

INFRASTRUCTURE CONCESSION REGULATORY COMMISSION (ESTABLISHMENT, ETC) ACT, 2005

EXPLANATORY MEMORANDUM

This Act provides for the participation of private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements; and the establishment of the infrastructure Concession Regulatory Commission to regulate, monitor and supervise the contracts on infrastructure or development projects

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**A BILL
FOR
AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF THE INFRASTRUCTURE
CONCESSION REGULATORY COMMISSION, AND FOR RELATED MATTERS**

Commencement

ENACTED by the National Assembly of the Federal Republic of Nigeria-

PART I — PRIVATE SECTOR PARTICIPATION IN FEDERAL INFRASTRUCTURE

1.- (1) As from the commencement of this Act, any Federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contract with or grant concession to any duly pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure that is financially viable or any development facility of the Federal Government in accordance with the provisions of this Act.

Conduct with Private Sector for the construction, maintenance of Federal Infrastructures, Etc.

(2) This Act applies to investment and development projects relating to any infrastructure of any Federal Government ministry, agency, corporation or body.

2.- (1) Every Federal Government Ministry, Agency, Corporation or body shall prioritize its infrastructure projects and such priority projects may be qualified for concession under this Act.

(2) The projects mentioned in Subsection (1) of this section shall be submitted to the Federal Executive Council for approval on the recommendation of the relevant sector, ministry or agency prior to entering into any contract under Section 1 of this Act.

Priority Projects

(3) In entering into any contract or granting any concession under section 1 of this Act, the Federal Government Ministry, Agency, Corporation or body shall ensure that the project proponent possesses the financial capacity, relevant expertise and experience in undertaking such infrastructure development or maintenance.

(4) The Commission established under section 14 of this Act shall publish, in the Federal Gazette at least three national newspapers having wide circulation in Nigeria, and such other means of circulation, the list of projects eligible for contract for the financing, construction, operation or maintenance of any infrastructure under this Act.

3. No Federal Government Ministry, Agency, Corporation or body shall give any guarantee, letter of comfort or undertaking in respect of any concession agreement made pursuant to this Act, except with the approval of the Federal Executive Council.

Guarantee on Concession Agreement.

4.- (1) Upon an approval for any project or contract for financing, construction, operation or maintenance of any infrastructure or development project under this Act, the Federal Government Ministry, Agency, Corporation or body concerned shall, by publication in at least three national newspapers having wide circulation in Nigeria, and such other means of circulation, invite open competitive public bid for such project or contract approved under this Act.

Competitive public bidding for projects and contracts.

(2) With respect to projects under this Act, the concession contract shall be awarded to the bidder who, having satisfied the pre-qualification criteria, submits the most technically and economically

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comprehensive bid.

(3) Where a consortium participates in a bid under this section, there shall be proof by the consortium that all its members shall be bound jointly and severally under the contract and the withdrawal of any member of the consortium before or during the implementation of the project may be a ground for review or possible cancellation of the contract.

5.- Notwithstanding Section 4 of this Act, and if after advertisement in accordance with section 4 of this Act –

Circumstances where competitive bidding for contracts may not be necessary

(a) only one contractor or project proponent applied or submits a bid or proposal, or

(b) only one contractor or project proponent meet the prequalification requirements, the Ministry, Agency, Corporation, body may undertake direct negotiation without competitive bidding for any contract to be entered into pursuant to section 1 of this Act.

6. The duration of any concession shall be as may be specified in the agreement or contract governing the concession.

Duration of Concession

7. (1) Any project proponent or contractor who enters into any contract for financing, construction, operation or maintenance may, subject to the provisions of the concession contract, recover his investments.

Recovery of Investment, etc.

(2) Notwithstanding Subsection (1) of this section, the project proponent or contractor shall –

(a) undertake appropriate insurance policy on the concession with an insurance company approved by the National Insurance Commission; and

(b) undertake the maintenance and repairs of the infrastructure or facility during the subsistence of the contract.

(3) Subject to subsection (4) of this section, the amount expended by any project proponent or contractor who enters into any contract for financing, construction, operation or maintenance under any concession under this Act may be repaid by the relevant Ministry, Agency, Corporation, or body to such proponent or contractor, by way of amortization payments.

(4) Any contractor to whom any concession has been granted under this Act shall make payment to the Federal Government, of such sum and at such intervals, from the proceeds realized from the implementation of the concession as may be provided in the concession-contract or agreement.

