Public-Private-Partnership and Road Infrastructure Development in Nigeria: Understanding the Presidential Executive Order No. 007 of 2019

On Friday, January 25, 2019, the Federal Government of Nigeria (**"FGN"**), in furtherance of its commitment to infrastructure development being a key growth driver and economic development enabler; issued the ***Companies Income Tax (Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme) Order, 2019*** otherwise referred to as the *Presidential Executive Order No. 007 of 2019 (**"EO7" or the "Order"**).*

Made pursuant to the executive powers of the Federation, as vested in the President by the *Constitution of the Federal Republic of Nigeria, 1999 (as amended) and section 23(2) of the Companies Income Tax Act ("CITA" – Cap C21, Laws of the Federation of Nigeria, 2004),* the Order established the ***Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme ("the Scheme")*** as a Public-Private-Partnership (**"PPP"**) intervention in the delivery of good roads across the length and breadth of the country.

Pursuant to the EO7, private companies will be able to finance construction or refurbishment of federal roads designated as "Eligible Roads" under the Scheme and recoup their investments by utilizing the approved total costs expended on the particular Eligible Roads, as a credit against the annual Companies Income Tax payable by such private companies in the corresponding year of assessment.

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The value of the credit due to a private sector partner, known as the ***Road Infrastructure Tax Credit ("Tax Credit"),*** as calculated in accordance with the terms of the Scheme, will be reflected on the ***Road Infrastructure Tax Credit Certificate ("Tax Credit Certificate")*** to be issued by the Federal Inland Revenue Service (**"FIRS"**), in line with the conditions stipulated in the Order.

In specific terms, the Scheme, which has a duration of ten (10) years from the date of commencement of the EO7, is set up to:

- *enable the FGN leverage on private sector funding for the construction or refurbishment of Eligible Road infrastructure projects in Nigeria;*
- *focus on the development of Eligible Road infrastructure projects in an efficient and effective manner that creates value for money through private sector discipline; and*
- *guarantee Participants in the Scheme timely and full recovery of funds provided for the construction or refurbishment of Eligible Road infrastructure projects in the manner prescribed in the EO7.*

This article provides a synopsis of the Regulations for the Administration and Operation of the Scheme; Eligible Roads; Participants; and application of the Tax Credit granted under the Scheme.

ELIGIBLE ROAD

The EO7 defines an Eligible Road as any road approved by the President as eligible for *the Scheme* on the recommendation of the Minister of Finance and as duly notified to Participants and published pursuant to the Order. Such recommendation, however, is expected to be made from a list of roads presented to the Minister of Finance by the ***Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme Management Committee ("the Committee"),*** being the implementing and administrative body to be established pursuant to the EO7. As provided in the EO7, the list of Eligible Roads may be updated from time to time by the President on the advice of the Minister of Finance provided that such updates are published in the Official Gazette of the Federal Republic of Nigeria (**"FRN"**).

ADMINISTRATION AND OPERATION OF THE SCHEME

The Scheme is to be implemented and administered by the Committee established by the EO7.

As provided in the Order, the Committee is expected to:

- be chaired by the Honourable Minister in charge of Finance while the Honourable Minister in charge of Works is to be the Deputy Chairman. The Permanent Secretary, Federal Ministry of Finance is to act as the Secretary;
- draw its members from specified Ministries, Departments and Agencies (**"MDAs"**) of Government (not below the rank of a Director or its equivalent). The relevant MDAs include the Federal Ministry of Finance; Federal Ministry of Power, Works and Housing; Federal Ministry of Industry, Trade and Investment; Federal Ministry of Justice; Bureau of Public Procurement;

FIRS; Nigerian Investment Promotion Commission; Securities and Exchange Commission (**"SEC"**); Infrastructure Concession Regulatory Commission; Budget Office of the Federation; National Bureau of Statistics; Nigerian Investment Sovereign Authority; and The Presidency;

