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A MODEL WITHOUT A MANDATE? THE NIGERIA MODEL PPP AGREEMENT AND THE LIMITS OF STANDARDISATION

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Introduction

Nigeria's infrastructure deficit remains one of the most significant impediments to the country's economic growth and social development. It is well established that public revenue alone cannot address this deficit. The resultant effect is that private capital has become central to the development of roads, power, and ports, amongst other infrastructure.

Federal concessions have been negotiated one transaction at a time for nearly two decades under the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act 2005 (**"the ICRC Act" or "the Act"**), with step-in rights, compensation on termination and the treatment of lenders settled afresh in each case. The outcome frequently turned on which ministry was at the table and which adviser it had retained. Lenders responded by pricing that uncertainty into their terms, and in several transactions, they declined to assume the risk altogether.

To address these issues ad uncertainty, the Infrastructure Concession Regulatory Commission (**"the Commission"**) has issued the Model Public Private Partnership Agreement (**"the Model Agreement"**), an instrument whose commercial rationale is not in doubt but whose legal foundation should be viewed with a microscopic lens, because that foundation will ultimately determine what the Model Agreement is worth to an agency negotiating a concession and to a lender pricing one.

In this article, we examine three major questions:
(a) what legal status the Model Agreement has;
(b) whether the ICRC Act confers on the Commission the power to prescribe contractual terms that would be binding on ministries, departments and agencies (**"MDAs"**) and their private counterparties; and
(c) whether a lender may assume the position of a concessionaire under a direct agreement without a fresh procurement.

The Model Agreement in Context

The Model Agreement, designated Version 1.0 and issued in April 2026, was developed with the Federal Ministry of Justice and presented to MDAs at a stakeholder engagement session held in Abuja in June 2026. It comprises thirty clauses together with schedules which include a Step-In Protocol and a Contract Management, Reporting and Performance Monitoring Framework.

Its coverage is wide, extending to risk allocation, default and termination, lender protections, insurance, force majeure, change in law, and anti-corruption compliance. The diModel Agreement equally incorporates Arbitration as the mechanism for resolving disputes, with Abuja being the seat of Arbitration and the Arbitration and Mediation Act 2023 being the applicable dispute resolution law. Its principal innovation is the direct agreement, under which lenders may cure a concessionaire's default and step in to preserve a distressed project before termination becomes inevitable.

The instrument is, however, highly regulated in the field. The National Policy on Public Private Partnerships was approved by the Federal Executive Council in 2009 and revised in 2021, while the Infrastructure Concession Regulatory Commission Public

Private Partnership Regulations 2014, made under section 34 of the Act, contain the procedural rules governing federal projects and are acknowledged in the Model Agreement itself, which requires the concessionaire to be a special purpose vehicle and defines hand-back requirements by reference to Regulation 29. The Commission has in addition issued a PPP Regulatory Notice dated 11 August 2025 (**"the Notice"**), setting out the approval and compliance requirements presently applicable to all federal PPP projects.

Two features of that framework are material to the present enquiry. The first is that the Commission has previously made subsidiary legislation, one of which is the 2014 Regulations, while the Model Agreement was neither made under it nor scheduled to those Regulations.

The second, and the more consequential, is that the language of compulsion is found in the Notice rather than in the Model Agreement; three of the compulsion paragraphs are hereby paraphrased:
(a) paragraph 3.3 requires every MDA to obtain the Commission's Certificate of Compliance for every PPP project as a prerequisite to approval, and provides that any approval granted without a Certificate duly issued by the Commission shall be null and void;
(b) paragraph 3.4 provides that the terms and conditions of a project certified by the Commission shall not be altered without its written approval; and
(c) paragraph 3.6 provides that the Commission will lead project negotiations.

Mandatory, Persuasive or a Default Form?

