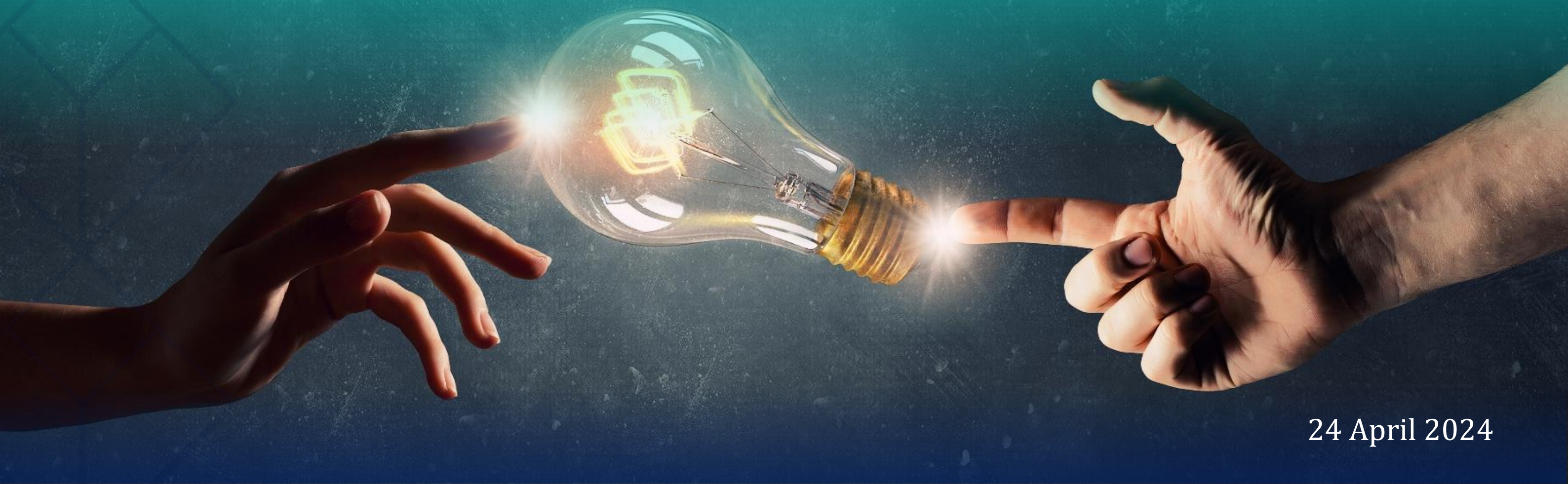

Key contacts

Dayo Okusami
Partner and Co-Head,
Energy and Natural Resources
dayo.okusami@templars-law.com

Temple Ezebuike
Senior Associate,
Energy and Natural Resources
temple.ezebuike@templars-law.com

Joshua Chizoma
Associate,
Energy and Natural Resources
joshua.chizoma@templars-law.com

TEMPLARS Thought Lab

De-Risking Public-Private Partnerships in the Nigerian Electricity Sector: A Guide for Investors

The "reforms" in the Nigerian electricity sector have been going on for about 20 years with a decidedly mixed bag of results: some good, but a lot remains to be done.

The most recent and perhaps, most effective reform that could truly kickstart significant and sustainable development was the signing into law of the Fifth Alteration (No. 33) Bill 2022, which altered the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "**Constitution Amendment**"), to empower states within the federation to make laws with respect to the generation, transmission, and distribution of electricity in areas covered by the national grid within the relevant state. Prior to the amendment, states could only make laws with respect to the generation, transmission, and distribution of electricity in areas not covered by the national grid within their states.

Further to the Constitutional Amendment, the Electricity Act 2023 ("**Electricity Act**") was signed into law in February 2024 by the Nigerian President, Bola Tinubu, to open up power generation, transmission, distribution and trading at the state level, thus making it possible for states to commence issuance of licenses for all electricity activities within their jurisdictions, including making laws, regulations and policies across the entire power sector value chain within their states.

In preparation for this, various states have begun establishing regulatory structures to take advantage of the expanded powers now granted them under the Constitution Amendment[1]. Therefore, there are new opportunities for power generation, transmission, distribution, system operations and trading projects.

Investors looking to invest often consider public-private partnerships ("**PPPs**") with the relevant governments (State or Federal) and must sometimes, obtain, amongst other requirements, a concession to carry out certain public electricity projects (e.g., generation and/or distribution projects over earmarked unserved or underserved areas).

However, there have been concerns from investors about (actual and potential) non-compliance of the public sector of their contractual obligations under these PPPs, which could potentially derail the intention to provide a boost to the development of electricity assets in Nigeria.

