

PUBLIC-PRIVATE PARTNERSHIP BILL, 2021

ARRANGEMENT OF SECTIONS

Section:

PART I - GENERAL PROVISIONS

1. Application of the Act
2. Responsibilities of public partner
3. Public-private partnership contract
4. Tender Procedure
5. Duration of Relationship
6. Control over the Performance of Activities
7. Supervisory Measures
8. Prior Approval for Particular Business Activities
9. Changes to Private Partner Company
10. Law Applicable to Disputes on Public-Private Partnership Contract

PART II - ADMINISTRATIVE STRUCTURE

11. Coordinating and Supervisory Ministry
12. Establishment of Public-Private Partnership Council
13. Membership of the Public-Private Partnership Council

PART III - PUBLIC-PRIVATE PARTNERSHIP PRELIMINARY PROCEDURE

14. Purpose of the Preliminary Procedure
15. Call to Promoters
16. Content of call
17. Initiation of Preliminary Procedure
18. Rights of Promoter

PART IV - SELECTION OF PRIVATE PARTNER

19. Submission and Opening of Applications
20. Review and Evaluation of Application
21. Report on Review and Evaluation of Application
22. Declaration of Decision on Selection
23. Rejection of all Applications
24. Rejection of a Candidate
25. Interpretation
26. Short Title



A BILL

FOR

AN ACT TO PROVIDE FOR THE IMPLEMENTATION OF PUBLIC-PRIVATE PARTNERSHIP CONTRACTS BETWEEN PUBLIC PARTNER AND PRIVATE PARTNER AND TO ESTABLISH A SET OF RULES GOVERNING PUBLIC-PRIVATE PARTNERSHIP CONTRACT AND FOR RELATED MATTERS

Sponsored by Hon. Gideon Gwani

[] Commencement

BE IT ENACTED by the National Assembly of the Federal Republic of Nigeria:

1 PART I - GENERAL PROVISIONS

2 1.-(1) A public partner shall establish a public-private partnership Application of
3 only in compliance with the provisions of this Act unless otherwise stated in the Act
4 this Act or any other law.

5 (2) The purpose of this Act is to-

6 (a) enable and promote private investment in the construction,
7 maintenance or operation of structures and facilities of public-private
8 partnership and other projects that are in the public interest;

9 (b) ensure the economically sound and efficient performance of
10 public services or other activities whose performance is in the public
11 interest;

12 (c) facilitate the rational use, operation or exploitation of natural
13 assets or private and public funds in the construction of structures and
14 facilities that are partly or entirely in the public interest, or in an activity
15 provided in the public interest;

16 (d) ensure the transparency, competitiveness, non-discrimination
17 and regularity of procedures of the creation, establishment and operation of
18 public-private partnership; and

19 (e) protect the public interest in this relationship and ensuring the

1 influence of the public partner to ensure that the subject of the public-private
2 partnership is performed in the public interest.

3 (3) In order to achieve the purpose of this Act, public-private
4 partnership shall be performed in the areas of financing, design, construction,
5 supervision, organisation and management, maintenance and providing the
6 activities referred to in subsection (2).

Responsibilities
of public partner

7 2.-(1) A public partner shall undertake or cause to be undertaken a
8 feasibility study where it considers that a project may be implemented under a
9 contract, to assess whether the proposed project is feasible as a public-private
10 partnership project.

11 (2) A public partner shall also-

12 (a) identify, appraise, develop and monitor a project to be
13 implemented under this Act;

14 (b) undertake or cause to be undertaken a feasibility study where it
15 considers that a project may be implemented as a public private partnership
16 project;

17 (c) submit the feasibility study to the Ministry in charge of finance for
18 its approval;

19 (d) supervise private partner;

20 (e) assist the private partner in securing the necessary material and
21 other rights and the various permits which the private partner alone cannot
22 obtain, in compliance with regulations and the public-private partnership
23 contract; and

24 (f) perform any other functions specified in this Act.

Public-private
partnership
contract

25 3.-(1) A public partner may enter into a contract with a private partner
26 for the performance of any of the functions of that public partner.

27 (2) A contract made pursuant to subsection (1) of this section shall-

28 (a) identify the responsibilities of the public partner and the private
29 party;

30 (b) specify the financial terms or obligations of the parties;

1 (c) ensure the management of performance of the private partner;
 2 (d) provide for the return of assets, if any, to the public partner, at
 3 the termination or expiry of the contract, in such matter as may be provided
 4 for in the contract;

5 (e) provide for the sharing of risks between the public partner and
 6 the private partner;

7 (f) provide for the payment to the private partner by way of
 8 compensation from a revenue fund or of charges or fees collected by the
 9 private partner from users or customers of a service provided by it;

10 (g) provide for its duration;

11 (h) provide mechanism for the resolving of disputes arising from
 12 the contract except otherwise stated by law; and

13 (i) contain such other information as may be provided in this Act.