8. Project cost shall be duly authenticated by the relevant Ministry or government department and relevant qualified professional to determine correctly the amount to be repaid by amortization.

Authentication of Project cost.

9. There shall be a Special Concession Account into which shall be credited money accruing to the government and from which shall be defrayed monies to be paid in respect of the concession scheme.

Establishment of Special Account, etc.

10. The Commission and Federal Government Ministry, Agency, Corporation or body shall have the power at any reasonable hour during the day time to enter upon and inspect any land or asset comprised in any concession granted or contract executed pursuant to this Act for the construction or erection of any infrastructure project and it shall be the duty of the project proponent, the contractor or anyone acting on its behalf to permit and give free access to enter and inspect.

Power to inspect

11. No agreement reached in respect of this Act shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the provisions of this Act.

Arbitrary variation of agreements

12. Subject to the provisions of this Act, the relevant Federal Government Ministry, Agency Corporation or body shall supervise the project in respect of which concession has been granted by it

Supervision of project under concession

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Right of way, etc

under this Act.

13. Every contractor to whom any concession has been granted under this Act shall have a right of way or easement in respect of any land or property near to or bordering the project site or facility as may be reasonably necessary for the proper implementation of the project under this Act.

PART II – ESTABLISHMENT OF THE INFRASTRUCTURE CONCESSION REGULATORY COMMISSION, ETC

14.- (1) There is established a body to be known as the Infrastructure Concession Regulatory Commission (in this Act referred to as "the Commission").

The establishment of the Infrastructure Concession Regulation, Commission, etc

(2) The Commission-

(a) shall be a body corporate with perpetual succession and a common seal;

(b) may sue or be sued in its corporate name; and

(c) may acquire, hold or dispose of any property, movable or immovable for the purpose of carrying out any of its functions under this Act.

(3). The headquarters of the Commission shall be located in the Federal Capital Territory, Abuja.

15.- (1) There is established for the Commission, a Governing Board (in this Act, referred to as "the Board") which shall have overall control of the Commission.

Establishment of the Governing Board for the Commission.

(2) The Board consists of-

(a) A part -time Chairman;

(b) the Attorney-General of the Federation;

(c) the Minister of Finance;

(d) the Secretary to the Government of the Federation;

(e) the Governor of the Central Bank of Nigeria;

(f) one person each -from the six geopolitical zones of Nigeria who shall each have cognate experience and expertise in law, business administration, engineering, economics or public administration and two of whom shall be women; and

(g) the Director-General of the Commission.

(3) The Chairman and members of the Commission, other than ex-officio members, shall be appointed by the President subject to confirmation by the Senate.

(4) The supplementary provisions set out in the Schedule to this Act shall have effect with respect to the proceedings of the Board and the other matters mentioned therein.

Schedule

16.- The Chairman and other members of the Commission, other than ex-officio members shall each hold office-

Tenure of office

(a) for a term of 4 years in the first instance and may be re-appointed for a further term of 4 years; and

(b) on such terms and conditions as may be specified in his letter of appointment.

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17.- Notwithstanding the provisions of Section 15 of this Act, a member of the Board shall cease to hold office as a member of the Board if-

Cessation of
Membership

- (a) he resigns his appointment as a member of the Board by notice, under his hand, addressed to the President;
- (b) he becomes of unsound mind;
- (c) he becomes bankrupt or makes a compromise with his creditors;
- (d) he is convicted of a felony or of any offence involving dishonesty or corruption,
- (e) he becomes incapable of carrying out the functions of his office either arising from an infirmity of mind or body; or
- (f) the President is satisfied that it is not in the interest of the Commission or in the interest of the public for the person to continue in office and the President removes him from office.

(2) Where a vacancy occurs in the membership of the Board, it shall be filled by the appointment of a successor to hold office for the remainder of the term of office of his predecessor, so however that the successor shall represent the same interest as his predecessor.

Emolument etc of
members

18. The Chairman and members of the Commission other than ex-officio members shall be paid such emoluments, allowances and benefits as may be recommended by the Revenue Mobilization Allocation and Fiscal Commission.