The Model Agreement is preceded by an ICRC Guidance Note on its use. The Guidance Note directly addresses the question of the legal status and form of the Model Agreement by providing as follows:
(a) paragraph 1 describes the Model Agreement as a reference framework for MDAs in structuring, negotiating and implementing PPP projects;
(b) paragraph 2, headed "Nature and Status of the Model Agreement", states that the Guidance Note is intended solely as interpretive guidance, that it does not create contractual or legal rights, and that the Model Agreement should not be treated as a one-size-fits-all template;
(c) paragraph 3 requires agencies to ensure that the Model Agreement is not adopted without proper modification;
(d) paragraph 4 provides that nothing in the document derogates from applicable law, and that use of the template does not replace or override compliance with the ICRC Act, the Regulations or the Guidelines, while requiring all adapted agreements to be submitted to the Commission for review as part of the statutory approval process; and

Taken on its own terms, therefore, the instrument is persuasive and nothing more. It disclaims legal effect and requires modification rather than adoption, and it is neither a prescribed form nor subsidiary legislation, nor has it been gazetted. A concessionaire or a lender is bound by its provisions only to the extent of its incorporation in the agreement executed between the parties.
That, however, is not the crux of the matter, because the Commission does not rely on the template to compel its own use; rather, it relies on the Certificate of Compliance. An agency may depart from the Model Agreement, but any departure must survive the Commission's review. Where it does not, the agency may be unable to obtain certification, and an approval granted without the compliance certificate is void under paragraph 3.3 of the Notice. Clause 30.7.2 carries the same control into the operational phase by providing that no amendment to an executed agreement is effective except with the written approval of the Commission.

The two characterisations which the Commission has offered is, far-fetched. The Model Agreement is to be understood as a default form which applies unless the Commission accepts a reason for departing from it, the sanction for an unapproved departure being administrative rather than legal.

That distinction carries practical consequences. If the Model Agreement were subsidiary legislation, it would carry the force of law, and a concession which does not conform to it could be challenged before the courts as illegal. It is not subsidiary legislation, and a non-conforming concession is therefore not unlawful merely because it departs from the template. The exposure lies elsewhere. An agency which cannot justify its departures risks a refusal of certification, and the private party risks an approval rendered void for want of a certificate which the agency, and not the private party, was under a duty to obtain. The default therefore falls on the public party of the transaction, and the loss on the private party.

The Power to Prescribe Contractual Terms

The Act empowers the Commission to make rules and regulations from time to time. The enabling sections are clear and unambiguous. Sections 19, 33 & 34 of the Act particularly define these powers:

(a) section 34(1) empowers the Commission, with the approval of the President, to make such regulations as in its opinion are necessary or expedient for giving full effect to the provisions of the Act and for the due administration of those provisions;

(b) section 34(2) empowers the Board to issue guidelines to give full effect to the Act;

(c) section 19© permits the Board, subject to the Act, to make, alter and revoke rules and regulations for carrying on the functions of the Commission, a power directed at the internal operations of the Commission rather than at third parties; and

(d) section 33 grant powers to the President to give the Commission directives of a general nature or relating generally to matters of policy.

Although Version 1.0 was issued in April 2026 and presented at an engagement session in June, it was not made as a regulation, it did not receive the approval of the President for that purpose, and it has not been scheduled to the 2014 Regulations by amendment.

What the Act omits becomes clear when compared with the procurement regime, in that section 5(m) of the Public Procurement Act 2007 directs the Bureau of Public Procurement to prepare and update standard bidding and contract documents, a provision for which the ICRC Act has no equivalent. Section 20 of the Act confers functions of custody, monitoring and supervision, namely:

(a) to take custody of every concession agreement made under the Act and monitor compliance with its terms and conditions;

(b) to ensure the efficient execution of any concession agreement or contract entered into by the Government;

(c) to ensure compliance with the provisions of the Act; and

(d) to perform such other duties as the President may direct.

Those functions would, in our view, support a regulation prescribing a standard form, on the footing that such a regulation is an incident of the compliance function. However, these functions are a considerably thinner foundation for a standard form issued without any enabling regulation.

A more significant limitation applies whichever route is taken, which is that a regulation binds MDAs but not their counterparties. A concessionaire is a private company which has made no submission to the Commission's regulatory authority and owes it no statutory duty, and whatever the Commission may prescribe, the concessionaire is bound because it has executed the agreement and for no other reason.

The question therefore divides in two, in that, as against MDAs, the Act would support prescription by regulation, whereas as against private counterparties it would not, and no instrument which the Commission is competent to issue will alter that position. The leverage of the Commission over the private side is necessarily indirect, being exercised through the agency, at the point of certification and before signature.

