Council's comments and approval.

(2) The Bureau and the Procurement Body shall undertake the said joint review and send the results thereof back to the Contracting Authority within four weeks of the submission.

(3) No Request for Proposals shall be issued to a candidate unless the Bureau and the Procurement Body have approved it after a joint review.

PART IV Bidding and State Executive Council

29. Every proposal submitted by a candidate in response to a Request for Proposals shall, in order to be valid, discuss without equivocation or evasion of each of the matters required in the regulations made by the Council.

Contents of a Bid.

30. The contracting Authority shall be responsible for –

Duties of the
Contracting Authority.

- (a) conducting the bidding process with respect to any PPP project in an equitable, transparent, cost effective and competitive manner;
- (b) examining and evaluating the bids received; and
- (c) making recommendations to the Council for negotiating with the preferred bidder with the objective of completing a PPP transaction.

31.(1) In evaluating bids, the Contracting Authority shall determine their individual compliance with minimum scores previously established for various criteria including those listed in Subsection (2) below.

Bid evaluation criteria.

(2) These criteria shall include but not be limited to:

- (a) affordability of the service to be provided;
- (b) value for money;
- (c) comprehensive commercial and technical plans that demonstrate project viability, expected return on investment, the nature of service to be delivered to the public; and
- (d) the extent to which the bidders propose to take on various risk elements.

(3) For each project, the Contracting Authority shall identify a preferred and a reserve bidder and upon doing so, the Contracting Authority shall submit a report to the Procurement Body and the Bureau on the entire contract award process (in this Law referred to as the "Procurement Report").

State Executive Council
Approval.

32. (1) The Bureau shall consult with the Procurement Body regarding the Procurement Report and they shall make and conclude a joint review of the said Report within three weeks of receiving it.

(2) Within a further one week of concluding the joint review, the Bureau shall forward the result and recommendations of the joint review to the Council.

(3) The Council shall consider the said result and recommendations and if it approves the PPP transaction to go forward, it shall forward its decision along with minutes of its relevant proceedings to the State Executive Council for ratification.

(4) Upon its decision to ratify the council's approval, the State Executive Council shall thereby be deemed to have authorized the Council to issue a Notice of Award.

Notice of Award.

33. (1) The Bureau shall, immediately after EXCO approval is granted, and after notifying the Contracting Authority under Section 32(4), publish the name of the PPP Council in at least one national newspaper, the State Tenders Journal, the State newspaper and the electronic media in the State, notice of the award of the PPP contract.

(2) The notice shall include the essential terms of the proposed PPP, particularly the names of the parties, the tenure of the PPP Agreement, a summary of the services to be provided, the cost of the project and the value for money benefits for the general public.

Closed Bid.

34. (1) Notwithstanding anything to the contrary in this Law, the Executive Council may approve a closed bid provided that each of the following conditions are met:

(a) there are peculiar intellectual property and trade secrets required to undertake the project; and there is only one source capable of providing the service due to peculiarities of such intellectual property and trade secrets, or other similar consideration;

(b) the project is incorporated into the Master Plan;

(c) the State Executive Council establishes that regardless of not adopting the contract award procedures, value for money for the citizens of the State will be obtained;

(d) all documentation relevant to the closed bid, including minutes of meetings, correspondence, Request for Proposals or bid document howsoever called, proposals from one or more prospective candidates and a draft PPP Agreement are submitted by the council to the State Executive Council for review and approval; and

(e) there is a compelling public interest to so approve.

(2) If the State Executive Council determines that the conditions in sub-section (1) have been met, it shall approve the PPP Agreement resulting from the closed bid in terms satisfying Section 31(2) herein, and issue an EXCO approval to the Council.

(3) Upon grant of EXCO approval under sub-section (2) above, the provisions of Section 34 shall apply.

PART V

Execution of the Public – Private Partnership Agreement

35. (1) Upon receiving EXCO approval, the Contracting Authority shall, with the support of the Office of the Attorney-General and the Bureau, conclude the PPP Agreement between the Private Party and the Contracting Authority.

The Public Private Partnership Agreement.

