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# Who Has The Power To Concession Public Airports In Nigeria?



## Introduction

The concessioning of the four major airports in Nigeria was a cardinal aim of the administration of the erstwhile President of the Federal Republic of Nigeria, Muhammadu Buhari. The concessioning of the Murtala Mohammed International Airport, Lagos (MMIA), Nnamdi Azikwe International Airport, Abuja (NAIA), Mallam Aminu Kano International Airport, Kano (MAKIA) and Port Harcourt International Airport was part of the six programmes enunciated by the Buhari's administration.<sup>1</sup>

The concessioning of the Nnamdi Azikwe International Airport, Abuja and Mallam Aminu Kano International Airport, Kano have been approved by the Federal Executive Council (the "FEC"). The concessioning of the Murtala Mohammed International Airport has been stalled due to a pending lawsuit filed by aggrieved bidders, and no bid was received for the Port Harcourt International Airport.<sup>2</sup>

In this article, we consider who has the power to concession these public assets to private entities. We conclude that none of the existing statutes fully addresses the issue of concessioning public airports in Nigeria. Thus, there is need for a more robust statute to facilitate successful project development, procurement, and delivery on a concession basis in Nigeria.

## Legal Framework

The legislation governing public-private partnerships ("PPP") and concessions in Nigeria consists of: the (a) Infrastructure Concession Regulatory Commission (Establishment, Etc.) Act, 2005 (the "ICRC Act"); (b) Public Enterprises (Privatisation and Commercialisation) Act, 1999 (as amended) (the "Public Enterprises Act (as amended)"); (c) Public Enterprises (Privatisation and Commercialisation) Order, 2012 (the "Public Enterprises Order"); (d) Public Procurement Act, 2007 (the "PPA"); and (e) ICRC Public Private Partnership Regulations, 2014 (the "ICRC Regulations"). For the purposes of this article, the sector-specific statutes are the (x) Federal Airports Authority of Nigeria Act, 2022 (the "FAAN Act"); and (y) Civil Aviation Act, 2022 (the "CAA").

## Who has the Power?

### The ICRC?

The Infrastructure Concession and Regulatory Commission (the "ICRC") is responsible for the regulation of PPPs and concessions in Nigeria. The ICRC Act gives the ICRC the supervisory mandate over all concessions of public infrastructure (whether granted by the BPE or not). Thus, every concession of public infrastructure must be made in accordance with the provisions of the ICRC Act and subject to the regulatory oversight of the ICRC.

The ICRC, however, does not grant concessions. It merely approves, monitors, and advises on every concession entered into or granted by any Ministry, Department and Agency ("MDAs") in Nigeria. The ICRC Act in section 20 provides that the ICRC shall have in its custody every concession agreement and monitor compliance with the terms and conditions of such concession agreement

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<sup>1</sup> Others include (1) establishment of major Maintenance, Repair and Overhaul (MRO), (2) national carrier, (3) leasing company, (4) Aerospace University, and (5) agro-cargo airports. <https://www.thisdaylive.com/index.php/2023/04/28/failed-concession-of-nigerian-airports> Retrieved on August 24, 2023.

<sup>2</sup> <https://businessday.ng/aviation/article/explainer-what-to-know-about-airport-concession-in-nigeria/> Retrieved on August 24, 2023. However, some news reports say that the new Minister of Aviation and Aerospace, Festus Keyamo, has suspended the airport concession programme. See <https://www.premiumtimesng.com/business/business-news/619111-fg-suspends-nigeria-air-airport-concession-plans.html> Retrieved on August 31, 2023.

and shall “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 function” of the ICRC under the ICRC Act.

The above provision of the ICRC Act unequivocally confers on the ICRC, supervisory powers over concessions of public infrastructure in Nigeria.

### The BPE?

The Bureau of Public Enterprises (the “BPE”) is enabled by the Public Enterprises Act (as amended) (which is the law pursuant to which the BPE operates) to undertake the privatisation and commercialisation of public enterprises through any mode. The Public Enterprises Act (as amended) confers on the BPE the power to grant concessions of the public infrastructure listed in the Schedule [*Enterprises for Concession*] to the Public Enterprises Act (as amended)<sup>3</sup>.

In the same vein, section 1(1) of the ICRC Act expressly provides that only a Federal Government Ministry, Agency, Corporation, or body involved in the financing, construction, operation, or maintenance of infrastructure may grant a concession on such infrastructure. This means that the sky is not the limit for the BPE in the exercise of its power to grant concessions. Hence, the BPE only has statutory power to grant concessions over public assets which have been added by the National Council on Privatisation (“NCP”) to the list of assets in the Schedules to the Public Enterprises Act (as amended).

The power of the BPE to grant a concession is derived from sections 14 and 16 of the Public Enterprises Act (as amended).<sup>4</sup> By section 14(a), the BPE has the responsibility to “implement” the NCP’s policy on commercialisation.<sup>5</sup> By section 14(b), the BPE has a duty to “prepare” public enterprises approved by the NCP for commercialisation.<sup>6</sup> In the performance of its functions under section 14, the BPE is empowered under section 16(b) to “enter into contracts or partnerships with any company, firm or person which in its opinion will facilitate the discharge of its functions”.<sup>7</sup>

Therefore, the BPE can grant or facilitate the concession of public airports in Nigeria pursuant to the Public Enterprises Act (as amended).