A further limitation is that a prescribed form cannot validate a term which the Act itself makes conditional, and two provisions of the Model Agreement illustrate the point.

The first is the regulatory levy in Clause 6.3, which requires the concessionaire to pay one per cent of the project's gross revenues to the Commission throughout the concession, remitted in real time and described as statutory regulatory fees. Act however does not impose that charge. Sections 19 and 20 confers no power to levy on concession revenues, and a charge described as statutory in an instrument which is not a statute is without foundation.

The second is government support, in respect of which Clause 7.1.2 obliges the Grantor to make availability payments where project revenues are insufficient to meet debt service, while Clause 5.4.1(h) makes the execution of government support agreements, including guarantees and subsidies, a condition precedent. Section 3 of the Act nevertheless permits no ministry, agency, corporation or body to give a guarantee, letter of comfort or undertaking in respect of a concession agreement except with the approval of the Federal Executive Council, and since standardising those provisions does not supply that approval, a template cannot dispense with a statutory condition.

Step-In, Substitution and Fresh Procurement

The direct agreement is the feature of the Model Agreement on which the bankability of a project most depends, and it is at the same time the feature least supported by statute, the ICRC Act nowhere contemplating step-in, novation or the substitution of a concessionaire at the instance of its lenders. The template nevertheless constructs the machinery with care:

(a) Clause 5.3.3(b) makes the execution and effectiveness of the Direct Agreement a condition precedent which neither party may waive;

(b) Clause 18 permits lenders to cure a material breach and to step in, either directly or through a nominee or substitute entity, any substitute being subject to the approval of the Grantor, which is not to be unreasonably withheld;

(c) Clause 18.5 provides that the Direct Agreement prevails where it conflicts with Clause 18;

(d) paragraph 2.2 of the Step-In Protocol gives lenders the first right to step in within the cure period, and confines the Grantor to cases of immediate risk to public safety or critical service continuity, or to a failure by lenders to act; and

(e) Clause 28.2.1© confers on lenders the right to procure the substitution of the concessionaire with a suitable replacement entity, subject to the Grantor's consent.

The question which arises is whether such a substitution requires a fresh competitive process. Section 4(1) requires the agency, upon an approval for any project or contract under the Act, to invite open competitive public bids by publication in at least three national newspapers of wide circulation, and section 4(2) requires the award to be made to the bidder who, having satisfied the prequalification criteria, submits the most technically and economically comprehensive bid, the only exception being the narrow one in section 5, under which direct negotiation is permitted where, after advertisement, a single contractor or project proponent applied or submitted a bid, or only one met the prequalification requirements. Lender substitution is not among those circumstances.

On the better construction, section 4 does not apply to a substitution of this kind, since the section attaches to the award of a project or contract approved under the Act, and a substitution effected under a direct agreement is neither a fresh approval nor a new project, the concession subsisting and only the identity of the private counterparty changing. That is the construction on which lenders will rely, and it is a defensible one.

A construction is not, however, the same as an authority, and three provisions of the Act pull in the opposite direction:

(a) section 4(3), which binds the members of a bidding consortium jointly and severally, and makes the withdrawal of any member before or during implementation a ground for review or possible cancellation of the contract;

(b) section 2(3), which obliges the agency to ensure that the project proponent possesses the financial capacity, relevant expertise and experience to undertake the project; and

(c) section 36, which defines a project proponent by reference to an adequate financial base, consisting of equity and firm commitments from reputable financial institutions sufficient to cover the total estimated cost of the project.

Section 4(3) thus treats a change in the composition of the private side as an event calling for scrutiny rather than as an ordinary transfer of rights, while sections 2(3) and 36 set a standard which the incoming party must meet, so that a substitute which cannot answer those descriptions is not a party which the Act recognises.

Clause 28.6 goes further than the Act permits, requiring the prior written consent of the Grantor and of the Commission to any direct or indirect change of control of the concessionaire but dispensing, at paragraph (a), with that consent where the change results from the enforcement of security or the exercise of rights by finance parties under the Direct Agreement. The template therefore removes the regulator from the very transaction in which the identity of the private partner is most likely to change, and it purports to do so by contract. But a contract cannot displace a consent requirement imposed by statute, and the duty of the agency under section 2(3) does not cease upon the enforcement of security.