(2) The PPP Agreement shall include a management plan that establishes the capacity of the Contracting Authority and the private party to effectively implement, operate and continuously monitor and evaluate the project.

(3) Every PPP Agreement shall state provisions that meet the requirements of affordability, value for money and transfer of substantial risk to the private party and other provisions as required in Regulations made pursuant to this Law.

(4) Within two weeks of concluding the PPP Agreement, the Contracting Authority shall send an electronic copy thereof without commentary or mark-up, and complete with all relevant schedules, ancillary agreements, and with any relevant duly executed supporting financing agreements, project agreements, consents and licenses, to the Bureau; which documents shall collectively be called the "PPP Documents".

36. (1) Upon receiving the PPP Documents, the Bureau shall prepare the requisite number of clean copies thereof and ensure that each page is initialed by a representative each of the Contracting Authority and the Private Party, which stage shall be known as "completion", to signify that both parties confirm the correctness of the initialed copies.

Completion, Execution and Registration of PPP Agreement.

(2) The completed PPP Agreement with all relevant PPP Documents shall be formally presented by the Council and executed for the State only by the Governor, or by a person acting in such capacity, with his signature witnessed by the political or the administrative head of the Contracting Authority; and for the Private Party by its Chairman or person acting in that capacity with his signature witnessed by its chief executive officer or person acting in that capacity.

(3) Upon the execution of a PPP Agreement, the Bureau shall immediately register it, retain a counterpart with copies of all other PPP Documents and transmit other counterparts each to the-

(a) Governor;

(b) Deputy Governor;

(c) House of Assembly;

- (d) Contracting Authority;
- (e) Private Party;
- (f) Office of the Attorney-General;
- (g) Ministry of Finance;
- (h) State Planning Commission;
- (i) Department of Budget, Monitoring and Evaluation;
- (j) Investment Promotion Bureau;
- (k) Office of the Accountant-General of the State;
- (l) Procurement Body; and
- (m) Government body responsible for monitoring and/or evaluating Government-wide project performance.

(4) The Council shall be the sole authority empowered to issue certified true copies of a PPP Agreement and any accompanying PPP Documents.

PART VI

Guarantees, Indemnities, Incentives, Financing and Risk Mitigation

Power to issue Guarantees.

37. It shall be lawful for the Government to provide guarantees in favour of a private party in support of the financial or contractual obligations of a Contracting Authority in form, substance and terms agreed with a financial services provider entering into a project finance arrangement for a PPP Project.

Power to Indemnity.

38. It shall be lawful for the Government to issue an indemnity to a multilateral entity providing partial or other risk insurance to a PPP project or to a Private party in a PPP Agreement.

Guarantee or Indemnity to be approved by State Executive Council.

39. A guarantee or an indemnity shall be approved by the State Executive Council only upon consideration of a proposal from the Council setting out a detailed justification for it.

40. In considering a proposal to grant a guarantee or an indemnity, the State Executive Council shall give due consideration to the following –

Proposal for approval of Guarantee or Indemnity.

- (a) the objectives of this Law and the general policy of the State with regard to investment promotion and public-private partnerships;
- (b) the type of project finance arrangement, its tenor, interest rates, applicable moratorium, maximum amount of funding, and other relevant financial and legal terms and conditions contained in a term sheet or other binding document setting out such essential terms;
- (c) the total amount of project financing to be guaranteed by the Government for all PPP projects at any given time;
- (d) the extent of compliance with any Federal or other State Law in force for the time being; and
- (e) the extent of compliance with such guidelines or regulations as may be issued by the Council relating to such guarantees or indemnities.

41. A Government guarantee or indemnity shall be applied solely to –

Application of a Guarantee.

- (a) fulfillment by the Contracting Authority of its financial and contractual obligations under the PPP Agreement or any ancillary agreement or any financing agreement;
- (b) payment of any termination payments specified in the PPP Agreement;
- (c) payment by the Government of a minimum revenue charge covering the cost of operating and maintaining the facility built under the finance arrangement; and
- (d) such other purposes as the Council may recommend to the State Executive Council as necessary to enhance the viability of a relevant project finance or PPP Agreement

42.(1) The State Executive Council may approve the grant or appropriate financial incentives and investment support to approved PPP projects recommended by the Council as being necessary to attract private investment into a specific PPP project.

