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OVERCOMING FAILURE IN THE DESIGN AND IMPLEMENTATION OF PUBLIC-PRIVATE PARTNERSHIP PROJECTS: LESSONS FROM THE LEKKI TOLL ROAD CONCESSION

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ABSTRACT

At its inception, the Lekki toll road project was touted as the landmark public-private partnership (PPP) project in Nigeria and even in West Africa. The project was lauded for its status as the first road sector PPP project in Nigeria and anticipated to become the template for future PPP projects across the country. However, the project failed and the Lagos State Government had to buy back the concession from the private sector concessionaire. This article evaluates why the project failed through the lens of risk management. This is based on the theoretical premise that the most critical success factor for PPPs is proper risk allocation and management. Therefore, where risks are not properly identified, allocated and mitigated, it most likely leads to project failure. Consequently, using a case study methodology, this article examines how different project risks were managed in the Lekki toll road project, to identify why it failed. The study concludes that while financial, construction and currency risks were managed to varying degrees with limited success, the management of stakeholder opposition risk failed completely. It is believed that the lessons learned from this study will help in designing better PPP projects in Nigeria.

Keywords: Public-Private Partnerships; Toll Roads; Project Risks; Project Risk Management

1. INTRODUCTION

The Lekki toll road concession was supposed to be Nigeria's flagship road sector public-private partnership (PPP) project. Much hope had rested on the project's success as proof that the PPP model was viable in Nigeria. Many believed that if the project proved to be a success, it would most likely lead to a surge in the development of similar projects across the country and even around West Africa. Unfortunately, the Lekki Toll project failed due to a number of reasons and few studies have been carried out so far to analyse different aspects of the project, particularly the financing structure.¹ However, none of these studies have looked at the reason for the collapse of the Lekki Toll Road concession project solely from a risk management perspective. This manner of evaluation is important, since risk management is one of the most critical success factors for PPP projects.²

Risk is the exposure or chance of occurrence of events adversely or favorably affecting project objectives as a consequence of uncertainty.³ Therefore, risk is not always negative. For most entrepreneurs, the truism that risk leads to rewards is more or less

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¹ See for example, Peter Brocklebank 'Private Sector Involvement in Road Financing' SSATP Africa Transport Policy Program, Working Paper No. 102 (2014), 69. See also ERYescombe 'Public Private Partnerships in Sub-Saharan Africa: Case Studies for Policy Makers' UONGOZI Institute, 63; AC Otegbulu and F Famiyuwa 'Demand Assessment for Sustainability in Urban Toll Roads: Practicalities From the Contingent Valuation Method'(2014) 7 Ethiopian Journal of Environmental Studies & Management 339-352; R Osei-Kyei and PC Chan Albert 'Developing Transport Infrastructure in Sub-Saharan Africa Through Public-Private Partnership: Practice and Implications, (2015) Transport Reviews 1-17.

² Robert Osei-Kyei and Albert PC Chan, 'Review of Studies on the Critical Success Factors for Public-Private Partnership (PPP) Projects from 1990 to 2013' (2015) 33 International Journal of Project Management 1335-1346. See also Z Muhammad and F Johar 'Critical Success Factors of Public-Private Partnership Projects: A Comparative Analysis of the Housing Sector between Malaysia and Nigeria' (2019) 19 International Journal of Construction Management 257-269 <DOI: 10.1080/15623599.2017.1423163> accessed 05 May 2022.

³ JF Al-Bahar and KC Crandall 'Systematic Risk Management Approach for Construction Projects' (1990) 116 Journal of Construction Engineering and Management 533-546.

intuitive. From a project management point of view, risk reflects the underlying uncertainty of developing and operating projects. When viewed as an uncertain event, risk reflects the possibility of both threats and opportunities.⁴ Risk should therefore be managed in a way that not only avoids or reduces threats but also embraces opportunities. Viewing risk in this manner allows this article to take a more holistic look at the reasons for the collapse of the Lekki toll road concession.

It is important to note that risks are unavoidable in projects. They arise in all projects, however procured. Thus, it does not matter whether projects are delivered through traditional public procurement or PPPs, they still carry significant amounts of risks. In traditional public procurement, while it is sometimes erroneously assumed that risks are solely borne by the public sector, in reality they are merely passed on to the public as customers and taxpayers. Large-scale infrastructure projects potentially carry more risks than other business activities because of the complexity of coordinating a wide range of disparate and inter-related skills and activities.⁵ This complexity is further compounded where these large infrastructure projects are delivered as PPPs. The reason is that PPP projects tend to have multiple stakeholders whose objectives and interests differ and also the fact that the infrastructure delivered through PPPs is usually user specific.⁶ Thus, PPPs increase the parties' awareness of risk, as the management of risk is essential to achieving the larger project objectives and improving the respective parties' bottom lines. Indeed, the centrality of risks in PPPs has helped in raising the awareness of project risks to the level which public procurement had not been able to attain.⁷

PPP's are defined as long term relationships between public sector agencies and private sector entities under which the responsibility

⁴ J Froud 'The Private Finance Initiative: Risk Uncertainty and the State' (2003) 28 *Accounting Organizations & Society* 567-589.

⁵ L Shen et al, 'Role of Public Private Partnerships to Manage Risks in Public Sector Projects in Hong Kong' (2006) 24 *International Journal of Project Management* 587-594.

⁶ *ibid.*

⁷ D Grimsey and K Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance*, (Edward Elgar Publishing, 2007) 136.

for any or all of the combination of designing, financing, construction, management and operation of public infrastructure and utilities that were traditionally undertaken by the public sector are contractually shared and jointly undertaken by both the public and private sector, usually in proportion to the kind of risks each party can best carry.⁸ PPP as a concept is not new in Nigeria. It has been the policy choice of successive Nigerian governments. The deference to private sector finance for infrastructure has been a recurring theme in Nigeria's economic planning documents for years and was finally made concrete with the passage of the Infrastructure Concession Regulatory Commission (ICRC) Act in 2005.⁹ The ICRC Act does not specifically define PPPs. Instead, the Act relates to the granting of concessions by public sector parties to private sector project proponents for 'the financing, construction, operation or maintenance of infrastructure by whatever name called'. The scope of the Act appears to be very wide and the definition of 'concession' under the Act further lays credence to this. Under the ICRC Act, concessions are defined as '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'. Following the Act, the National Policy on Public Private Partnerships (PPP) also embraces a wide characterisation of the concept. It provides that 'PPPs includes a wide range of contractual arrangements between the public and private sectors.' Despite the opaque definition of PPPs under official Nigerian legal and policy instruments, there are however a general understanding of the certain essential attributes that a PPP transaction should have in practice.¹⁰

As in majority of countries, the main reason for the use of the PPPs for the delivery of infrastructure in Nigeria appears to be the need to attract alternative sources of finance to deliver public

⁸ George Nwangwu, 'Addressing the Impacts of the Covid-19 Pandemic on Public-Private Partnership Contracts' (2021) 12(2) *The Journal of Sustainable Development, Law and Policy* 368 – 397, 369.

⁹ George Nwangwu, 'PPPs in Nigeria: The Journey So Far' (2021) 8(3) *Nnamdi Azikiwe University Journal of Commercial and Property Law* 97 – 115, 99 – 101.