- facilitate publication, in the prescribed manner, of the following documents: (i) a list of Eligible Roads as published in the Official Gazette of the FRN; (ii) design and specification of Eligible Roads; (iii) a list of required documentation by an applicant desiring to be registered as a Participant in the Scheme; (iv) Project Cost and Completion Timeline bid;
- review and evaluate applications submitted by any company, or a pool of companies operating through a Fund Manager;
- register Participants in the Scheme pursuant to the execution of appropriate Memorandum of Understanding ("MOU") executed between Participants and the Committee;
- register and designate as an Infrastructure Fund, any special purpose vehicle (**"SPV"**) set up by a Fund Manager in accordance with the provisions of the Order, in conjunction with the SEC and in compliance with applicable SEC rules and procedures, as appropriate;
- ensure that the contracts for road construction and refurbishment included in the Project Cost bid submitted by Participants are obtained through a competitive bidding process, and thereafter facilitate the review, evaluation and approval of the submitted Project Cost and Completion Timeline bid; applying the standard procedures adopted by the Federal Ministry in charge of Works;
- facilitate evaluation by the Federal Ministry in charge of Works, the degree of completion of an Eligible Road infrastructure development project and thereupon issue a certificate of work done on an annual basis;
- facilitate the issuance, on an annual basis, of a *Tax Credit Certificate* by the FIRS to a Participant or Beneficiary under the Scheme; within fourteen (14) days of the issuance by the Committee of the certificate of work done;
- do other things, specifically provided in the First Schedule to the Order, necessary for the effective administration and operation of the Scheme.

PARTICIPANTS

Participation in the Scheme is open to the following set of entities:

- any company or corporation (other than a corporation sole) established under the *Companies and Allied Matters Act* or any law in force in Nigeria, and designated as a Sponsor of an Eligible Road pursuant to the Order;

- any company or corporation (other than a corporation sole) established under the *Companies and Allied Matters Act* or any law in force in Nigeria, and certified by the Committee as an eligible participant;
- a pool of companies – operating through an SPV – which undertakes the construction or refurbishment of any Eligible Road. However, to qualify under the Scheme, a pool of companies must be represented by a Fund Manager duly registered with the SEC and certified by the Committee as an eligible participant while the representative SPV must be registered with, and designated by, the SEC as an Infrastructure Fund set up solely for the purpose of managing the amounts received by the pool of companies; and
- Institutional Investors duly established as a company/companies under the *Companies and Allied Matters Act* and operating as Pension Fund Administrators, Collective Investment Schemes, Insurance Companies, Investment Banks etc., and are also certified by the Committee as eligible participants.

An eligible participant interested in participating in the Scheme is required to submit an application to the Committee, attaching the required documents which include a written notification of Expression of Interest in respect of an identified road project; a valid and current FIRS-issued Tax Clearance Certificate; and Project Cost and Timeline bids which must include design and specification for the identified road project, as specified.

PROJECT COST

Project Cost under the Scheme is construed as:

"any expenditure wholly, reasonably, exclusively and necessarily incurred by a Participant for the construction or refurbishment of an Eligible Road as quoted by the Participant in its Project Cost bid and as certified by the Committee".

However, as provided in the EO7, the Committee has discretionary power to determine what type of expenditure may be allowed as part of the Project Cost. In exercising this discretion, the Committee is expected to give due consideration to certain specified costs, namely:

- cost of road construction or refurbishment;
- professional service fees paid by the Participant in the course of executing a road construction/refurbishment contract, subject to a limit of 1.25% of the cost of the construction/refurbishment where such costs exceed ten (10) billion Naira;
- cost of road maintenance for a period of five (5) years following completion of the construction or refurbishment of an Eligible Road; and
- any amount in excess of the initial project cost, necessarily and reasonably incurred on an Eligible Road, which excess is certified by the relevant regulatory authority.