Incentives for Public Private Partnership Projects.

(2) Such financial incentives and investment support may include-

- (a) equity participation in cash or in kind not exceeding 49.9% of the total equity investment in the relevant project;
- (b) justifiable direct subsidies with respect to any particular project;
- (c) reduction of or exemption from fiscal impositions applicable in the State;
- (d) approaching the Federal Government with the Private Party to grant reduction or exemption from fiscal impositions by the Federal Government; and
- (e) the grant of a loan by the Government to a specific project on terms.

Promotion of an
Infrastructure
Facilities Fund.

- (3) The Council may issue regulations with respect to-
 - (a) the criteria for qualification by the private sector for the grant of incentives and/or investment support; and
 - (b) The method of calculating and applying subsidies to a specific project.

43. (1) The State Government may, upon the approval of a proposal to that effect, collaborate with one or more well-established banks or financial services providers or a suitably-qualified private company, to promote the establishment, funding and operation of an Infrastructure Facilities Fund ("a Fund" or the Fund").

(2) The Fund shall be incorporated under the Companies and Allied Matters Act ("CAMA") and regulated under the Investment and Securities Act ("ISA").

(3) The Fund shall be established for the sole purpose of investing its assets in PPP projects and reinvesting the profits therefrom in the Fund or distributing such profits to its shareholders.

(4) The moneys in the Fund may be contributed by the Government and other investors from the general public and shall be applied to-

- (a) acquire bonds, equity and other securities issued by private parties for implementing PPP projects in the State; and
- (b) obtain loans from financial services providers, corporations and individuals for the sole purpose of implementing PPP infrastructure projects.

(5) The Fund shall not be used for any business except those prescribed under this Section and in its incorporating documents approved under the ISA.

(6) The provision of this Section shall not be enforced except a resolution of the House of Assembly, by Two-Third (2/3) majority, is given to that effect; where moneys in the fund include a contribution from the Government or incentives as specified in Section 42.

The Fund and
Accounts
Monitoring
Committee.

44. (1) When a Fund is established and registered under CAMA and the ISA, there shall also be established a Public Private Partnership Investment Fund Accounts and a Monitoring Committee (hereinafter referred to in this Law as the "Monitoring Committee"), which shall be a standing Committee of the Council.

- (2) The function of the Monitoring Committee shall be to --
 - (a) keep watch on behalf of the Government on any and all PPP investment funds established under this Law or which, though not established under this Law, have funds invested in a PPP in the State; and
 - (b) obtain, review and report to the Council periodic financial and operating reports in respect of such funds from the persons or bodies charged with their management.
- (3) The members of the Monitoring Committee shall be --
 - (a) the member of the State Executive responsible for Finance, who shall be Chairman;
 - (b) the Attorney-General and Commissioner for Justice;
 - (c) the member of the State Executive Council with primary responsibility for providing economic advice to the Governor;

(d) three persons from the private sector who are members of the Council; and

(e) the Director-General of the Bureau, who shall also be the Secretary of the Committee.

45. (1) The Bureau shall provide technical assistance to Contracting Authorities on risk allocation mechanisms on a project-by-project basis.

Risk Allocation.

(2) The Council shall, on the advice of the Bureau, issue regulations on risk allocation and specific measures by the Contracting Authorities and/or State Government to mitigate or eliminate project risk.

PART VII Financial Provisions

46.(1) The Bureau shall maintain such bank accounts as the Council may approve, from which all expenses of the Council and the Bureau shall be met, and to which shall be credited-

Bank Account of the
Bureau

(a) such administrative fees as are paid on PPP transactions, as the Bureau may from time to time prescribe with the approval of the Council;

(b) all monies accruing to the Council or Bureau by way of grants-in-aid, bequests, endowments and contributions from any source; and

(c) such monies as may from time to time be appropriated to the Bureau from the annual budget of the State or other Government.