The Public Procurement Act 2007 raises a narrower question which, in our view, does not govern a concession award at all. Were a concession award a procurement of works and services by a federal agency within section 15 of that Act, section 24 would require open competitive bidding, section 42 would govern direct procurement and a certificate of no objection might be required under section 6(1)(b); but a concession under which the private party takes revenue risk is not an appropriation-funded acquisition, and the ICRC Act supplies its own bidding regime as the specific statute, so that on that view the Public Procurement Act governs neither the award nor a substitution within it.

The boundary between the two regimes remains, however, only partly settled, for although the published practice of the Commission is to apply the procedures of the Bureau for bid submission, opening and evaluation, that practice does not address substitution, and there is at present neither a joint instrument of the two regulators nor any decided authority on the point.

The answer to the third question is accordingly a qualified affirmative, in that a lender may take the position of the concessionaire under a direct agreement without a fresh procurement, but that result rests on a construction of section 4 rather than on any authority conferred by it, and it holds only where the substitute satisfies sections 2(3) and 36 and the consent of the Commission is obtained notwithstanding Clause 28.6(a), which is a thin foundation for a facility of fifteen or twenty years.

Putting the Model Agreement on a Statutory Footing

Three steps would, in our view, give the Model Agreement the force which its purpose requires.

Regulations Under Section 34(1)

The Model Agreement should be scheduled to the 2014 Regulations by an amendment made under section 34(1), with the approval of the President and duly gazetted, and that amendment should also provide a procedure for the approval of deviations and require that the reasons for any deviation be recorded. Such a step would place the template in subsidiary legislation rather than in a guidance note which disclaims legal effect, and it would convert the present administrative sanction into a legal one as against MDAs. Failing that, guidelines issued by the Board under section 34(2) would at least trace the instrument to the Act.

Amendment of the Act

Two amendments to the Act are required, the first being an express power to prescribe standard contract documents, on the model of section 5(m) of the Public Procurement Act 2007, and the second an express substitution regime carving qualifying lender transfers out of section 4, subject to defined criteria, to satisfaction of sections 2(3) and 36 by the substitute, and to the consent of the Commission. Until those provisions are enacted, the direct agreement rests on construction, and Clause 28.6(a) rests on nothing.

Reconciliation With the Act and With the Commission's Own Instruments

The levy in Clause 6.3 should be withdrawn unless and until it is imposed by an Act of the National Assembly, and the provisions on availability payments and government support should be reconciled with section 3, so that a concessionaire is not left holding a payment covenant given without the approval which the Act requires. The template should also be published and version-controlled, given that section 11 of the Act provides that no agreement reached in respect of the Act shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the Act, and a living document must therefore be drafted so that later versions cannot reach back into concessions already executed.

Conclusion

The Model Agreement is a considered response to a real constraint. The absence of a federal standard form had long impeded bankability, and the direct agreement, the Step-In Protocol and the compensation framework together address the three matters which lenders have most often found unresolved in Nigerian concessions. None of that is in dispute.

What is in dispute is the character of the instrument. It is not mandatory, because it disclaims legal effect and calls for modification rather than adoption. Neither is it merely persuasive, because an agency which departs from it without the agreement of the Commission cannot obtain the certificate on which the validity of its approval depends. It is best understood as a default form, carrying administrative rather than legal force.

That force reaches only one side of the transaction. As against MDAs, the Act would support prescription by regulation, and the

Commission has exercised that power before, though it did not exercise it here. As against private counterparties, the Act would not support prescription at all, and the leverage of the Commission over them is exercised indirectly, through the agency and before signature.

Standardisation is nonetheless worth having, for it shortens negotiation, lowers the cost of legal review and removes the least satisfactory drafting from the system. What it cannot do is supply an authority which the enabling statute withholds. Until the Model Agreement is placed in an instrument having the force of law, and the Act is amended to accommodate the substitution which the direct agreement contemplates, it remains what its own Guidance Note declares it to be: a reference framework, and not a mandate.