ROAD INFRASTRUCTURE TAX CREDIT

The amount of Tax Credit due to a Participant under the Scheme – which is reflected on the face of the Tax Credit Certificate to be issued by the FIRS – is determined by the approved Project Cost incurred in the construction or refurbishment of Eligible Roads plus a single uplift equivalent to the prevailing Central Bank of Nigeria (CBN)'s Monetary Policy Rate ("MPR") plus two (2) percent of the Project Cost.

Tax Credit = Project Cost + Single Uplift (MPR) + 2% of Project Cost.

The uplift granted to a Participant does not constitute a taxable income in the hands of the Participant or a Beneficiary under the Scheme.

Tax Credits are to be issued by the FIRS, through the Committee, and in the name of a registered Participant or its Beneficiary. In the case of a pool of companies represented by a Fund Manager or any other person, the Tax Credit shall be issued to each company in the pool separately in proportion to their respective contribution.

However, a person not duly registered and certified by the Committee as a Participant or representative of a Participant; or a person not duly designated as a Beneficiary of a Tax Credit by a Participant; or a Participant/Beneficiary that is unable to provide evidence of certification of the Project Cost by the Committee; shall not be entitled to be issued with a Tax Credit.

Required Documentation for Issuance of Tax Credit Certificate

Tax Credit Certificates are to be issued by the FIRS to Participants or their representatives, or to Beneficiaries of the Scheme, subject to presentation of the following documents:

i. Confirmation of Authorization to Participate in the Scheme (issued by the Committee);
ii. Approval (by the Committee) of the Project Cost and Completion Timeline bid;
iii. Contract Award Letter; and
iv. Certification of Work done (issued by the Committee).

At any stage of an Eligible Road project, the value of the Tax Credit Certificate to be issued shall be in proportion to the percentage of project completion as evaluated by the Committee, plus a proportion of the "uplift" due to the Participant (calculated as a percentage of the total uplift due).

Utilization of the Tax Credit

Tax Credit issued in any year of assessment is eligible for utilization as credit against the Companies Income Tax payable in the particular year, subject to a maximum of fifty percent (50%) of such tax due. However, it is permissible for an unutilized Tax Credit to be carried forward to subsequent tax years, until fully utilized.

Tax Credit as an Intangible Asset (Transferable and Qualified for Accounting Purposes)

The Tax Credit issued under the Scheme is a liquid asset capable of being disposed of, either wholly or partially, to willing buyers on the *FMDQ Over-The-Counter (OTC) Securities Exchange* or any other approved relevant Securities Exchange. This tradability of the Tax Credit is without prejudice to the provisions of Section 22, of the Companies Income Tax Act, 2007 ("**CITA**"), on "Artificial Transactions".

However, transfer of Tax Credit between related parties are to be carried out at arm's length while any gains or losses arising on the disposal of a Tax Credit is taxable as prescribed by applicable tax laws.

Trading of Tax Credits on a relevant Securities Exchange is subject to prior approval of the Committee. A Participant wishing to transfer its Tax Credit is required to designate the registration status of the connected Tax Credit Certificate as *"tradable on the Relevant Securities Exchange",* in the register maintained by the Committee – used also to keep the records of the Beneficiaries of traded Tax Credits. In a similar vein, a relevant Securities Exchange is required to maintain a register of every Tax Credit Certificate registered and traded on the Exchange.

A Tax Credit may qualify as an asset in a Participant's or Beneficiary's financial records in which case it will be treated in line with the International Financial Reporting Standards.

GUARANTEES & LIMITATIONS UNDER THE SCHEME

The Order makes certain provisions aimed at protecting the interest of Participants against possible bureaucratic bottlenecks or administrative inefficiencies, by guarantying the smooth operation of the Scheme in such circumstances. Hence,

- where a Participant incurred additional cost in excess of the initial Project Cost, **such additional amount incurred shall be allowed in the computation of the approved Project**

Cost, if the Committee is satisfied that such additional cost was necessarily and reasonably incurred; provided that the additional cost is certified by the relevant regulatory authority;