¹⁰ *ibid.*

infrastructure. There are however other benefits said to be inherent in the use of PPPs. For instance, the Netherlands has adopted PPP type structures primarily to promote an efficient procurement regime and reform its public sector. Other reasons for adopting PPPs include claims that PPPs provide better value for money and reduces government's debt levels and better efficiency in providing and running infrastructure services. PPPs also allow the government to shed some risk and share them with the private sector. Politicians have also found PPPs to be more politically attractive forms than nationalization or privatization.¹¹

One of the major advantages of PPPs over other procurement models is the possibility of the transfer of risk from the public sector to the private sector.¹² However, this comes with its own ideological problems. This is because governments are tempted to sell PPPs to the user public as free and therefore a vehicle for facilitating the dumping of risks on the private sector investor. The transfer of risks in PPPs is not always total and the assumption that it is possible for the public sector to transfer all the risk to the private sector is at best a fallacy. The essence of the 'partnership' in PPP is that parties are able to share the risks and rewards so that the party best able to assume a particular risk shoulders it. Therefore, the advantage of risk transfer is only realised when the right amount of risk is transferred to the right party. Consequently, there is a correlation between the proper transfer and management of risk and the improvement of value for money in projects. The reason for this is probably because parties to the project now take ownership of risks and are able to reduce either the probability of the risk occurring or the financial consequences if it does, or both.¹³

The thesis of this article is that if the parties to the Lekki Toll Road project had managed the project risks effectively, the project would have succeeded. Based on this thesis, the article takes a critical look at the project using a risk management framework. By deploying a risk management approach, the article reveals the root causes of the project's failure. Thus, whilst the Lekki Toll

¹¹ *ibid.*

¹² *ibid.* Li Bing et al , 'The Allocation of Risk in PPP/PFI Construction Projects in the UK', (2005) 23 *International Journal of Project Management* 25-35.

¹³ D Grimsey and K Lewis (n 7).

Road project could not become the expected catalyst for the growth of PPPs in Nigeria, a post-mortem analysis of the project may provide useful lessons for the development and effective management of PPP projects in Nigeria.

This article is divided into five sections. After this introduction, the second section reveals the methodology adopted in the study, the case study methodology, and provides justification for its use. This section also identifies the different sources of data. The third section supplies details about the project under study and gives a historical account of the stakeholder opposition that eventually led to the failure of the project. The fourth section looks at how different project risks were managed by the different parties in the Lekki Toll project. The study concludes in the fifth section that while financial risk was properly managed, there had been no counter balancing of the rein given to the financiers. This lack of balancing was detrimental to the management of other risks such as stakeholder opposition risk and political risk and eventually led to the failure of the Lekki Toll Road project.

2. THE CONCEPT OF RISK MANAGEMENT

This section of this article looks at how the different project risks were managed by the different parties in the Lekki Toll project. As mentioned above, the assumption is that this exercise will provide a clear indication of the reasons for the failure of the concession. The management of risk is crucial to the success of PPP projects. This process involves:

- a. Risk identification: the process of identifying all the risks relevant to the project;
- b. Risk assessment: the determination of the degree of likelihood of the risk and the possible consequences if the risk occurs;
- c. Risk allocation: assignment of the responsibility of the consequence of the risk to one or more of the contracting parties; and

- d. Risk mitigation: the process of controlling the likelihood of occurrence of the risk and/or the consequence of the risk.¹⁴

Several conditions must be satisfied to ensure the proper allocation of risk

- a. Risk should be allocated to the party with the best capability to control the events that might trigger its occurrence;
- b. Risk must be properly identified, understood and evaluated;
- c. A party must have the technical/managerial capability to manage the risks;
- d. A party must have the financial ability to manage the consequences of the risk or prevent it from occurring;
- e. A party must be willing to accept the risk.¹⁵

Abednego et al point out that these criteria only reveal the party who should bear the risk and consequently suggest that proper risk allocation should also acknowledge the appropriate time to allocate the risks and provide alternative solutions.¹⁶ The authors contend that besides determining which party (who) has the best capabilities to accept the risk, the ‘what’, the ‘when’, and ‘how’ factors should also be considered to ensure proper risk allocation.

There is no agreement on the exact nature and number of risks that a project may face. The reason is simply because risks vary from project to project and mutate even within the lifespan of the same project. In the same vein, many of the categories of risks overlap with one another. There is also a lack of uniformity in the use of semantics in making the classifications resulting in the use of different labels for the same types of risk by different scholars.

¹⁴ Department of Economic Affairs National Public Private Partnership Handbook (2006) Department of Economic Affairs, Ministry of Finance, Government of India 1- 246.

¹⁵ S Ward et al ‘On the Allocation of Risk in Construction Projects’ (1991) 9 (3) *International Journal of Project Management* 140–147; L Edwards, *Practical Risk Management in the Construction Industry: Engineering Management Series* (Thomas Telford 1995); R Flanagan and G Norman, *Risk Management and Construction* (Oxford-Blackwell Scientific Publications 1993).

¹⁶ MP Abednego and SO Ogunlana, ‘Good Project Governance for Proper Risk Allocation in Public-Private Partnerships in Indonesia’ (2006) 24(7) *International Journal of Project Management* 622-634.

For these reasons, there are therefore diverse classifications of risk factors in extant literature. It is also noted that risk classification is mostly predicated on perception of risk and that the perception of risk itself is determined principally by social and economic factors within the particular environments where the projects are situated. A number of studies have examined the prominent risks affecting PPP projects in Nigeria.¹⁷ However, an evaluation of extant literature reveals no consensus on what these risk factors are.

Therefore, a number of factors were taken into consideration in selecting the kinds of risk for consideration in this article. Whilst the risk factors that were most prominently referenced by researchers as affecting PPPs in Nigeria were considered, other factors were also taken into consideration. A preliminary evaluation of the case reveals that some risk factors impacted the project more than others. These risk factors were therefore given greater emphasis for the simple reason that they better enrich the case study.¹⁸ Consequently, the following risk factors have been selected: legal and regulatory risk, finance risk, demand risk, political risk, economic risk and shareholder opposition risk. These risk factors are considered to have impacted the LCC project the most and therefore likely to affect subsequent projects within Nigeria again.

2.1 Legal and Regulatory Risk

Legal and regulatory risk refers to the risks arising from the legal, regulatory systems and institutions surrounding PPPs within a country.¹⁹ This is the possibility that existing or subsequent laws

¹⁷ OE Ogunsanmi, 'Critical Success Factors (CFS) Determining the Implementation of Public-Private Partnership Projects' (2013) 1 *Covenant Journal of Research in the Built Environment* 41-66; AO Sani, 'Factors Determining the Success of Public-Private Partnership Projects in Nigeria' (2016) *Construction Economics and Building* 16(2) 42-55 <<https://doi.org/10.5130/AJCEB.v16i2.4828>> accessed 06 May 2022; Zayyanu Muhammad and Fozziah Johar 'Critical Success Factors of Public- Private Project: A Comparative Analysis of the Housing Sector Between Nigeria and Malaysia' (2019) 19(3) *International Journal of Construction Management* 257 – 269.

¹⁸ This is in line with the advice from Patton that whichever the case selection method used, the most important principle is to select information-rich cases, i.e. cases worthy of in-depth study. See MQ Patton, *Qualitative Evaluation and Research Methods* (Sage 1990) 64.