14 (3) Notwithstanding the provisions of this section, in a public-
 15 private partnership relationship, irrespective of its title, the private partner
 16 shall bear part of the risk.

17 4. Subject to the Public Procurement Act, any other law or Tender Procedure
 18 regulation applicable to public tender procedure, a private partner shall be
 19 selected on the basis of a public tender, notice of which must also be
 20 published on the internet.

21 5.-(1) Public-private partnership shall be established for a fixed Duration of
 22 period. relationship

23 (2) The duration of the public-private partner relationship shall
 24 afford the private partner-

25 (a) stability and security of investment;

26 (b) the possibility of effective and safe financial investment and the
 27 return of what it has invested;

28 (c) during the relationship, the return to the partnership of funds
 29 invested and the achievement on this of a proper market yield, while at the
 30 same time keeps, assumes and manages part of the commercial risk.

1 (3) The duration of the public-private partnership may be extended in
2 a manner provided by the public-private partnership contract, where-

3 (a) owing to the measures of the public partner or other measures by
4 an authority the private partner cannot implement the relationship;

5 (b) this is necessary owing to additional investment by the private
6 partner resulting from requests of the public partner or its measures in the
7 public interest.

8 (4) The duration of the public-private partnership may not be
9 extended by more than half of its established duration.

Control over the
performance of
activities

10 6.-(1) A public partner shall-

11 (a) have the right and obligation to control the implementation of a
12 contract on public-private partnership; and

13 (b) exercise control over the operation of a public-private partnership
14 in compliance with the agreed plan of control and quality assurance.

15 (2) A public partner may request a written report on the operations of
16 the private partner relating to the fulfillment of obligations pursuant to the
17 contract on public-private partnership.

18 (3) A report referred to in subsection (2) shall contain information on-

19 (a) the fulfillment of obligations held by the private partner and
20 relating to the fulfillment of obligations pursuant to the public-private
21 partnership contract;

22 (b) liabilities, assets and property of the private partner;

23 (c) complaints from users of the public-private partnership services
24 and on how they were dealt with;

25 (d) the awarding of business to subcontractors and changes in the
26 private partner company;

27 (e) damage events, changed conditions for carrying out the public-
28 private partnership contract;

29 (f) insurance claims; and

30 (g) all other circumstances that might directly or indirectly affect the

1 execution of the public-private partnership contract.

2 (4) Unless provided otherwise by the contract on public-private
3 partnership, reports referred to in this section shall be drawn up annually.

4 (5) In addition to reports referred to in this section, the public
5 partner shall have the right to view the business books and annual financial
6 statements which the private partner must draw up in accordance with the
7 law.

8 7.-(1) In addition to the rights of the public partner referred in this
9 Act, a competent body of the public partner shall conduct supervision of the
10 fulfillment of tasks and obligations pursuant to the contract on public-
11 private partnership.

Supervisory
Measures

12 (2) Within the framework of such supervision, authorised
13 representatives of the competent body of the public partner may-

14 (a) inspect structures and facilities of the public-private
15 partnership;

16 (b) inspect the documentation of the private partner;

17 (c) determine the quality of performance of the subject of the
18 public-private partnership.

19 (3) Where the competent body of the public partner determines that
20 the private partner is not properly fulfilling the obligations proceeding from
21 the public-private partner relationship, such body may, if so provided by law
22 or a regulation issued on the basis thereof, require the private partner
23 through an administrative decision to fulfill these obligations or to act in
24 some other way appropriate to the public-private partner relationship.

25 (4) In the event of it not being possible to require the fulfillment of
26 obligations unilaterally through an administrative decision referred to in this
27 section, fulfillment of obligations by the private partner shall be governed
28 by the provisions of other regulations and the public-private partnership
29 contract.

Prior approval for particular business activities

1 8.-(1) Public-private partnership contracts shall lay down the
2 conditions for awarding business to subcontractors.

3 (2) Where necessary in view of the nature, scope and subject of the
4 public-private partnership, the public-private partnership contract may also lay
5 down business which the private partner may undertake only on the basis of
6 prior consent from the public partner.