### The NCAA?

The Nigerian Civil Aviation Authority (“NCAA”) is the regulator of the civil aviation industry in Nigeria.<sup>8</sup> The NCAA is established by the CAA<sup>9</sup>. The CAA empowers the NCAA to register aircraft and issue certificates of registration, prohibit any Nigerian or foreign registered aircraft from operating within the Nigerian airspace without a certificate of airworthiness, and issue rules and regulations for ensuring aviation safety and the safety of aircraft, persons and property carried

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<sup>3</sup> The NCP pursuant to its powers under sections 1(3) and 6(3) of the Public Enterprises Act (as amended), enacted the Public Enterprises Order to provide for additional public enterprises to be partially or fully privatised and commercialised through concession. Hence, the NCP approved certain enterprises including nineteen (19) public airports to be commercialised by way of concession.

<sup>4</sup> Section 14 deals with the functions of the BPE in respect of commercialisation. Section 16 deals with the powers of the BPE.

<sup>5</sup> The NCP is a body established under the Public Enterprises Act (as amended) and has the responsibility of approving policies on privatisation and commercialisation. S. 11(b), Public Enterprises Act (as amended).

<sup>6</sup> The NCP is responsible for approving public enterprises to be privatised and commercialised. S. 11(d), Public Enterprises Act (as amended).

<sup>7</sup> Please note that in 2005, the BPE was responsible for the commercialisation exercise that led to the concessioning of about twenty-four (24) port terminals. In fact, some of these concession agreements have recently been renewed. The BPE was able to carry out that exercise pursuant to sections 14 and 16 of the Public Enterprises Act (as amended).

<sup>8</sup> S. 8(3), CAA.

<sup>9</sup> S. 4(1), CAA.

onboard an aircraft.<sup>10</sup> The NCAA does not own the airports and nothing in the CAA appears to empower the NCAA to enter into a concession of airports.

### The FAAN?

The FAAN Act establishes the Federal Airports Authority of Nigeria (the “**FAAN**”) with powers to manage the airports listed in the First Schedule to the Act and any other airport that may be assigned to it by the Minister of Aviation and Aerospace (the “**Minister**”).<sup>11</sup> The FAAN is also empowered by the ICRC Act to enter into PPP contracts and concessions.<sup>12</sup> It is empowered by section 6 of the FAAN Act to (i) carry out at airports, either by itself, by an agent or in partnership with any other person or body corporate, such “economic activities that are relevant to air transport and commercial and non-aeronautical activities which in the opinion of the FAAN are not prejudicial to its functions under the Act” and (ii) “negotiate and enter into agreements” with individuals, private entities, departments and agencies of government, governments of foreign countries or international organisations for giving effect to the provisions of the FAAN Act.<sup>13</sup>

The FAAN is empowered under the FAAN Act to “develop, provide and maintain airports within Nigeria and provide all necessary services and facilities for the safe, secure, orderly, expeditious and economic operation of air transport”.<sup>14</sup> It is also empowered to do anything necessary to facilitate the execution of its duties and functions under the FAAN Act.<sup>15</sup>

To the extent that (1) section 1(1) of the ICRC Act provides that any MDA, Corporation, or body involved in the financing, construction, operation, or maintenance of public infrastructure may enter into a concession agreement with a private entity and (2) the FAAN Act empowers the FAAN to “negotiate and enter into agreements” with private entities, it follows that the FAAN, being a government agency, can grant a concession or otherwise enter into a PPP contract with respect to the airports listed in Schedule 1 to the FAAN Act, or any other airport assigned to it by the Minister, within the scope of its functions, where necessary or expedient.

### Powers of the Minister of Aviation and Aerospace

The Ministry of Aviation and Aerospace (the “**Ministry**”) is one of the Federal Ministries in Nigeria and supervises air travels and aviation services in Nigeria. The Ministry is responsible for formulating and managing government aviation policies. It also oversees “air transportation, airport development, maintenance, provision of aviation infrastructural services and other needs.”<sup>16</sup>

The Ministry is headed by a Minister appointed by the President of the Federal Republic of Nigeria. It has various parastatals and agencies working under it and its duty is to monitor the activities of those agencies. Hence, the Ministry does not in itself grant a concession, the FAAN does.

Even though the FAAN must exercise some of its powers subject to the supervision of the Minister, the Minister’s supervisory powers do not appear to include the FAAN’s power to grant a

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<sup>10</sup> S. 8(1), CAA.

<sup>11</sup> S. 1(3), FAAN Act

<sup>12</sup> S. 1(1), ICRC Act.

<sup>13</sup> S. 6(b)(ii) and (e), FAAN Act.

<sup>14</sup> S. 5(1)(a), FAAN Act. Section 35(1) of the FAAN Act makes it an offence for any person or body corporate to commence construction or reconstruction of an aerodrome or airport in Nigeria without consultation with the FAAN.

<sup>15</sup> S. 5(1)(h), FAAN Act.

<sup>16</sup> <https://aviation.gov.ng/index.php> Retrieved on August 24, 2023.

concession. This is because nothing in the FAAN Act or any other law at all stipulates unequivocally that the FAAN requires the consent of the Minister to grant a concession.<sup>17</sup>

However, any decision by either the FAAN or the BPE to grant a concession is ultimately subject to ratification by the FEC (a cabinet in which the Minister is a member).

### Conclusion

The concession of public airports in Nigeria is regulated by statutes. However, none of the existing statutes fully addresses this issue. The ICRC Act is majorly a regulatory statute and does not address the issue of who grants a concession.

To our mind, the real panacea to this major issue is to have a general World-Bank-type PPP statute that will facilitate successful PPP project development, procurement, and delivery in Nigeria. The establishment of an Office of Public Private Partnerships of the type obtainable under the Lagos State Public Private Partnership Law 2011 is perhaps the way to go. Until then, the FAAN and the BPE remain the bodies legally responsible for the concessioning of public airports in Nigeria.

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<sup>17</sup> It should be noted however that some of the powers of the FAAN under the FAAN Act are made subject to the consent or approval of the Minister.

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