¹⁹ A Shrestha and I Martek 'Legal Risk Impact in Public Private Partnerships (PPPs): The Case of Chinese Water Sector' (2015) 6 *World Journal of Management* 90 -98.

and regulations may impede the delivery of PPP projects. Legal and regulatory risk arises all through the key PPP delivery stages: project development stage, procurement stage, construction stage and operations stage. The major element of legal and regulatory risk is change of law risk. This is the risk that laws, regulations or government policies may change in a way that affects the project outcome and in a manner that impacts on the underlying viability of the project. In most projects, this risk is typically shared between the public and private sector parties. The private sector bears a general change in law risk within a country whilst the government bears the risk of a discriminatory change in law that is specifically targeted at the project or a specific sector.

The Lagos State Roads, Bridges and Infrastructure (Private Sector Participation) Development Board Laws of 2005 and 2007 formed the enabling legal framework that was used to develop the Lekki Toll Road project.²⁰ The 2005 Act established the Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board within the Ministry of Public Works.²¹ This body was empowered to grant concessions to investors for the provision of highway road infrastructure. This was mainly a roads agency, comprised principally of public works staff with little or no PPP delivery experience. This lack of experience was evident in the negotiation of certain aspects of the agreement with LCC. For instance, the concession did not contain a detailed performance regime for LCC in relation to the project and therefore LCC was not liable to be penalised for failure to meet key performance indicators (KPIs).²² This lack of capacity could have been ameliorated through the hiring of consultants. However, there was no evidence that the Lagos State Government retained the services of transaction advisers as it appears that the private sector concessionaires and the project lenders drove the transaction process.²³

The history of the procurement process around the project is also instructive. The project was first commenced through an unsolicited proposal basis. ARM had initially showed an interest

²⁰ This law has been repealed by the Lagos State PPP Law of 2011.

²¹ Law No.3 of 2005.

²² P Brocklebank (n 1) 69.

²³ See Yescombe (n 1).

in the project and sought other private sector partners to bid for the project with it as a consortium.²⁴The consortium was then appointed by Lagos State government under a Memorandum of Understanding (MoU) to provide advisory services relating to the project. Subsequently, a further MoU enabled ARM to undertake the project feasibility studies.²⁵ With the positive result of the feasibility studies, ARM created an SPV to bid for and construct the road. What happened subsequently is not very clear as there appeared to be a subsequent competitive bid process which harvested just two bids.²⁶Due to the fact that LCC had prepared the feasibility studies and was already in partnership with the Lagos State Government in the project, it was predictable that LCC was awarded the concession.²⁷The manner in which the entire procurement process unfolded reveals the absence of a robust legal framework for PPPs. There appeared no clear guidelines for dealing with unsolicited proposals, especially how to generate competitive tension in an unsolicited proposal procurement process.²⁸ This gap in the process denied the project the value which comes with attracting several bidders to bid for the project. Due to this lapse, there are doubts therefore that value for money was maximized for the taxpayers.

2.2 Construction Risk

There are three aspects to this risk. The first is the risk that the construction of the asset takes longer than expected, resulting in major loss to the private sector party who usually assumes this risk. The second relates to cost overrun, where the cost of construction exceeds that which was projected. The third aspect is the risk that the construction contractor does not perform according to specification and therefore the quality of the asset delivered does not meet required standard. The likelihood of

²⁴ Brocklebank (n 1) and Yescombe (n 1). See also R Osei-Kyei and PC Chan Albert (n 1).

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ This is not uncommon with unsolicited bids in Nigeria, where the project proponent usually wins unsolicited bids. See for instance, Nwangwu George 'A Comparative Analysis of the Use of Unsolicited Proposal for the Delivery of Public-Private Partnership Projects in Africa' (2019) *Journal of Sustainable Development Law and Policy* 10(1&2) 75-94.

²⁸ Competitive tension is usually realized in PPP projects through either the bonus system, Swiss challenge or automatic shortlisting.

construction cost and time overrun has always been a major problem under traditional procurement. Due to budgetary constraints, it was always the case that the construction of infrastructure projects exceeded the allocated timeframe and consequently leading to the project costing far more than anticipated due to frequent cost variations arising from inflation and currency devaluation. In developing economies, these issues are further exacerbated by budgetary constraints, leading to delays in releasing funds for projects. The advantage of PPPs is that construction risk along with the risk of cost and time overrun is allocated to the private sector that are more likely to manage this risk by passing it down to an engineering, procurement and construction (EPC) contractor with technical capacity. The EPC contractor is often subjected to liquidated damages for late completion. In the Lekki Toll Road project, the construction risk was allocated to LCC, which subsequently passed it down to a construction contractor. It was reported that LCC found it difficult to attract some of the large construction companies due to the project's perceived high construction risk.²⁹ LCC however settled for a medium-sized construction firm, Hitech Construction Company Limited. One positive feature of the construction risk allocation process is the fact that the EPC contractor took an equity stake in the consortium. This 'skin in the game' ensured the buy-in of the construction contractor in the better management of the construction risk as well as other project risks.

The above notwithstanding, the project still experienced significant cost and time overruns. However, this was not the fault of the contractor as it was occasioned by the inability of the government to provide a clear right of way for the project. The government had undertaken to remove the existing pylons on the right of way of the project but had failed to do so on the time thereby causing significant delays to the completion of the project. The consequences of this delay were significant for the government as LCC requested that it should be made whole for losses arising as a result of government's inability to manage the risk.

²⁹ Yescombe (n 1).

Some of the other issues that affected the construction risk in the project was the lack of affordable quality materials in the local Nigerian market, as well as delays and high cost of importation of specialist equipment and a limited access to skilled contractors.³⁰ These difficult local conditions made the project more challenging than it ought to have been.

2.3 Finance Risk

This is the risk that the project proponents are not able to raise financing for the project. This risk is also known as the risk of project not reaching bankability. The risk that the project might not secure financing is controlled by both internal and external factors. The internal risk is heightened where the project feasibility studies or the financial aspects of the project are not properly structured with appropriate risk mitigating instruments. The external factors are usually dictated by wider economic issues which may be favourable or unfavourable to the project.

At the time of the Lekki Toll Road project, Nigerian banks were not open to giving long term loans. However, it is nearly impossible to finance infrastructure projects with short term funds. For this reason, the bulk of the debt funding for the project had to be raised outside of the country. Another factor that could have exacerbated the finance risk was the fact that the financing for the project was raised during the period of a global financial crises. This however ended up not significantly affecting the raising of financing for the project.

The African Development Bank (ADB) was identified as being a potential source of long-term financing and together with Standard Bank was able to offer a financial package which matched the long-term nature of the project revenues. Furthermore, as the ADB is a dollar lending organisation, Standard Bank was able to structure a swap facility whereby LCC's exposure to dollar-denominated obligations to the ADB was significantly mitigated.³¹ Five other local banks also formed part of the syndicate lending to the transaction. The financing risk in the project was further mitigated through the several incentives

³⁰ Aurecon Group 'Lekki-Epe Expressway Toll Road, Nigeria' <<https://www.aurecongroup.com/projects/transport/lekki-epe-expressway-toll-road>> accessed 14 August 2020.

³¹ See note 1.

granted to the project by the Lagos State Government. The government had provided a ₦6.5 billion abridged works guarantee and ₦5 billion mezzanine loan to LCC which was subordinated to the senior debt but ranked higher than equity. Also, the State Government had waived all state taxes, charges, stamp duties and land consent fees in order to reduce the cost of the project. All these ensured that the finance risk relating to the project was properly managed. However, as will be shown below, borrowing in foreign currency ended up being a major problem for the project. Therefore, it is suggested that it is always better to borrow in local currency where project revenues are in local currency.