7 (3) The public partner may refuse the consent referred to in subsection
8 (2) of this Section if such business would run counter to the public-private
9 partnership contract, the public order of the country or would threaten the
10 unimpeded operation of the public-private partner relationship.

Changes to Private Partner Company

11 9.-(1) A private partner must inform the public partner of changes
12 concerning the articles of association of the company, of reorganization of the
13 status of the private partner's company and its members, and of major changes
14 to the structure of the company's membership, to the management of the
15 company and its supervision.

16 (2) The public partner and private partner may agree in the public-
17 private partnership contract that prior to any decisions on all or individual
18 changes referred to in subsection (1) of this section, private partner must obtain
19 the consent of the public partner.

20 (3) The public partner may refuse its consent only where it has
21 reasonable grounds to suspect that the proposed change might threaten the
22 fulfillment of obligations under the public-private partnership contract.

Law applicable to disputes on Public-Private Partnership Contract

23 10.-(1) Nigerian law shall be applicable to all disputes arising from a
24 public-private partnership contract executed in compliance with this Act.

25 (2) Subject to subsection (1) of this section, the parties to a public-private
26 partnership may agree that disputes directly related to their relationship and
27 which are not within the exclusive jurisdiction of a court in Nigeria, may be
28 resolved through an agreed arbitration service.

Coordinating and Supervisory Ministry

29 PART II - ADMINISTRATIVE STRUCTURE

30 11.-(1) The Ministry in charge of finance shall-

- 1 (a) develop, monitor and cooperate in implementing public-private
2 partnerships in the country;
- 3 (b) draw up manuals for operating public-private partnerships,
4 (c) formulate measures that might help in improving practices and
5 eliminating problems in the formulation and implementation of public-
6 private partnership; and
- 7 (d) monitor, advise, participate in the selection, evaluation and
8 operation of public-private partnership projects;
- 9 (e) cooperate in all stages of the creation and operation of public-
10 private partnerships, especially in public calls and the collection of
11 applications, in compliance with the provisions of this Act and in
12 supervising the operation of public-private partnership projects;
- 13 (f) where necessary, involve the representatives of other ministries
14 or external experts in performing its activities under this Act.
- 15 (g) keep records of public-private partnership projects and monitor
16 them;
- 17 (h) offer expert assistance to other public partners in the country,
18 in-
- 19 (i) formulating documents serving to determine the fulfillment of
20 the conditions for the creation and operation of public-private partnerships;
- 21 (ii) in seeking technical solutions for public-private partnerships
22 and in all other issues relating to the formation of relationships; or
- 23 (iii) carrying out the procedure for selecting private partners.
- 24 (l) draw up guidelines and standards for the selection, monitoring
25 and assessment of public-private partnership projects.
- 26 (j) link and coordinate its work with budgetary planning and the
27 implementation of capital and other projects that might be the subject of
28 public-private partnership;
- 29 (k) keep records of public-private partnership contracts;
- 30 (l) on the basis of annual information and reports shall also draw up

1 annual reports on the success of implementation of individual public-private
2 partnership projects; and

3 (m) work to provide education, information exchange, public
4 presentations and promotion of the possibility of public-private partnership in
5 the country.

6 (n) perform other tasks provided by this Act.

7 (2) The substance and record-keeping for projects and records of
8 public-private partnership contracts shall be regulated by an implementing
9 regulation issued on the basis of this Act by the Minister.

Establishment
of the Public-Private
Partnership Council

10 12.-(1) There is established, for the purpose of studying policy and
11 providing consultation in public-private partnership, a council known as the
12 'Public-Private Partnership Council' (hereinafter referred to as 'the Council').

13 (2) The Council shall be chaired by the Minister.

14 (3) The membership of the Council shall comprise of independent
15 experts in the economic, legal and other areas of public-private partnership.

16 (4) The Council shall-

17 (a) study key policy issues of conducting public-private partnership
18 projects and problems and deficiencies of the system in this area;

19 (b) in line with its findings, draw up a strategy for operating public-
20 private partnerships;

21 (c) formulate proposals and initiatives, proposing them to the
22 Ministry, which shall in turn submit the strategy, proposals and initiatives to the
23 Federal Government for adoption.

24 (5) Operational and technical support for the functioning of the
25 Council shall be provided by the Ministry.

Membership of
the Public-Private
Partnership Council

26 13. The membership, appointment, tenure and condition of service of
27 members of the Council shall be determined by the Minister in a regulation.