PART III – FUNCTIONS AND POWERS OF THE COMMISSION

19. The Board shall have power to-

- (a) provide the general policy guidelines relating to the functions of the Commission;
- (b) manage and superintend the policies of the Commission;
- (c) subject to the provisions of this Act, make, alter and revoke rules and regulations for carrying on the functions of the Commission;
- (d) determine the terms and conditions of service of the employees of the Commission;
- (e) fix the remuneration, allowances and benefits of the staff and employees of the Commission in consultation with the National Salaries, Income and Wages Commission; and
- (f) do such other things which in its opinion are necessary to ensure the efficient performance of the functions of the Commission under this Act.

Powers of the
Commission;

20. The Commission shall-

- (a) take custody of every concession agreement made under this Act and monitor compliance with the terms and conditions of such agreement;
- (b) ensure efficient execution of any concession agreement or contract entered into by the Government;
- (c) ensure compliance with the provisions of this Act;
- (d) perform such other duties as may be directed by the President, from time to time, and as are necessary or expedient to ensure the efficient performance of the functions of the Commission under this Act.

Functions of the
Commission

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PART IV - STAFF OF THE COMMISSION

21. (1) There shall be for the Commission, a Director-General who shall-

Director-General of
the commission.

- (a) be appointed by the President subject to confirmation by the Senate;
- (b) be the chief executive and accounting officer of the Commission.
- (c) be responsible for the execution of the policy and day-to-day administration of the Commission, and
- (d) be a member and the secretary to the Commission.

(2) The Director-General shall hold office-

- (a) for a term of 4 years in the first instance and may be reappointed for a further term of 4 years; and
- (b) on such terms and conditions as may be specified in his letter of appointment.

(3) Notwithstanding the provisions of Subsection (2) of this section, the Director-General may-

- (a) resign his appointment by a notice in writing under his hand, addressed to the President through the Board; or
- (b) be removed by the President for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misconduct or corruption.

22. The Commission may, subject to the approval of the Board, appoint such other staff as it may deem necessary and expedient, from time to time:-

Other staff of the
Commission

- (a) for the proper and efficient performance of the functions of the Commission; and
- (b) on such terms and conditions as may be determined; from time to time; by the Board.

23. (1) The Commission shall be approved for the purpose of the Pensions Act, and accordingly, officers and employees of the Commission shall be entitled to pensions, gratuities and other retirement benefits as are prescribed -under the Pensions Act.

Pensions Act, 2004

(2) Without prejudice to the provisions of subsection (1) of this section, nothing in this Act shall prevent the appointment of a person to any office on terms and conditions, which preclude the grant of pension, gratuity or other retirement benefits in respect of that office.

(3) For the purposes of the application of the provisions of the Pensions Act, any power exercisable by a Minister or other authority of the Federal Government, other than the power to make regulations, under Section 23 thereof, is hereby vested in and shall be exercisable by the Board and not by any other person or authority.

PART V- FINANCIAL PROVISIONS

24. The Commission shall establish and maintain a fund to which shall be paid-

Funds of the
Commission

- (a) grants from the Federal Government;
- (b) all subvention and budgetary allocations from the Federal Government;
- (c) gifts, loans, grant-in-aid from national, bilateral and multilateral organizations and agencies.

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(d) rents, fees and other internally generated revenues from the services provided by the Commission; and

(e) all other sums accruing to the Commission, from time to time.

25. The Commission may, from time to time, apply the proceeds of the Fund established under Section 24 of this Act-

Expenditure of the Commission.

(a) to the cost of administration of the Commission;

(b) to the payment of the emoluments, allowances and benefits of members of the Board and for reimbursing members of the Board or of any committee set up by the Board and for such expenses as may be expressly authorized by the Board;

(c) to the payment of the salaries, fees or other remuneration or allowances, gratuities and pensions, and other benefits payable to the staff and other employees of the Commission, so however that no payment of any kind under this paragraph (except such as may be expressly authorized by the Board) shall be made to any person who is in receipt of emolument from the Government of the Federation or of a State;

(d) for the development and maintenance of any property vested in or owned by the Commission;

(e) for maintaining general financial reserves subject to general or specific directives that may be given in that behalf by the President in accordance with the provisions of this Act; and

(f) for and in connection with all or any of its functions under this Act.

26. (1) The Commission shall, not later than 30th September in each year, submit to the President an estimate of its expenditure and income (including payments to the Commission Fund) for the next succeeding year.