2.4 Demand (Traffic) Risk

Demand risk is the most important factor in determining the commercial viability of toll roads. This is comprised of the volume of traffic and the willingness of the road users to pay commercially viable tolls. Demand or traffic risk is therefore basically the risk of actual traffic numbers being lower than forecasted. In order to manage demand risk properly, the first step is usually to carry out empirical traffic studies which more or less forecast future volumes of traffic on a particular road. However, the problem with traffic forecasts is that it is based on assumptions which are susceptible to change from time to time. It is therefore the case that one of the most common factors leading to the failure of toll road PPP projects is the mismanagement of traffic risks. Empirical evidence shows that traffic risk is very significant in toll roads.³²

There are two major methods of allocating demand risk in PPP projects and they are both related to the payment mechanisms employed within the contract. The first is the availability payment model, where the government makes annuity payments to the private sector asset provider based on the availability of the service. In this case, the demand risk is effectively transferred to the government as the volume of traffic on the road does not affect the private sector party's revenues. The second is the user fee or concession model. Under this model, traffic risk is taken by the

³² H Muller Robert 'Examining Toll Road Feasibility Studies (Public Works Financing 1996); Robert Bain et al, 'Traffic Forecasting Risk Update 2005: Through Ramp Up and Beyond (Standard and Poor's 2005) <<http://www.robbain.com/Traffic%20Forecasting%20Risk%202005.pdf>> accessed 08 May 2022.

private sector party since it recovers its costs from the volume of traffic on the road.

In cases like the Lekki Toll Road project where the concession contract model was used to transfer traffic risk to the private sector party, it is incumbent on the party to mitigate this risk. The need for mitigation is because as mentioned above, traffic volumes are dependent on economic variables which are never constant. The most common strategies used to mitigate traffic risk is to either allow the term of the concession or the revenue accruable to the concessionaire to adjust with demand realisations. The three most common mechanisms used to achieve this are: ‘modification of the economic balance’ of contracts; traffic guarantee contracts; and, duration-adjusted contracts.³³ Under the Modification of the Economic Balance of Contracts, if the Internal Rate of Return (IRR) of the project falls below a minimum threshold stipulated in the contract, then the ‘economic balance’ of the concession is re-established. In most cases, a minimum IRR is accompanied by a maximum IRR. This ensures that the concessionaire’s profits are limited if traffic is much higher than expected, with the excess creamed off by the state. Traffic Guarantee Contracts involves guaranteeing either the traffic or revenue levels in the contract. The failure to reach this minimum levels triggers compensation from the public sector. Duration-Adjusted Contracts involves matching the term of the concession to predefined and verifiable target traffic or revenue levels.³⁴

It appears that the concessionaire did not expressly apply any of these strategies to manage the traffic risk. Perhaps, they were certain of the viability of the toll road. However, LCC had a toll adjustment mechanism in the contract that allowed them escalate tolls according to economic realisations. It is doubtful whether this was the proper way of managing this risk as the proposed movement of tolls in line with the inflation rate was one of the major reasons for the collapse of the project. The theory is that if

³³ Transport Research Centre (TRANSYT) ‘Evaluation of Demand Risk Mitigation in PPP Projects’ (2007) 8.

³⁴ This approach was first applied in 1990 in the concession of the Second Severn Crossing in the United Kingdom. See D Foice ‘Second Severn Crossing’ Proceedings of the Seminar PPP Risk Management for Big Transport Projects (Spanish Ministry of Development 1998).

either of the methods discussed above had been utilised to manage this risk, it might have led to a better project outcome. This is because these methods allow government to support the toll project from time to time where the economic conditions demand, instead of transferring this risk directly to the user public.

Another factor that triggered the demand risk in the project was the decision of the government to construct a new bridge from Lekki to Ikoyi which diverted approximately 30% of the traffic away from the project. This aspect of demand risk is usually managed contractually through the use of non-compete clauses. This clause basically bars the government from building competing infrastructure that is likely to divert traffic away from the toll road. This ensures that the traffic volumes on which the private sector relies on for repaying its loans are secure. The effects of non compete clauses are ameliorated by giving the private sector party the first right of refusal on a competing project.

2.5 Political Risk

Political risk is a large amorphous category. It contains virtually all ‘risks associated with business or investment in a country which would not be present in another country with a more stable and developed business, economic and regulatory climate and regime’.³⁵ A good classification of political risk is that put forward by Tilmann Sachs et al, who classified political risks under six broad headings:

- a. **Currency Inconvertibility and Transfer Restriction Risk:** any action of the host government restricting the conversion and transfer of currency outside the host country.
- b. **Expropriation Risk:** any legislative or administrative action from the host government that has the effect of depriving an investor of ownership or control of or substantial benefit from their investment.
- c. **Breach of Contract Risk:** any repudiation or breach of a contract by a host-government, when either there is no recourse to judicial or arbitral forum to determine the claim, or a decision by such

³⁵ CA Hill ‘How Investors React to Political Risk’ (1998) 8 *Duke Journal of Comparative and International Law* 283-313.

- forum is not rendered within reasonable period of time, or such decision cannot be enforced.
- d. Political Violence: acts of war, civil war, insurrection/civil disturbance, terrorism, sabotage, or landowner and/or indigenous people's disturbance in the host country.
 - e. Legal, Regulatory, and Bureaucratic Risks: risks within the administrative process that cannot be directly attributed to one of the above. These include the legal enforceability and execution of laws, conflict of authority, corruption, transparency, issuing of approvals and consents, change of government causing changes in law, policy, and taxation, and obstruction during arbitration process.
 - f. Non-governmental Action Risks: risks that the government has no direct influence over and do not fall within any of the above categories. This includes action by environmental and union activists, religious fundamentalism, ethnic tensions etc.³⁶

The success of PPPs depends on a stable political environment. The reason is simply that most countries, particularly developing ones, rely on the influx of private capital from overseas to finance infrastructure under PPPs. It makes sense that the private sector will not invest in a country unless it is satisfied that the political environment is conducive for its investments to flourish. If the private sector decides to invest regardless of the existence of political risk, it will usually demand a great premium. These premiums come in the form of guarantees, discounts or larger profit margins for assuming the risk.³⁷

The need for greater certainty that invested capital is recovered is even more crucial in PPPs than other types of investments. This is because PPPs are financed primarily through non-recourse financing, where lenders rely primarily on future project cash flows and not from any other form of collateral or security. There is of course also the fact that infrastructure is not mobile and once built within a country, the investment is subject to the dictates and caprices of the political actors and institutions within the country.

³⁶ T Sachs et al, 'Analysis of Political Risks and Opportunities in Public Private Partnerships (PPP) in China and Selected Asian Countries: Survey Results' (2007) 1(2) Chinese Management Studies 126 – 148.

³⁷ Hill (n 35).

Political risk in the Lekki toll project was covered by the Export Credit Insurance Corporation of South Africa. Also, a Fiscal Support Agreement for the project was signed with the Federal Government. This Agreement provided a mechanism that mandated the Federal government to deduct Lagos State's constitutionally allocated funds at source to support the project if the need arose. This was to be utilised to support the State's obligations to make termination payments in the event of the termination of the Concession Agreement. This support was apparently a condition precedent for the project accessing bank finance.