28 PART III - PUBLIC-PRIVATE PARTNERSHIP PRELIMINARY PROCEDURE

Purpose of the
preliminary
procedure

29 14.-(1) Prior to taking a decision on public-private partnership, the
30 public partner shall initiate a preliminary procedure on the basis of which the

1 decision is made to operate a public-private partnership project.

2 (2) The purpose of the preliminary procedure is to-

3 (a) determine whether the economic, legal, technical,
4 environmental and other conditions for implementing the project and
5 establishing a public-private partnership have been fulfilled, and

6 (b) define the fundamental elements of public-private partnership
7 to determine the substance of the decision and/or document on public-
8 private partnership.

9 (3) The assessment of the economic feasibility of the project or
10 programme shall be performed by the public partner in compliance with the
11 relevant laws or regulations.

12 15.-(1) The public partner shall as a rule issue once a year a call to Call to Promoters
13 potential promoters to submit applications regarding their interest in
14 operating a public-private partnership in areas where the conditions might
15 be met for public co-financing of a private project or where there exists an
16 interest in private investment in public projects.

17 (2) Public partners shall issue calls ,no later than following
18 inclusion of the project in the plan of development programmes or other
19 document of similar substance once a year, within three months of adoption
20 of the budget.

21 (3) Calls to potential promoters to submit applications regarding
22 their interest in operating a public-private partnership may be issued prior to
23 the decision on public-private partnership.

24 16.-(1) Public calls shall set out the substance of applications Content of call
25 regarding interest and the expectations as to which documents promoters
26 must attach or which aspects of public-private partnership to present.

27 (2) Public calls which already contain a definition of the public
28 partner's requirements and the essential elements from the capital elaborate,
29 may not prejudice forms of public-private partnership or the substance of
30 decisions and documents on public-private partnership.

Initiation of
Preliminary
Procedure

1 17.-(1) The public partner shall initiate the preliminary procedure on
2 its own initiative or on the basis of an application regarding interest in
3 operating a public-private partnership.

4 (2) An application regarding interest may be submitted by a person
5 that has an interest in operating a public-private partnership.

6 (3) The public partner must deliberate and decide on any application
7 regarding interest in operating a public-private partnership within four months
8 of receipt, and in that time it must also decide, wherein it shall not be bound to
9 initiate a preliminary procedure-

10 (a) whether the proposed project runs counter to the Constitution or
11 law;

12 (b) whether it involves activities that are so closely linked to the
13 protection of State, Official or Military secrets that implementing the
14 procedure would prevent the protection of such secrets; or

15 (c) whether the activity that is the subject of the proposal is already
16 being performed.

Rights of Promoter

17 18.-(1) A person that has submitted an application regarding interest
18 in operating a public-private partnership has the same rights as other
19 candidates in the ensuing procedure of establishment.

20 (2) Submission of an application regarding interest shall not be deemed to
21 indicate that the investor is also a candidate in the further procedure of selecting
22 a contractor.

23 PART IV - SELECTION OF PRIVATE PARTNER

Submission and
opening of
applications

24 19.-(1) Candidates may supplement or change applications until the
25 expiration of the tender deadline.

26 (2) Until the expiry of the tender deadline, candidates shall not have
27 the right to view the applications of other candidates in the same tender.

28 (3) The opening of bids or other applications for selection a private
29 partner contractor shall be public, unless for reasons of protecting commercial
30 secrets or official, military or state secrets the public partner determines that the

1 procedure of opening bids should not be public.

2 20.-(1) After the completion of public opening, the public partner
3 shall review the applications and ascertain whether they fulfill the tender
4 conditions. Review and
Evaluation of
Application

5 (2) The public partner may demand explanations from the
6 candidates that would assist it with the review, comparison and evaluation of
7 the applications.

8 (3) The public partner may request supplementation of
9 applications as will eliminate minor discrepancies with the requirements of
10 the tender documentation and which shall in no way affect the substance of
11 the application and assessment and ranking of the individual application in
12 accordance with the established criteria for selection of the private partner.

13 (4) The public partner may, with the consent of the candidate,
14 correct calculation errors discovered during the review.

15 21. After the completion of its review and evaluation, the public
16 partner shall draw up reports and indicate which applications fulfill the
17 tender requirements, and shall rank these applications such that it is clear
18 which of the applications are most successful in meeting the criteria set. Report on Review
and Evaluation
of Application

19 22.-(1) The declaration of the decision on selection shall name the
20 party that has been chosen and the parties whose applications have been
21 rejected. Declaration of
decision on
selection

22 (2) The decision on selection shall be sent to all parties in the
23 procedure.

24 (3) The decision shall be issued with a limited period of validity,
25 which may not be longer than one year.