Annual Estimates and Accounts

(2) The Commission shall keep proper accounts in respect of each year and proper records in relation to those accounts and shall cause its accounts to be audited within six months after the end of each year by auditors appointed from the lists and in accordance with the guidelines supplied by the Auditor General of the Federation.

27. (1) The Commission shall prepare and submit to the President not later than 30th June in each year a report in such form as the President may direct on the activities of the Commission during the immediate preceding year, and shall include in the report a copy of the audited accounts of the Commission for that year and of the auditors report thereon.

Annual Reports

(2) The Auditor General of the Federation shall lay a copy of the report and the auditors report thereon before the National Assembly so soon after the receipt thereof .

28.- (1) The Commission may accept gift of land, money or other property on such terms and conditions, deemed lawful

Power to accept gifts

(2) The Commission shall not accept any gift if the conditions attached by the person or organization making the gift are inconsistent with the functions of the Commission under this Act.

PART VI – LEGAL PROCEEDINGS

29. Subject to the provisions of this Act, the provisions of the Public Officers Protection Act shall apply in relation to any suit instituted against any member or officer or employee of the Commission.

Limitation of suits against the Commission, etc. Cap 379 LFN, 1990.

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- 30.-** A notice, summons or other document required or authorised to be served on the Commission under the provisions of this Act or any other law or enactment may be served by delivering it to the Director-General or by sending it by registered post addressed to the Director-General at the principal office of the Commission Service of documents
- 31.-**(1) In any action or suit against the Commission, no execution or attachment of processes in the nature thereof shall be issued against the Commission unless not less than three month notice of the intention to execute or attach has been given to the Commission. Restriction on execution against property of the Commission
- (2) Any sum of money which by the judgment of any court has been awarded against the Commission shall, subject to any direction given by the court, where no notice of appeal against the judgment has been given, be paid from the Fund of the Commission.
- 32.** A member of the Board, the Director-General or any officer or employee of the Commission shall be indemnified out of the assets of the Commission against any liability incurred by him in defending any proceeding, whether civil or criminal, if the proceeding is brought against him in his capacity as a member, Director-General, officer or other employee of the Commission. Indemnity of officers

PART VII – MISCELLANEOUS PROVISIONS

- 33.** The President may give to the Commission such directives of a general nature or relating generally to matters of policy with regards to the exercise of it or his functions under this Act as he may consider necessary and it shall be the duty of the Commission to comply with the directives or cause them to be complied with. Directives by the President, etc.
- 34.** (1) The Commission may, with the approval of the President, make such regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions. Power to Make Regulations
- (2) Without prejudice to the generality of subsection (1) of this section, the Board may issue guidelines to give full effect to the provisions of this Act.
- 35.** (1) A member of the Board, the Director-General or any other officer or employee shall- Secrecy
- (a) not, for his personal gain, make use of any information which has come to his knowledge in the exercise of his powers or is obtained by him in the ordinary course of his duty as a member of the Board or as the Director-General, officer or employee of the Commission;
 - (b) treat as-confidential any information which has come to his knowledge in the exercise of his powers or is obtained by him in the performance of his duties under this Act;
 - (c) not disclose any information referred to under paragraph (b) of this subsection, except as required by law.
- (2) Any person who contravenes the provisions of subsection (1) of this section commits an offence and shall on conviction be liable to a fine of not less than N50,000 or imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.
- 36.-** In this Act- Interpretation
- "Board" means the Governing Board of the Commission established under Section 15 of this Act;
"Chairman" means the Chairman of the Governing Board of the Commission appointed under Section 15 of this Act.
"Commission" means the Infrastructure Concession Regulatory Commission established under Section 14 of this Act;
- "Concession" means a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure

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and the provision of any services;

"Contractor" means any person or body corporate who may or may not be a project proponent who enters into a contract or has been granted a concession by any Federal Government Ministry, agency, corporation or body and undertakes to construct any infrastructure or facility or supply any equipment for any infrastructure or facility under this Act;

"Construction" means any form of engineering work whether civil, structural, mechanical or electrical and includes rehabilitation, improvement, expansion, alteration and related works and activities, supply and installation of equipment or materials;

"Director-General" means the Director-General of the Commission appointed under Section 21 of this Act.