One major issue that triggered political risk in the project was the fact that major terms of the project were shrouded in secrecy. The state lacked a PPP disclosure policy. Hence, there appeared to be a manifest lack of transparency in the manner in which the project was procured. This factor increased the political risk in the project since at the time Lagos State was governed by a different political party to the one at the centre, thereby creating a very vibrant opposition to the ruling party in Lagos. The lack of transparency fuelled opposition parties who saw it as a weakness with which to attack the project, basically alleging corruption. This effectively put the project in danger of being cancelled by the opposition party if it had won the elections.

2.6 Economic Risk

This is the risk which implies that the macro economic conditions in a country may affect the project. The most common types of economic risks that directly affect PPPs are currency risk, inflation risk and taxes. It is noteworthy that whilst the government waived all taxes directly related to the project, both currency and inflation risks impacted the Lekki Toll road project.

2.6.1 Currency Risk

Currency risk arises from possible future movements in exchange rates between the host country's currency and that of other countries to which the project is commercially connected. For instance, where the finance for the project is obtained in foreign currency and the revenues are generated in local currency, then there is the risk that the debt surrounding the project may increase unexpectedly. In line with the fact that risk may also provide opportunities, there is also the possibility of a positive movement of the host currency in favour of the project company. In any case,

debt financiers dislike uncertainty and would always like the currency risk mitigated, usually by requesting that the project revenue streams are periodically adjusted and the project company made whole in the event of any potential fall in the actual revenues generated by the project. However, in practice, it is more efficient for currency risk to be managed by allocating it to the public sector, which then mitigates the risk through hedging.

As discussed above, in the case of the Lekki Toll Road project, the loans were sourced in dollars as the Nigerian banks were unable to provide long-tenured loans suited for infrastructure projects. The fact that the loans were obtained in dollars created a challenge for the long term sustainability of the project.³⁸ Also, despite the fact that ADB's currency risk was managed by Standard Bank, South Africa, which provided ADB with an innovative long term currency swap, it did not completely eliminate the currency risk. When the Naira lost value in relation to the US dollars, the project became too expensive for the LCC and they suggested increase in the toll rates and the number of tolling points to make up for the shortfall.³⁹ The government considered this to be too expensive for the user public and this ended up being one of the major reasons why the government bought back the project.

2.6.2 Inflation

This risk arises from the possible rise in inflation. In the Lekki Toll Road project, toll rates were for instance indexed against the Nigeria consumer price index (CPI). Therefore, when it was suggested by the project proponents that tolls were to increase by 20% reflecting both inflation and currency movements, the project immediately became very expensive. The government was unwilling to indulge LCC by agreeing to an increase in the toll fees since there was already serious opposition to the project from the public. It was also unreasonable to index tolls to inflation in a country like Nigeria where salaries were not indexed to inflation. In this case, the project becomes too expensive for the users. This fact was reiterated by the Lagos State Commissioner for Finance, Mr. Ayo Gbeleyi, who said at the time when the termination of the concession was announced that:

³⁸ R Osei-Kyei and PC Chan Albert (n 1) 204 – 223.

³⁹ See note 1.

As provided for in the concession agreement between the parties, the concessionaire, (LCC) can increase the toll tariff based on the inflation rate in the country, among other things every quarter. The risk is that when an agreement was reached between two parties to negotiate on a contract, whatever the year, one cannot envisage the entire challenge that will arise later. The dynamics of the Lekki project did not envisage that there would be devaluation of the country's currency, between 2008 and 2013 from ₦118 to ₦160. This impacted on their cost which they will attempt to pass to the common man on the street, because of the inflation adjustment. . . For instance, if the state government had not come up with this plan last July, the concessionaire would have increased the toll fee for cars from ₦120 to ₦144 while drivers of SUVs will have to part with ₦180 as against the ₦150 cost they are still enjoying. This is because the concessionaire would have added 20 percent. The government felt that this would be difficult to push to the residents at this time. And of course, at every anniversary, it was meant to go up by the inflation rate plus five percent. And we should not forget that this is the first Public Private Partnership, PPP, agreement reached by the state government.⁴⁰

In conclusion therefore, the economic risk was one of the major reasons why the project was cancelled. The Lagos state government via a share sale and purchase agreement acquired Lekki Concession Company Limited in December 2014. According to the government the project which was initially designed as a PPP, was based on assumptions and economic indicators that were no longer feasible.⁴¹

2.6.3 Stakeholder Opposition Risk

It is not uncommon to hear that PPP projects failed due to opposition from stakeholders.⁴² By its very nature PPPs are very

⁴⁰ Nairametrics 'Why Lagos State Terminated LCC Contract on Lekki-Epe Expressway' <<https://nairametrics.com/2013/08/29/why-lagos-state-terminated-lcc-contract-on-lekki-epe-expressway/>> accessed August 14 2020.

⁴¹ See note 43.

⁴² S Olander and A Landin 'Evaluation of Stakeholder Influence in the Implementation of Construction Projects' (2005) 23 *International Journal of Project Management* 321-328.

political and controversial, primarily because it pursues the divesting of public control and the operation of public assets by a private sector operator. The citizens usually do not take kindly to the divesting of ‘public treasures’ in any way, whether through privatisation or PPPs.⁴³ There is a need therefore to properly gauge the acceptance of the public for a project and find ways of mitigating any apprehension before the commencement of a project. It is for this reason that it is advocated that parties to a project must identify the risk that the public might be opposed to the project, evaluate it and manage it appropriately. The public and private sector parties to the project should mitigate the risk by designing a stakeholder inclusion and consultation programme.

Stakeholder consultation and involvement is not merely a desired good governance or moral practice but a constitutional right of the citizens. The real partnership in PPPs is actually between the citizens (represented by their governments) and the private sector, not between the government who are merely agents of the people and the private sector.⁴⁴ Stakeholder engagement or involvement means adopting a stakeholder participatory approach. This entails engaging stakeholders meaningfully at every stage of the project, from inception to operational phase. Integral to effective stakeholder participation is the initiation of and constant maintenance of communication with various stakeholders.⁴⁵ Also, the particular method used to engage stakeholders should depend on several factors including the nature of the project, the resources available for the project, and the objectives to be attained from the engagement.⁴⁶

⁴³ PPPs are usually said to be more politically acceptable than privatisations for the very reason that it allows for the reversion of ownership of the asset to the public sector after a number of years as opposed to privatisation which leads to complete divestment and transfer of the asset to the private sector.

⁴⁴ See also MR Hayler, ‘Public-Private Partnerships in Hong Kong: Good Governance – The Essential Missing Ingredient’ (2010) 69 *The Australian Journal of Public Administration* 99 - 119.

⁴⁵ W Bakens et al, ‘Engaging Stakeholders in Performance-based Building: Lessons from the Performance-Based Building (PeBBu) Network’ (2005) 33(2) *Building Research & Information* 149 – 158 ;GE Jergeas et al, ‘Stakeholder Management on Construction Projects’ (2000)12 *AACE International Transactions* 1–5 ;S Olander and A Landin ‘A Comparative Study of Factors Affecting the External Stakeholder Management Process’ (2008) 26(6) *Construction Management and Economics* 553.

⁴⁶ J Yang et al ‘Critical Success Factors for Stakeholder Management: Construction Practitioners’ Perspectives’ (2010) 136 (7) *Journal of Construction. Engineering.*

It is obvious that the stakeholders, especially the user public never had any input into the design of the Lekki Toll project. Most crucially, the public were not consulted regarding the toll fees they would pay for the use of the road. It is opined that if the public had been properly consulted, the issues of the multiple roundabouts and toll plazas which the stakeholders complained about would have been flagged very early in the initial stages of design and compromise arrangements reached.⁴⁷ There could have also been a robust debate about the merits or otherwise of erecting a fence on the highway and a compromise decision reached, rather than the residents having to fear that it would alienate them from their kith and kin on the other side.⁴⁸ There should also have been consultation on user charges.