(2) A special government account shall be open, by the Accountant-General, to which all profit accruing to the Council shall be paid into.

(3) The Director -General shall be the approving authority and the Head of Finance and any other Departmental Head shall be joint signatories to all banking transactions of the Bureau

47. The Bureau shall cause to be prepared and submitted to the Council not later than 15th September each year, estimates of the recurrent and capital expenditure for the succeeding year of both the Bureau and the Council.

Annual Estimates.

48. The Council shall prepare and submit to the Governor not later than the 30th day of April each year, a report on its activities during the immediately preceding year, including in such report the Auditors' Report for the previous financial year.

Annual Report.

49. (1) The Bureau shall cause to be kept such proper accounts and financial records, which shall be audited by auditors recommended by the Auditor-General for the State.

Accounts and Audit.

(2) Audited account of the Council/Bureau shall be submitted to the House of Assembly not later than three months into the succeeding year.

PART VIII
Miscellaneous Provisions

Unsolicited Project Proposals and their Qualifying Criteria.

50. (1) Any proposal to the State Government for a PPP project that is not contained in the Master Plan shall be referred to as an "Unsolicited Project Proposal".

(2) A prospective Contracting Authority that receives an Unsolicited Project Proposal shall forward it to the Council with its comments and recommendations.

(3) The Bureau shall undertake a comprehensive review of the submissions under subsection (2) hereof and forward them to the Council for onward presentation to the State Executive Council for approval.

(4) Only those proposals that fulfill the criteria set out in Sections 20 (2) and 31 (2) of this Law shall be approved.

(5) Upon the approval of an Unsolicited Project Proposal by the State Executive Council, it shall be deemed to have been included in the Master Plan and shall then comply with the provisions of this Law.

Duration of a Public Private Partnership Project.

51. (1) Except the State Executive Council approves, upon the recommendation of the Council, no PPP Agreement shall exceed a term of twenty-five years from the date of the PPP Agreement.

(2) The term of a PPP Agreement shall include a construction period not exceeding two years in any event, during which no revenue or royalty payments however so called shall be due from the private party to the State.

Prohibited transactions.

52. (1) The following shall not be valid without the written consent of the Council –

(a) any transfer of shares in a project SPV or any other transaction involving the transfer of voting rights in such SPV;

(b) any increase in share capital, or any amendment of the incorporation documents of the SPV, apart from those that are mandatory under the PPP Agreement or any issue of bonds or other security to be undertaken by the SPV;

(c) any merger, takeover or other change in corporate status of the SPV;

(d) any assignment in part or full by the SPV of its existing or future claims under a PPP Agreement to a domestic or foreign financial institution involved in financing of the PPP, or contracts with such other financial institutions to secure their claims arising from such financing; and

(e) any assignment under the immediately preceding paragraph (d) to a domestic or foreign financial institution for the purpose of conversion of such claims to securities.

(2) The listing of the shares of a project SPV in the Nigerian or other capital market shall be permitted only following a recommendation by the Council approved by the State Executive Council.

(3) The provision of this Section shall not come into effect except a resolution of the House of Assembly, by Two-Third (2/3) majority, is given to that effect; where moneys in the SPV includes a contribution from the Government or incentives as specified in Section 43.