---

[1] While some states (e.g., Oyo and Enugu States) have enacted their own laws, some states (e.g., Lagos state) are still in the process of law making and are expected to enact their electricity laws before the end of 2024.

This piece examines this phenomenon and potential ways investors can protect themselves while getting the states to keep to their own end of the bargain.

Boulevard of Broken Dreams

PPPs in Nigeria are subject to Nigeria's public procurement laws,[2] and are most times initiated through private entities responding to solicitations and requests for proposals (**"RFPs"**) from relevant federal or state government entities, referred to as **"Procuring Entities"**. The RFPs will contain requirements to be met, and the most competent bidder is selected based on certain technical and financial considerations.

In response to these RFPs, investors typically prepare proposals, make these available to the Procuring Entities and await feedback. However, sometimes after receiving bids from eligible investors, the Procuring Entities either do not respond, or perhaps even after selecting a preferred bidder, may unduly delay the process, which often negatively affect the initial cost assumptions of the investor. Often, this is after investors have obtained commitments from financiers and structured their processes to accommodate the anticipated PPP with the relevant procuring entity.

In other scenarios, the investor sometimes directly approaches the procuring entity, relying on the rules for direct procurement provided in the procurement laws. Upon successful direct negotiations with the relevant procuring entity, the investor will typically extract a commitment from the procuring entity to grant them the requisite concession or rights to carry out the identified electricity project.

Relying on this commitment, an investor may obtain letters of comfort from fund providers and expend resources, and thereafter approach the procuring entity to formally document such commitment (in form of concessions for generation/distribution operations to designated customer clusters, direct power supply contracts to government entities, or other forms of documented rights), but may be bogged down in a slow bureaucratic process or outrightly stonewalled by the procuring authority, or the procuring authority may renege on prior commitments.

A question which becomes relevant at this stage is: ***why do procuring entities sometimes renege on prior commitments made to investors in the energy or infrastructure space?***

Several reasons can be given including political change or economic uncertainty due to low internally generated revenues, which may render the commitment of the previous government redundant.

Reneging of Prior Commitments by Procuring Entities: Impact on Investment Landscape

In assessing investment destinations, investors consider a destination's investment pulse, factoring in issues such as political stability and predictability, possible change in law and political institutions. In fact, stability and predictability are such huge considerations for investors that the concept of *political risk insurance* for energy projects has garnered momentum in recent years.

Governments are supposed to introduce and maintain policies, laws and programs that reduce the perception of risks while increasing investor confidence. However, where procuring authorities renege on promises or commitments made to intending investors in the relevant state's electricity infrastructure, that increases the political risk profile as well as the cost of raising capital for projects in the state, which negatively impacts such state's status as a viable investment destination.

Currently, each state's electricity sector is in the early growth stage. Hence, from preliminary engagements, investors can form opinions regarding the potential economic landscape of such state. Therefore, governments or Procuring Entities who consistently renege on commitments would fail to inspire the necessary confidence in investors looking

[2] The Nigerian public procurement laws at the federal level include the Infrastructure Concession Regulatory Commission Act (ICRA) 2005, the Public Procurement Act (PPA) 2007, the Fiscal Responsibility Act 2007, as well as a host of other ancillary legislation. In addition, certain states such as Lagos State and Ogun State have enacted laws to govern PPPs.

to commit hundreds of millions of dollars into such states' electricity industries, and broader economies.

Furthermore, such reneging acts by Procuring Entities may open the governments to litigation or arbitration. Investors can sue state governments on the basis that the relevant state government's Procuring Entity, by reneging on their commitments, caused economic losses[3]. Additionally, there is always a risk that such suit may result in an unfavourable decision for the state governments, exposing such states to avoidable liabilities.

Moreso, these reneging acts cause reputational damage. When the initial P&ID judgement (which later was overturned in Nigeria's favour) became public knowledge, it portrayed Nigeria as a country with weak contractual compliance metrics. Therefore, the ability of procuring authorities to make and keep commitments goes to the standing of the relevant government in local and international scenes and will impact on such state's ability to enter and/or raise funds from local or foreign sources, for relevant PPP projects.

Investor Options? Follow The Yellow Brick Road

Identifying a problem is easy, what is the solution? A few suggestions:

Stipulating an irreversible benchmark in public procurement laws

Investors can advocate and champion the amendment of existing PPP laws to include a benchmark upon the attainment of which the relevant procuring entity (the states in this case), will be estopped from reneging on commitments or be mandated to complete the PPP process.

In such a scenario, the law may provide that once a prospective concessionaire or PPP party meets certain thresholds, such as being selected as the preferred bidder or awarded a contract, or has incurred certain predevelopment costs, the relevant procuring entity will be prohibited from resiling from their commitment and compelled, at least, to complete the competitive procurement/post-procurement or direct procurement processes.