26 (4) If during this time no contract is made, the decision on selection
27 shall cease to be valid.

28 23.-(1) Even after publishing a public tender notice, the public
29 partner shall not be bound to select a private partner. Rejection of all
applications

30 (2) If in the selection procedure the public partner does not select a

1 private partner, it shall issue an instrument to that effect whereby it terminates
2 the selection procedure, and shall set out all the parties whose applications have
3 been rejected and the grounds for their rejection.

4 (3) With regard to legal remedies and/or administrative disputes
5 against such instrument referred to in subsection (2) of this section, the
6 provisions of this Act relating to the instrument of selecting a public-private
7 partner shall be applicable.

Rejection of a
Candidate

8 24.-(1) Until a contract on public-private partnership is concluded the
9 public partner may reject the candidate that most successfully meets the criteria
10 set, and select the next one on the ranking scale, if circumstances arise to
11 indicate that the candidate will not be able to fulfill the contractual obligations.

12 (2) Circumstances indicating that a candidate will not be able to fulfill
13 the obligations under a public-private partnership contract are in particular if-

14 (a) proceedings of bankruptcy, liquidation or forced settlement are
15 instigated against the candidate,

16 (b) if the candidate has not settled its liabilities regarding tax and other
17 contributions provided by law,

18 (c) if it is shown that the application enclosed false information on the
19 fulfillment of essential requirements, on the existence of acts of organized
20 crime, corruption, fraud or money laundering and similar.

21 (3) With regard to the form of taking a decision referred to in the first
22 paragraph of this article, legal remedies and/or administrative disputes against
23 such decision, the provisions of this Act relating to the instrument of selecting a
24 public-private partner shall be applicable.

25 PART V - MISCELLANEOUS

Interpretation

26 25. In this Act, unless the context otherwise requires-
27 "application" is any application aimed at obtaining a public-private
28 partnership, unless otherwise expressly provided in this Act;
29 "associated company" means any undertaking over which a company may
30 directly or indirectly exercise predominant and decisive control, deriving from

- 1 ownership, financial interest or legal rules from which such relationship
2 derives;
- 3 "awarding authority" is the public partner in the case of a concession form of
4 public-private partnership;
- 5 "candidate" is a person that participates in the procedure of selecting the
6 contractor for a public-private partnership, by submitting an application
7 aimed at establishing a public-private partnership; unless otherwise
8 expressly provided in this Act or where this does not proceed from its
9 purpose, the rules applicable to candidates shall also apply mutatis mutandis
10 to bidders and contractors for public-private partnerships;
- 11 "commercial public service" is an activity in which the private partner has
12 special obligations in the public interest;
- 13 "concessionaire" is the public-private partnership contractor in the case of a
14 concession form of public-private partnership;
- 15 "concession partnership" is a form of contractual public-private partnership
16 as defined in this Act;
- 17 "Council" means the Public-Private Partnership Council established under
18 this Act;
- 19 "feasibility study" means study to determine the viability or otherwise of a
20 project;
- 21 "Minister" means the Minister in charge of finance;
- 22 "Ministry" means the Ministry in charge of finance;
- 23 "person" means individual or company;
- 24 "private partner" means a party to a contract other than a public partner;
- 25 "project" means a scheme which is the subject matter of a public-private
26 partnership contract;
- 27 "public interest" is a general benefit, as defined by an act or regulation issued
28 on the basis thereof, which is determined by a decision referred to in this Act;
- 29 "public partner" means any Ministry or Government department, local
30 authority or statutory corporation;

1 "public-private partnership contract" means a contract between a public
2 partner and a private partner, approved in terms of this Act, in terms of which-

3 (a) the private partner undertakes to perform a public partner's
4 function on behalf of the public partner for a specified period;

5 (b) the private partner receives a benefit for performing the function
6 by way of-

7 (i) compensation from a revenue fund;

8 (ii) charges or fees collected by the private partner from users or
9 customers of a service provided by it; or

10 (iii) a combination of compensation and charges or fees;

11 (c) the private partner is liable for the risks arising from the
12 performance of its function;

13 (d) state facilities, equipment or other state resources may be
14 transferred or made available to the private partner;

15 "structures and facilities" means buildings, services, equipment, etc, that are
16 provided for a particular purpose;

Short title

17 26. This Bill may be cited as the Public-Private Partnership Bill, 2021.

EXPLANATORY MEMORANDUM

This Bill seeks to provide for the implementation of public-private partnership contracts between public partner and private partner and to establish a set of rules governing public-private partnership contract.