PART IX
Concluding Provisions

53. The Council may, on the advice of the Bureau, issue, amend, modify or alter Regulations as may be necessary to give full effect to the provisions of this Law and for their due implementation and administration. Power to make Regulations.
54. In the event that a public entity fails to comply with the provisions of Parts III – V of this Law, the Council may revoke the relevant inclusion decision or issue such other directive to the Contracting Authority, as it deems appropriate to ensure compliance with the said Parts. Failure to Comply with Parts III – V.
- 55.(1) Notwithstanding anything to the contrary in this Law or any other enactment, at the commencement of this Law, all ongoing or completed projects involving a PPP for the provision of infrastructure, goods or services shall be registered with the Bureau and shall be known as Deed Approved Projects. Transitional Provisions.
- (2) Upon registration under sub-section (1) hereof, the Council shall review all agreements or contracts relevant to such Deemed Approved Projects and, after discussions with the parties thereto, may issue such directives to them as may be necessary to bring the said agreements or contracts into conformity with this Law.
- (3) The State Executive Council, upon exceptional circumstances being shown by the Council, may, in the public interest, exclude any Agreement executed prior to the commencement of this Law from complying therewith.
56. (1) In this Law, unless the context otherwise requires – Interpretations.
- “Achievable” in Sections 3(i) refers to the ability of a private party to provide the management skills and financial and technical resources required to implement its obligations under a PPP Agreement;
- “Accounting Officer” means any person in charge of a Contracting Authority or so designated to perform such function;
- “Affordable” or “Affordability” means that the financial commitments to be incurred by an institution in terms of the PPP Agreement can be met by public funds and/or charges imposed for the use of the output of the project;
- “Agreement” or “PPP Agreement” means a public-private partnership agreement recording the terms of a PPP between a Contracting Authority and a private party;
- “Asset” includes an existing asset of a relevant Contracting Authority or a new asset, the acquisition of which is the purpose of entering into a PPP agreement;
- “CAMA” means the Companies and Allied Matters Act and includes such amendment or re-enactment thereof as may from time to time be made;
- “CBN” means the Central Bank of Nigeria or its successor-in-title;

"Closed Bid" means a PPP procurement not complying with any or all the procurement procedures provided in this or any other applicable Law or in regulations made thereunder;

"Concession Agreement" or a PPP agreement shall include but not be limited to public-partnership schemes such as:

- (a) Design-Build-Finance-Operate (DBFO) and its variants, including Build-Own-Operate (BOO);
- (b) Buy-Build-Operate (BBO), Lease-Develop-Operate (LDO);
- (c) Build-Operate-Transfer (BOT), Build-Own-Operate-Transfer (BOOT), Build-Lease-Operate-Transfer, (BLOT), Build-Operate (BTO);

"Contingent liability" includes a government guarantee for a loan, a foreign currency transfer or step-in right in the event of a default by a party to a project or financing agreement;

"Contracting Authority" means a public entity that procures a private party with which it will execute a PPP agreement to carry out works or provide services;

"Contract Award Procedure" means the procedure defined for the procurement of a Private Party and for the consequent conclusion of a PPP agreement with that party, which procedure may be detailed by regulations made hereunder;

"council" or "the Council" means the PPP Council established in Section 1 herein;

"Desirable" in Sections 3(i) and 31(2) refers to the question whether there is an overriding requirement that the infrastructure or service should be provided directly by the public sector;

"Financing Agreement" means an agreement for financing the acquisition of the assets constituted into a project subject of a PPP agreement and includes any agreement pursuant thereto, providing security for the loan, a term sheet, fee letter and any other document designated as between the loan agent (or the security agent or the arranger) or lender under such an agreement and the borrower.

"Government" ordinarily means the Government of Cross River State but where the context so admits, shall also mean the Federal Government of Nigeria;

"Gross misconduct" mean such acts of indiscipline as are defined in the Public Service or amendment or re-enactment thereof in force in the State for the time being;

"House" or "House of Assembly" means the Cross River State House of Assembly;

"Institution" means a ministry, department or agency, a constitutional body or other public entity of the State and includes a Contracting Authority;

"Institution function" means-

- (a) a service, task, assignment or other functions that a Contracting Authority is entitled or obliged to perform;
 - (i) in the public interest; or
 - (ii) on behalf of the public generally; or
- (b) any part or component of or any service, task, assignment, or other function performed or to be performed in support of such a service, task, assignment or other function;

"ISA" means the Investment and Securities Act and includes such amendment or reenactment thereof as may be made from time to time;

"Preferred Bidder" means the bidder, including any bidding consortium, found after a competitive bid process to be in the lead position to be the private party to a PPP agreement;

"Private Party" means a party to a PPP Agreement, other than the Contracting Authority or other public entity;

"Procurement Body" means such ministry, department or agency of the Government conferred with general responsibility for regulating and overseeing the procurement of goods, works and services for public purposes of the State;