Also, penalties may be put in place to discourage non-compliance. However, to accommodate and alleviate concerns the government may have and to account for unexpected situations, there may be carve-outs to capture extraordinary circumstances where the government can renege on commitments or call off competitive procurements, such as economic downturns, security concerns, change in law etc. An amendment, along these lines, of existing PPP laws will incentivize and strengthen investor confidence in developing energy projects.

Accommodating renegotiations

Granted, changing economic conditions, changes in law and policies, and unforeseen events, can (validly) make it impracticable for states to follow through with promises or commitments to investors. As such, investors may consider having *renegotiation provisions* inserted into preliminary contracts (where available) or having the option of renegotiation included in conversations between them and Procuring Entities.

Renegotiation gives the parties the room to adapt PPP arrangements to peculiar situations or changes in circumstances, while at the same time, preserving the relationship between the parties. Where states are aware that they can renegotiate or requalify potential PPP arrangements with potential investors, they will be more incentivized to return to the deal table whenever there is any limiting factor, rather than reneging on existing promises or commitments.

[3] At the federal level, Nigeria is consistently the subject of suits for breach of contractual obligations. In 2022, the Nigerian government settled a long-standing dispute with Global Steel Holding by agreeing to pay $496 million. Global Steel's lawsuit stems from the cancellation of a 2007 contract to update Nigeria's dormant steel mills among other obligations.

Sunrise Power was also awarded and paid $200 million for breach of contract in a similar case. The Nigerian government had signed a BOT contract with Sunrise Power in 2003 for the Mambilla Power Project. (Báyọ̀dé P Akọ́mọláfé, 'Questions: Taming Nigeria's unending contractual blunders' (*LinkedIn*, 6 September 2022).

Ceding more control/returns to the states

Parties are often incentivized to act in the interest of a partnership to the degree of their stake in such partnership. Sometimes, the reason states are quick to renege on promises, commitments or awarded contracts is because they stand to lose very little and can replicate any benefits from an energy or PPP arrangement with a different investor. Investors looking to protect their position can offer more to the government, in terms of equity or control in the venture and can perhaps even further tie government entitlements to the viability of the project, or the project reaching certain stipulated milestones. When governments have a higher stake, and therefore more to lose, they may be less likely to renege on prior commitments.

Exploring the principle of promissory estoppel

Promissory estoppel is an equitable remedy that exists where one party has, by word or conduct, made a promise or assurance to another party, with the intention to effect legal or binding relations[4]. The remedy prevents the maker of a promise from resiling from it, even if it is not supported by any consideration[5]. While we note that there may be difficulty extending this principle to discussions with Procuring Entities due to sovereign immunity or protection of public interest[6], investors may consider exploring claims under this principle, especially where they have incurred significant predevelopment costs due to reliance on a procuring entity's promises or commitments. However, we note that sometimes, investors may argue the business need of maintaining a harmonious relationship the government, and therefore may not pursue this line of action.

Conclusion

Certainly, the government plays a crucial role in investments in energy infrastructure development. In the context of the electricity industry, state governments currently wield enormous power over the investment landscape. Unfortunately, investors have to grapple with issues such as deliberate reneging of promises or prior commitments by Procuring Entities. While it may not be possible for this risk to be eliminated, investors can take active steps, as suggested in this piece, to protect their interests.

However, to make their electricity markets conductive to investments, state governments are implored to honour commitments made to investors, and consider amending existing procurement laws to include thresholds, upon which states will be precluded from reneging on PPP commitments.

Additionally, state governments may provide enforceable risk mitigation instruments such as bank guarantees and ISPOs[7], backed by relevant state laws. These, along with a working judicial arm interpreting such reforms, will boost investor confidence.

[4] See *TIKA-TORE PRESS LTD v. ABINA & ORS* (1973) LPELR-3245(SC); *MTN (NIG) COMMUNICATION LTD V. CORPORATE COMMUNICATION INVESTMENT LTD* (2019) 9 NWLR (PT. 1678) 427 at 457 - 406.

[5] *PDP & ORS v. GUSAU & ORS* (2022) LPELR-58924(CA).

[6] See *Tolliver v. Federal Republic of Nigeria*, 265 F. Supp. 2d 873 (W.D. Mich. 2003) where Mr. Tolliver sued the FRN for breaching a contract for consulting services provided to the NNPC and argued that even though there was no formal written contract, the government should be bound by promissory estoppel. The court did not decide the case based on promissory estoppel but dismissed the case on other grounds, primarily because Tolliver failed to establish a binding contract with the Nigerian government.

[7] Irrevocable Standing Payment Orders, tied to a designated internally generated revenue account.