It appears that stakeholders were not involved in the procurement or tender stage in any shape or manner. This led to a high level of distrust and allegation of fraud and corruption. There are reports though that there was actually a tender process where only two companies participated. The opposition party however alleged that the reason why the procurement process was conducted in secret was to enable key government officials to concession the road to their cronies. It is clear that the lack of management of the stakeholder opposition risk actually exacerbated the political risk.

From the analysis above, it is discernible that this project failed because of the lack of stakeholder engagement and management.⁴⁹ Stakeholder opposition risk in the project was not properly identified and addressed at the beginning or at any time during the project lifespan. The consequences of not dealing with this risk ultimately led to the cancellation of the project. It must be noted that the lack of stakeholder consultation is not unique to the Lekki Toll Road project. It is common across several states and

Management 778-786; J Yang et al 'Exploring Critical Success Factors for Stakeholder Management in Construction Projects' (2009) 15(4) *Journal of Civil Engineering Management* 337-348.

⁴⁷ The inclusion of multiple roundabouts in the design of the road had allegedly increased traffic gridlock on the road and had therefore been one of the numerous concerns expressed by stakeholders.

⁴⁸ This was also a major concern raised by stakeholders about the project.

⁴⁹ MA Bayero and TM Barwa 'Addressing Infrastructure Deficit Through Public-Private Partnership: A Review of Issues, Benefits and Challenges' (2017) 15(3) *Journal of Management Sciences* 126 -142.

projects across the entire country. This situation continues despite the express provisions of Nigeria's National PPP Policy on the need for stakeholder engagement.⁵⁰ It is proposed that there is need for a mandatory requirement for public consultation to be taken more seriously by codifying the provision in a legal instrument.

3. THE CASE

The principal methodology used in carrying out this research is the case study methodology. A case study is an empirical methodology that investigates a contemporary phenomenon within its real-life context using multiple sources of evidence.⁵¹ It is suitable for answering the questions about 'how' and 'why' things happen when you cannot manipulate the behaviour of those involved in the study and when the boundaries are not clear between the phenomenon and the context. It is used because it allows investigations into contextual realities.⁵² Case studies also allow investigations into the differences between what was planned and what actually occurred.⁵³ It is said to be appropriate, just like in the present study, where one needs to understand some particular problems or situations in greater depth and where one can identify cases rich in information.⁵⁴ It is also useful for testing hypothesis.⁵⁵

One of the advantages of using case studies is that it enables the researcher gain a holistic view of events.⁵⁶ The approach can also provide a broad picture of the issues being explored and many

⁵⁰ Infrastructure Concession Regulatory Commission, National Policy on Public Private Partnership (2009).

⁵¹ RK Yin, Case Study Research: Design and Methods, Revised Edition (Sage Publications 1989) 22.

⁵² RK Yin, Case Study Research: Designs and Methods (3rd Edition, Sage Publications 2003) 140.

⁵³ G Anderson, Fundamentals of Educational Research (Falmer Press London 1993) 152-160.

⁵⁴ M Patton, How to Use Qualitative Methods in Evaluation (Sage Publications 1987) 18 - 20; K Morland et al, A Case for Case study' (1992) 71(1) Social Forces 71 (1) 1- 6.

⁵⁵ RE Stake, 'The Case Study Method in Social Inquiry', (1978) 7(2) Educational Researcher 5- 8.

⁵⁶ E Gummesson Qualitative Methods in Management Research (Sage Publication 1981) 83-156.

facets of the phenomena are revealed since many sources of evidence are used, as issues are explored through a variety of lenses.⁵⁷ Adopting the typology suggested by Yin, the type of case study methodology employed in this research could be said to be descriptive and explanatory in nature because the research seeks to describe and explain how risks were handled in the Lekki toll road concession project.⁵⁸ The case study is not an end in itself and is not only used to understand the particular case but will be instrumental to understanding why the project was unsuccessful. Therefore, it may also be said to be instrumental in nature.⁵⁹

It is important to point out that the case study methodology has been criticised for lacking scientific rigour and reliability and not addressing the issue of generalisation.⁶⁰ However, a number of authors have refuted this claim.⁶¹ For instance Stake counters the argument of lack of generalisation by claiming that case studies ‘are epistemologically in harmony with the readers experience and thus to that person a natural basis for generalisation’.⁶² In fact, case studies are said to be an intensive study of a single unit with an aim to generalise across a larger set of units.⁶³ Therefore, even though only the Lekki Toll Road project is studied in this article, the outcome can be used as a basis for understanding why other similar PPP projects have failed in Nigeria.

The data that was used for the case study was obtained from several sources. Firstly, documentary evidence was the most used source of information. Some of the documents used were transaction documents. Others were parliamentary reports and proceedings. The second source of data was media reports

⁵⁷ BM Noor Khairu ‘Case Study: A Strategic Research Methodology’(2008) 5(11) American Journal of Applied Sciences 1602 - 1604; Pamela Baxter and Susan Jack, ‘Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers’ (2008)13(4) The Qualitative Report 544-559 <<http://www.nova.edu/ssss/QR/QR13-4/baxter.pdf>> accessed 29 August 2012.

⁵⁸ Yin (n 52) 11-15.

⁵⁹ R Stake, *The Art of Case Research* (Sage Publications 1985). 92.

⁶⁰ D Johnson, *Research Methods in Educational Management* (Longman Group 1994); Jasen L Jensen and R Robert ‘Cumulating the Intellectual Gold of Case Study Research’ (2001) 61 *Public Administration Review* 235 – 46.

⁶¹ LP Ruddin, ‘You Can Generalise Stupid! Social Scientists, Bert Flvberg and Case Study Methodology’ (2006) 12(4) *Qualitative Inquiry* 797.

⁶² Stake (n 55).

⁶³ J Gerring, ‘What is a Case Study and What is it Good For’ (2004) 98(2) *Political Science Review* 341 -354.

including newspapers, magazines and commentaries from other researchers. Stakeholder interviews formed the third source of data. The use of these multiple sources of data for triangulation helped validate and enhance the reliability of the findings. This is in consonance with the suggestion by Yin, who advocates for this method on the basis of the ethical need to confirm the validity of the data and process.⁶⁴

3.1 The Lekki Toll Road Concession Project

The Lekki Toll Road Concession Project was awarded to the Lekki Concession Company (LCC), a Special Purpose Vehicle (SPV) set up by an indigenous finance company, Asset Resource Managers (ARM) with Macquarie Bank of Australia and Old Mutual of South Africa also shareholders.⁶⁵ The project was consummated under the now repealed Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Act 2004 at a total project cost of USD\$340m.⁶⁶ The project was a 30-year Build Operate and Transfer (BOT) project for the upgrade, expansion and maintenance of approximately 49.4km of the Lekki Epe Expressway (Phase 1) and the construction of the 20km of coastal road (phase 2).⁶⁷ The project was designed to have three lanes in each direction. The average daily traffic at the toll plazas was estimated at approximately 70,000 vehicles per day.⁶⁸ It was proposed that the expanded road would eliminate traffic congestion around the area, ensure for shorter journey times and better law enforcement around the project area. The project was financed using long-term debt and equity and the project cost was to be recovered principally through LCC charging user tolls. The project was enabled by the provision of a ₦6.5billion abridged works guarantee and ₦5 billion, 20-year mezzanine loan to LCC pledged by the Lagos

⁶⁴ Yin (n 52).