"Project officer" means a person identified by the accounting officer or accounting authority of a Contracting Authority to manage a PPP to which that Contracting Authority is a party from its inception to its expiration or termination;

"Project" means an arrangement for the construction of works or the provision of goods and services, which can be, or is to be, implemented under a PPP agreement;

"Project Agreement" means any agreement, contract, arrangement and undertaking entered into by a private party in connection with the project, including an engineering, procurement and construction contract, a PPP agreement, a lease, an operation and maintenance agreement, a fuel or feed stock supply agreement and such other agreements as may from time to time be so designated under a PPP agreement;

"Public entity" means any Government ministry or department or agency, statutory corporation or agency or any company in which the State has controlling shares or a controlling beneficial interest;

"Public Private Partnership" or "PPP" means a commercial transaction between a public entity and a private party in terms of which the private party:

- (a) Undertakes a project or performs an institutional function on behalf of the Government;
- (b) Acquires the use of a State asset or State property for that purpose;
- (c) Assumes substantial financial, technical, operational and management risk in connection therewith; and
- (d) Receives a benefit therefore, by way of-
 - (i) consideration to be paid by the Government via an agreed payment mechanism;
 - (ii) charges to be collected by the private party from users or customers of a service provided to them; or

(iii) a combination of paragraphs (i) and (ii) above;

“Public Private Partnership Agreement” or “PPP Agreement” shall be construed accordingly;

“Public Sector” means the class to which all public entities belong;

“Request for Proposal” or “RFP” means a written request calling for technical and commercial proposals from interested parties to undertake the execution of a PPP project;

“Revertible Facility” means a facility developed under a PPP transaction designated thereunder to become the full and unencumbered property of the State at the termination of the PPP transaction;

“special Purpose Vehicle” or “SPV” means a limited liability company incorporated under the Companies and Allied Matters Act, whose purpose is solely for the acquisition, financing and use of certain defined assets and their associated permits, licenses or regulatory approvals and contract rights for a specific PPP project;

“State” means Cross River State of Nigeria;

“State Executive Council” or “Exco” means the Governor of the State seating, deliberating and taking decisions of State formally with the Deputy Governor and the members of the Executive Council of Cross River State;

“State Property” includes all movable and immovable property belonging to the State as well as intellectual property and other inchoate rights vested in the State;

“Transaction adviser” means a person or persons appointed in writing by an accounting officer or accounting authority of a public entity, who has or have appropriate skills and experience to assist and advise that public entity in connection with a PPP, including the design of contract award procedures and the preparation and conclusion of a PPP Agreement;

“Value for money” means the consideration of a combination of the service outcome to be delivered by a private party with the value of risks transferred to it and the direct costs to the Government and users, determined by the extent to which that combination results in a net benefit to the State through the project in terms of cost, price, quality, quantity, risk transfer or a combination thereof, all of which may be expressed as the net present value of project lifetime costs, including the cost of bearing risk; and

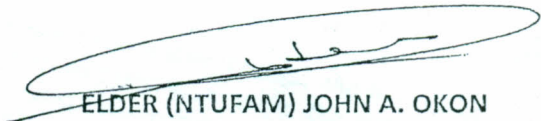
“Viable” in Sections 3(2) and 31(2) refers to the affordability and value for money for Government and/or users as well as a reasonable return for private investors.

(2) The Interpretation Act, Cap. 123, Laws of the Federation of Nigeria, 2004 shall apply with appropriate modifications to bring it into conformity with this Law.

Short Title/
Commencement

57. This Law may be cited as the Cross River State Public Private Partnership Law 2010 and shall come into force on the..... day of2010.

This printed impression has been carefully compared by me with the Law which has been passed by the Cross River State House of Assembly and found by me to be a true and correctly printed copy of the said Law.



ELDER (NTUFAM) JOHN A. OKON
CLERK OF THE HOUSE

I assent



SENATOR LIYEL IMOKE
GOVERNOR
CROSS RIVER STATE

MADE AT Calabar this 4th day of August 2010