- under the Scheme, the Committee is required within two (2) weeks to facilitate notification to Participants, of certification (approval) or refusal to certify (disapproval), as the case may be, of procurement of the Project Costs as well as, issue road infrastructure development contract. However, **where the Committee fails to notify a Participant of its approval, the Participant shall be entitled to commence work on the particular Eligible Road project;**
- where a notice of refusal to approve procurement of a Project Cost (disapproval) is issued to a Participant, **the notice shall contain the grounds for the disapproval and any additional information that must be provided (if any) to secure an approval;** and
- where a certificate of work done has been issued by the Committee to a Participant, the FIRS has within fourteen (14) days to issue the connected Tax Credit. **Where the FIRS fails to do this, the Participant shall be immediately entitled to claim its due Tax Credit in its Companies Income Tax Return.**

The benefits derivable under the Scheme are totally not without qualification. Essentially, there are limitations in certain circumstances which include the following:

- A Participant (except a Participant executing a road project in a designated Economically Disadvantaged Area) can only utilize its total Tax Credit against the tax payable in any year of assessment, **subject to a maximum of fifty percent (50%) of the Companies Income Tax payable by the Participant or its Beneficiary.**
- A Participant entitled to a Tax Credit on an Eligible Road under the Scheme **is not entitled to claim, in addition to the Tax Credit, any other tax credit, capital allowance, relief or incentives on the Project Cost incurred, in respect of the same Eligible Road** under any law in force in Nigeria.
- The total professional service fee payable by Participants for the services of consultants in respect of Eligible Roads with Project Cost of ten billion Naira (₦10 billion) and above, **is limited under the Scheme to 1.25% of the cost of construction or refurbishment.**

COMMENTS

The Scheme established by the EO7 is without doubt a policy worth adopting by the FGN, in view of the low impact which federal budgetary votes for infrastructure development have had in recent years.

As the Government begins implementation of its policy to reduce sovereign debts by curtailing borrowing (particularly foreign loans) and looks inward towards harnessing the mutual gains of PPPs, the highlighted objectives of the EO7 have been seen by many in the Organized Private Sector as “better late than never”. The Scheme is also expected to incentivize private sector investment in road construction and refurbishment, across key economic corridors and industrial clusters in Nigeria, thereby freeing up FGN’s funds which hitherto may have been budgeted for road infrastructure projects, for other essential social services.

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Without prejudice to the laudable goals of the Scheme, we note that the 50% limit on utilization of Tax Credit in respect of road projects executed in economically developed areas; limit of professional fees payable by Participants to 1.25% of the approved Project Cost where the cost is ₦10 billion and above; the limited margin granted in the form of an uplift of MPR plus 2% (which is not more profitable than interest accruable from traditional risk-free government securities); as well as the disqualification from enjoying other statutorily available tax reliefs/incentives in respect of Eligible Roads on which a Tax Credit has been granted; could severally or collectively potentially reduce interest of private sector players, in participating in the Scheme.

In a similar vein, we note that the wide latitude given to the Committee to determine what shall constitute *allowable additional cost necessarily and reasonably incurred on an Eligible Road where the additional cost is certified by the relevant regulatory authority,* is potentially susceptible to bureaucratic abuse. This is especially so, given the fact that the membership of the Committee is drawn from a wide range of MDAs and that the meaning of "relevant regulatory authority" is not defined in either the EO7 or its Schedules.

Essentially, the EO7 in its Second Schedule provides for the Terms and Conditions of a Memorandum of Understanding (**"MOU"**) required to be executed between an eligible Participant and the Committee, in respect of an Eligible Road project. Notably, the required MOU is to be adopted ***"subject to contract, on terms and conditions that may be subsequently set out in the Relevant Eligible Road Project Contract Documents".*** Hopefully, most of the identified grey arrears in the operation and administration of the Scheme would be addressed through negotiation prior to contract. It is therefore very important that adequate professional advice be sought by interested Participants before concluding any commercial arrangements for the purpose of entering into an Eligible Road Project Contract, under the Scheme.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo

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