⁶⁵ Nwangwu George, 'Financing Roads through Tolls in Nigeria: The Role of Public-Private Partnerships' (2021) 6(6) Account and Financial Management Journal 2338 – 351.

⁶⁶ This law was repealed by the Lagos State Roads (Private Sector Participation) Authority Law 2007 which in turn has recently been repealed by the Lagos State Public Private Partnership Law 2011. See Peter Brocklebank (n 1).

⁶⁷ N Mouraviev and N Kakabadse, *Public-Private Partnership Partnerships in Transitional Nations: Policy, Governance and Praxis?* (Cambridge Scholars Publishing 2017) 210.

⁶⁸ BrockleBank (n 1).

State Government.⁶⁹ The mezzanine facility was to bridge the gap between the available equity and what the promoters of the project considered was prudent to borrow against the projected project cash flows.⁷⁰ Also, the State Government waived all state taxes, charges, stamp duties and consent fees under the Land Use Act. The Federal Government also weighed in with a sovereign guarantee through a Federal Support Agreement to ensure the bankability of the project.⁷¹ At financial close, the project was financed with a total of 24% equity, 11% mezzanine loan by Lagos State Government and 65% by bank loans.⁷²

The road expansion programme which was originally scheduled to be completed in 2009 encountered significant delays.⁷³ Some of the reasons for the delays were slow access to the right of way, especially owing to obstructions from utility infrastructure such as electricity pylons, and buried fibre-optic and other cables located within the right of way. It appeared that there were disputes amongst the different agencies and organisations that owned the infrastructure as to which agency had the obligation to pay for their relocation.⁷⁴ This was also compounded by the high volume of traffic passing through the construction site. Under the concession agreement, the Lagos state government was responsible for providing a clear right of way for the project. Failure to provide this had led to a considerable loss of revenue for the concessionaires and significantly increased the construction cost. Since this risk was with the Lagos State Government, the state government was subjected to penalties in line with the concession agreement.

⁶⁹ N Mouraviev and N Kakabadse (n 67).

⁷⁰ Yescombe (n 1).

⁷¹ The negotiation of this Support Agreement with the Federal Government had significantly delayed the project financial close.

⁷² Cedric Achille, Mbeng Mezui, and Bim Hundal, 'Structured Finance: Conditions for Infrastructure Project Bonds in African Markets' (NEPAD Regional Integration and Trade Department and African Development Bank 2013) P 244 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Structured_Finance_Conditions_for_Infrastructure_Project_Bonds_in_African_Markets.pdf> accessed 20 June 2022..

⁷³ *ibid.*

⁷⁴ C Harding 'Nigeria PPP Project Various Challenges' <<https://www.howwemadeitinafrica.com/nigerian-ppp-project-facing-various-challenges/349/>> accessed on August 14 2020.

LCC had completed the 4km stretch of road from the Law School end of Ozumba Mbadiwe to the Maruwa Bus Stop and set up a toll gate at the Admiralty Road end but was initially unable to collect any tolls. The user public simply refused to pay any tolls.⁷⁵ Toll collection was supposed to begin on 3rd January 2011 and was to relate to only the completed portion of the road. However, after several protests by the residents, two weeks after the initial announcement of the commencement of the operation of the toll facility, the Lagos State Government announced the indefinite suspension of collection of toll on the road.⁷⁶ Several splinter stakeholder groups⁷⁷ emerged either threatening to sue the government or actually commencing legal proceedings against the government and the concessionaire.⁷⁸ Some of the stakeholder groups asked the government to terminate the contract and pay the concessionaire off.

On December 18 2011, the State Government reverted to the collection of tolls on the road. The government had been placed under considerable fiscal burden by having to pay shadow tolls to the concessionaire for nearly a year.⁷⁹ It was suggested by Governor Raji Fashola that the state had spent over ₦4b on shadow tolls being money which could have been used in other

⁷⁵ Achille, Mbeb and Bim (n 72).

⁷⁶ The Director General of the Lagos State Public-Private Partnership Office, Mr. Ayo Gbeleyi then argued that the suspension was to enable the State Government to engage with the Concessionaire and other stakeholders. See K Ugboaga 'Fashola Suspends Toll Collection on Lekki Road' PM News (Lagos, December 30 2010) <<https://www.pmnewsnigeria.com/2010/12/30/fashola-suspends-toll-collection-on-lekki-road/>> accessed August 14 2020.

⁷⁷ For example, Stakeholder Forum (comprising indigenes, businesses, and residents of the Lekki Ajah axis of Lagos State) and the Etiosa Heritage Group. See Sahara Reporters, 'Why We Want Lekki-Epe Expressway Concession Deal Reviewed' <<http://saharareporters.com/2010/09/01/why-we-want-lekki-epe-expressway-concession-deal-reviewed>> accessed August 14 2020.

⁷⁸ For example, a Lagos based lawyer and resident of the area, Eburn Olu Adegboruwa went to court alleging fraud and challenging the government's right to toll the road as he considered the toll an infringement of his constitutional right to free movement. He also insisted that the Government should make available provisions of the contract for everyone to see and read. See D Benson 'Lekki/Epe Expressway Toll Plaza: Lagos Govt Violated our Fundamental Right to Protest – Adegboruwa' Vanguard (December 22, 2011) <<https://www.vanguardngr.com/2011/12/lekki-epe-expressway-toll-plaza-lagos-govt-violated-our-fundamental-right-to-protest-adeboruwa/>> accessed 12 May 2022.

⁷⁹ Peter BrockleBank (n 1).

developmental projects.⁸⁰ The decision to resume with the tolling of the road led to another wave of protests by the road users,⁸¹ who were allegedly dispelled by thugs and policemen loyal to the State Government.⁸² At the end of the protest a number of people were severely injured and 23 people were arrested including a governorship candidate of the opposition party.⁸³ This led one of the opposition parties in the state, Peoples Democratic Party (PDP) to call for the impeachment of the Governor if he continued with the collection of tolls on the road.⁸⁴

After sustained pressure, on August 27, 2013, the Lagos State Government finally announced the cancellation of the Lekki Toll Road concession.⁸⁵ The Lagos State government had maintained that the contract with LCC was not terminated, rather that the state had to buy back the project.⁸⁶ According to the state government, the assumptions underlying the concession had changed materially as the Naira had become devalued against the dollar thereby increasing the cost of the project. Also, it emerged that LCC intended to increase tolls from ₦120 to ₦144 and also increase the number of toll gates on the road.⁸⁷ The reason offered

⁸⁰ This assertion was made by the Governor whilst presenting the 2012 budget. See Nairametrics, 'The Year 2012 Budget Presentation of the Governor of Lagos State' <<https://nairametrics.com/wp-content/uploads/2011/12/THE-Y2012-BUDGET-PRESENTATION-OF-THE-GOVERNOR-OF-LAGOS-STATE.pdf>> accessed 05 May 2022.

⁸¹ See Sahara Reporters 'Occupy Lekki: Lagos Protests Against Lekki Toll Gate' <<http://www.saharareporters.com/news-page/occupy-lekki-lagos-protests-against-lekki-toll-gate/>> accessed August 12 2013.