"infrastructure" includes development projects which, before the commencement of this Act, were financed, constructed, operated or maintained by the Government and which, after the commencement of this Act, may be wholly or partly implemented by the private sector under an agreement pursuant to this Act including power plants, highways, seaports, airports, canals, dams, hydroelectric power projects, water supply, irrigation, telecommunications, railways, interstate transport systems, land reclamation projects, environmental remediation and clean-up projects, industrial estates or township development, housing, government buildings, tourism development projects, trade fair complexes, warehouses, solid wastes management, satellite and ground receiving stations, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council;

"Member" means a member of the Governing Board of the Commission and includes the Chairman; "New investment and development projects" include-

(a) any project involving any infrastructure, not existing at the time the concession is being made, that will require the injection of substantial funds or resources to design, construct, build, maintain or operate such infrastructure, or

(b) any project involving any infrastructure, existing at the time the concession is being made, that will require the injection of substantial funds or resources to repair, service, overhaul, improve, maintain or sustain such infrastructure;

"President" means the President of the Federal Republic of Nigeria;

"Project Proponent" means any person or body corporate who has contractual responsibilities for the project and who has adequate financial base to implement the said project consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project.

"Ex-officio" means the Attorney -General of the Federation, Minister of Finance, Secretary to the Government of the Federation and Governor of Central Bank of Nigeria.

37. This Act may be cited as the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005

Short title

Schedule

Section 15 (4)

Proceedings of the Board

1. Subject to this Act and Section 27 of the Interpretation Act, the Board shall have power to regulate its proceedings and may make standing orders with respect to the holding of its meetings, and those of its committees, notices to be given, the keeping of minutes of its proceedings, the custody and production for inspection of such minutes and such other matters as the Commission may, from time to time, determine.

Supplementary Provisions relating to the Commission

2. (i) There shall be at least four ordinary meetings of the Board in every calendar year and subject thereto, the Board shall meet whenever it is covered by the Chairman, and if the Chairman is requested to do so by notice given to him by not less than 3 other members, he shall convene a

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meeting of the Board to be held within 14 days from the date on which the notice was given.

(ii) Every meeting of the Board shall be presided over by the Chairman and if the Chairman is unable to attend a particular meeting, the members present at the meeting shall elect one of their number to preside at the meeting.

3. The quorum of any meeting of the Board shall consist of the Chairman (or in an appropriate case, the person presiding at the meeting pursuant to paragraph 2 of this Schedule) and four other members.

4. The Board shall meet for the conduct of its business at such places and on such days as the Chairman may appoint.

5. A question put before the Board at a meeting shall be decided by consensus and where this is not possible, by a majority of the votes of the members present and voting

6. The Chairman shall, in the case of an equality of votes, have a casting vote in addition to his deliberative vote.

7. Where the Board seeks the advise of any person on a particular matter, the Board may invite that person to attend for such periods as it thinks fit, but a person who is invited by virtue of this paragraph shall not be entitled to vote at any meeting of the Board and shall not count towards the quorum.

Committees

8. The Board may appoint one or more committees to carry out on behalf of the Board such of its functions as the Board may determine and report on any matter with which the Board is concerned.

9. A committee appointed under paragraph 8 of this Schedule shall be presided over by a member of the Board and consist of such number of persons (not necessarily all members of the Board) as may be determined by the Board, and a person other than a member of the Board shall hold office on the committee in accordance with the terms of his appointment.

10. A decision of a committee of the Board shall be of no effect until it is confirmed by the Board.

Miscellaneous

11. The fixing of the seal of the Commission shall be authenticated by the signature of the Chairman and the Director-General or the Director-General and such other person authorized by the Board to act for that purpose.

12. A contract or an instrument which, if made or executed by any person not being a body Corporate, would not be required to be under seal, may be made or executed on behalf of the Commission by the Chairman or the Director-General or by any person generally or specifically authorized to act for that purpose by the Board.

13. A document purporting to be a contract, an instrument or other document signed or sealed on behalf of the Commission shall be received in evidence and, unless the contrary is proved, be presumed without further proof, to have been properly signed or sealed.

14. The validity of any proceedings of the Board or its committees shall not be affected by-

- a) any vacancy in the membership of the Board or its committee; or
- b) reason that a person not entitled to do so took part in the proceeding; or
- c) any defect in the appointment of a member.

15. Any member of the Board or committee thereof who has a personal interest in any contract or

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arrangement entered into or proposed to be considered by the Board or any committee thereof—

- a) shall forthwith disclose his interest to the Board or Committee; and
- b) shall not vote on any question relating to the contract or arrangement