⁸² C Iremeka 'Anxiety Mounts Over Second Toll Gate' <<https://topetempler.wordpress.com/2012/12/21/lekki-epe-expressway-anxiety-mounts-over-second-toll-gate/>> accessed 12 May 2022.

⁸³ S Okoruwa and O Olabulo '1 Killed, Many Injured in Lekki Tollgate Protests' Nigerian Tribune (Ibadan, December 18 2011) 4.

⁸⁴ Compass Newspaper 'PDP Calls for Fashola's Impeachment Over Lekki Toll Plaza Nigeria' Nigerian Compass (December 16 2011) 12.

⁸⁵ A Dada and R Bisiriyu 'Lagos Cancels Lekki-Epe Expressway Concession' Punch Newspaper (Lagos, August 28 2013); G Akinsanmi 'Lekki-Epe Road: Lagos to Raise ₦87.5bn to Acquire Concession Rights' ThisDay (Lagos, August 29 2013) <<https://allafrica.com/stories/201308300319.html>> accessed 12 May 2022.

⁸⁶ Ezeamalu B 'Why Lagos Undertook 'buy back' of Lekki- Epe Expressway Contract – Commissioner' Premium Times (Abuja, August 29 2013) <<https://www.premiumtimesng.com/news/143707-why-lagos-undertook-buy-back-of-lekki-epe-expressway-contract-commissioner.html>> accessed July 10 2020.

⁸⁷ AC Otegbolu and F Famuyiwa 'Demand Assessment for Sustainability in Urban Toll Roads: Practicalities from the Contingent Urban Valuation Method' (2014) 7(4) Ethiopian Journal of Environmental Studies and Management 339 – 352.

by the concessionaires was that the increase was required to cover high interest payments, maintain availability of the road and fund the completion of the construction of the remaining sections of the road.⁸⁸ Furthermore, the state government argued that the decision to buy back the project was strategically done in order to make the road affordable to road users. Today, the Lagos State Government continues to operate the tolls directly.⁸⁹

4. ADDRESSING FAILURE IN PPP PROJECTS: RECOMMENDATIONS

The Lekki Toll Road project faced challenges on account of improper management of several risks, including demand risk, economic risk, stakeholder risk and political risk. What was evident is that most projects risks were interconnected and influence one another. The economic risk for instance, triggered by inflation and the devaluation of the local currency, potentially increased the toll tariffs for the public using the toll road. In turn the fear of the social unrest that might emanate from such high tariffs influenced the political calculation of the sitting government and the opposition. While the opposition seized on popular dissatisfaction to campaign for the removal of the incumbent government, the incumbent government saw it expedient to buy back the concession to avert further reactions from the public and looming electoral defeat. Therefore, in order to prevent a repeat of the Lekki toll road experience, it is necessary for stakeholders involved in future PPP projects to take concrete steps to better manage and mitigate all project risks. This is important since the failure to properly manage a particular risk might trigger adverse consequences from other risks.

Firstly, where there is a knowledge gap in the delivery of PPP projects, it is necessary that transaction advisors be contracted to guide public authorities from the earliest stage of project development. Such advisors should not have a conflict of interests as was the case of the Lekki toll road where ARM was both an

⁸⁸ *ibid.*

⁸⁹ *ibid.*

advisor and a bidder at different stages of the project delivery process.⁹⁰ In addition to embedding accountability and transparency in the procurement process, it is also necessary to strengthen the whistleblowing mechanisms in PPPs. Although there is no general legal framework for whistleblowing in Nigeria,⁹¹ whistleblowing could be specifically enacted into PPP-specific laws and policies while taking advantage of whatever general frameworks are valuable such as the Whistle-blower Policy managed through the Federal Ministry of Finance and the Presidential Initiative on Continuous Audit. This means that rather than having an adversarial and defensive attitude towards external monitoring, public authorities should see whistle-blowers as equal stakeholders and collaborate with them towards getting the best value for money in PPP projects. Again, PPP-specific whistle-blower laws and policies are needed because the Whistle-blower Policy of the Ministry of Finance focuses majorly on retrospective accountability, providing incentives for loot recovery rather than real-time adherence to due process.⁹²

There should be a balancing of all project risks such that the management of one risk does not result in overly negative trade-offs as regards other risks. The trade-offs made in order to manage the finance risks associated with the Lekki Toll Road project were excessive to the extent that they made the government incapable of managing other risks. In relation to this point, governments should not approach PPP projects with a do or die mind-set. Where PPPs are unlikely to provide value for money due to excessive risks that make the projects unaffordable for the user public, it might be better to procure the project in the conventional manner using government budgets.

Thirdly, and very importantly, it is necessary to consult stakeholders for the purpose of collating and addressing their interests and concerns in the planning and implementation of PPP projects. This is the surest way of handling stakeholder and

⁹⁰ Peter Brocklebank (n 1).

⁹¹ Although a combined application of the Freedom of Information Act 2011 and the Policy on Whistleblowing can be used to good effect by whistleblowers, the framework provided is not broad enough. The Whistleblower Bill introduced at the National Assembly in 2016 was not passed into law.

⁹² LawPadi, '7 Things to Know about Nigeria's Whistle Blower Policy' <<https://lawpadi.com/7-things-know-nigerias-whistle-blower-policy/>> accessed 3 May 2022.

political opposition. Consultation tackles stakeholder opposition generally and also its impact on political opposition. It has a double effect on reduction of political risk because political actors are first of all stakeholders, and then it also eliminates room for opportunistic politicisation of stakeholder concerns.

As regards the legal and institutional framework for PPPs, it is imperative that ministries, departments and agencies at both the state and federal levels, develop internal capacity to plan and implement PPP projects. Such capacities should be deployed within well-articulated legal paradigms. Where these do not exist, they should be developed drawing from the experience of other jurisdictions both local and international. Very importantly in this regard, the National Policy on Public-Private Partnerships should be used as a guide. As has been mentioned above, these should include provisions for transparency, accountability and whistleblowing.

5. CONCLUSION

This article examined the Lekki Toll Road project from the prism of risk management to discover the reasons for the collapse of the project. After careful consideration, the following risk factors were considered in-depth: legal and regulatory risk, finance risk, demand risk, political risk, economic risk and shareholder opposition risk. This study affirmed that the mismanagement of risks in PPP transactions would ultimately lead to their collapse. It also exposed the inter-relatedness of risk. For instance, due to the fact that stakeholder opposition risk was not properly managed, it exposed the project to other types of risks including demand and political risk.

Whilst the finance risk was properly managed leading to the ultimate delivery of the project, the project failed due to the mismanagement of other important project risks. In summary, it may well be that the management of other important risks were sacrificed in order to satisfy financiers. This overcompensation in favour of the financing risk meant that the project could not survive the subsequent demands of the debt and equity holders immediately the underlying economic fundamentals changed. The lesson for future projects in Nigeria is the importance of balancing the different project risks to ensure the long term sustainability of

projects. This balance could have been better achieved if the project had been procured through a competitive process and the State had hired experienced transaction advisers to represent it throughout the negotiation process with the private sector parties.

Finally, it is important to stress the importance of care in the delivery of projects as their failure usually has serious consequences. Indeed, the problem with the collapse of PPP projects is that it is nearly always expensive and the biggest losers are usually the citizens. For instance, Lagos State Government bought back the concession from the concessionaires through an additional ₦7.5 billion budgetary allocation and by raising ₦87.5 billion through the issuance of bonds.⁹³ In this case, both sources of funds were provided by taxpayers in one way or the other.

⁹³ G Akinsanmi (n 85).