

**IMPROVING COMPETITION WITHIN PUBLIC
PRIVATE PARTNERSHIP (PPP) PROCUREMENT
PROCESS FOR INFRASTRUCTURE DELIVERY
IN MALAYSIA**

Muhammad Imran bin ZIN ZAWAWI

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Declaration

This thesis is submitted as partial fulfilment for the award of Doctor of Philosophy at the University of Salford, United Kingdom and has not been previously submitted to meet requirements for an award at any higher education under my name or that of any other individuals.

Any materials previously published or written by another person(s)/organisation(s) is made reference accordingly. Part of the research findings were published in international peer-reviewed journals and as conference presentation prior to the submission of the thesis during the period of PhD study as per page xiii.

Abbreviations

EPEC	-	European PPP Expertise Centre
ETP	-	Economic Transformation Programme
EU	-	European Union
GDP	-	Gross Domestic Product
JKAS	-	Jawatan Kerjasama Awam Swasta
JTAS	-	Jawatan Tertinggi Awam Swasta
NEP	-	New Economic Policy
NPV	-	Net Present Value
OECD	-	Organisation for Economic Co-operation and Development
PEMANDU	-	Performance Management and Delivery Unit
PFI	-	Public Finance Initiatives
PPP	-	Public Private Partnership
RFP	-	Request for Proposal
SIGMA	-	Support for Improvement in Governance and Management
TFEU	-	Treaty on the Functioning of the EU
TPPA	-	Trans Pacific Partnership Agreement
UKAS	-	Unit Kerjasama Awam Swasta
UNCITRAL	-	United Nations Commission on International Trade Law
UNCTAD	-	The United Nations Conference on Trade and Development
UNESCAP	-	The United Nations Economic and Social Commission for Asia and the Pacific
US	-	United States
WTO GPA	-	World Trade Organisation Agreement on General Procurement

Abstract

Public Private Partnerships (PPP) have come to be preferred by governments for infrastructure development over traditional procurement. PPP is seen as the answer to many shortcomings of traditional procurement. Despite the complex nature of a PPP procurement process, governments around the world are emphasising and promoting competition within the procurement process. Competition is recognised as a significant element in the abundance of academic literature. Competition in the procurement process leads to desirable results for the procuring authority, by achieving value for money, encouraging innovation and promoting efficiency. Nevertheless, there is evidence that competition is still lacking within the PPP procurement process, so the idea of obtaining efficiency from the private sector may not be fully realised.

This thesis first examines the procurement process from the global practice, and the integration of competition within the complexity of PPP. It then focuses on analysing the less known Malaysian PPP procurement process and the competition organised within its procurement process. A case study was conducted on the Malaysian Public Private Partnership Unit, Unit Kerjasama Awam Swasta (UKAS), to investigate the manner of competition incorporated within PPP in Malaysia. UKAS is the central agency responsible for facilitating and coordinating PPP implementation in Malaysia. The case study was generated from a combination of thirteen semi-structured interviews and multiple document reviews to address the research objectives. Content analysis was adopted to examine the interview transcripts and documents. Nvivo was later used to manage the coding process.

Based on the empirical findings, in its effort to make the country's PPP programme a success, UKAS has been flexible in its implementation, with less emphasis on incorporating competition within the procurement process. UKAS, however, still manages to procure infrastructure using PPP for the reasons for adopting PPP. This result in inconsistencies in UKAS governance on procurement process. Where the findings illustrate that value for money can be achieved by other means, the researcher concludes that competition involves more than achieving value for money; it can also be used as a procedural barrier, hence achieving good governance.

Output and Dissemination

Articles in international peer-reviewed journals

Zawawi, M, Kulatunga, U and Thayaparan, M. 2017, 'Malaysian experience with Public Private Partnerships (PPP) – managing unsolicited proposals', *Built Environment Project and Asset Management*, 6 (5), 508-520

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Chapter One - Introduction

1.1 Introduction

There have been rapid increases over recent years in the use of Public Private Partnerships (PPP) in place of traditional procurement. PPP can be identified as a procurement which involves cooperation between the public and private sectors to achieve a common goal (Koppenjan, 2005; Hodge & Greve, 2009; Kwak et al., 2009; Petersen, 2011a). PPP has been used by governments around the world as an alternative approach to the traditional procurement methods (Ball et al., 2000; Eaton & Akbiyikli, 2005; Grimsey & Lewis, 2005; Parker, 2009; Burger & Hawkesworth, 2011), due to the benefits gained from private sector participation: alternative financing (Ball et al., 2000; Yescombe, 2007; Dewulf et al., 2012; The World Bank, 2014); positive impact on quality and efficiency (Clive, 2003; Murphy, 2008; Son, 2012; World Bank Institute, 2012); and providing value for money (Yescombe, 2007; HM Treasury, 2008a; World Bank Institute, 2012). Despite its advantages, PPP has been the subject of numerous studies discussing whether it really is of benefit to the taxpayer and other stakeholders. Holistically, PPP has been discussed and investigated from all angles in many fields such as political science (Hayllar & Wettenhall, 2010; Gawel, 2011; Siddiquee, 2011); the law (Kalbe, 2005; Tvarnø, 2006; Burnett, 2009; Andersen et al., 2010); public administration (Brinkerhoff & Brinkerhoff, 2011; Chen et al., 2013); and accounting (Heald, 2003; Asenova & Beck, 2010).

Nevertheless, where most studies' objectives were to understand the nature of PPP and its positive outcomes (Eaton & Akbiyikli, 2005; Hardcastle et al., 2005; Koppenjan, 2005; Clifton & Duffield, 2006; Smyth & Edkins, 2007), there are also opinions on the drawbacks of PPP and its disadvantages. For example, the total cost of development can be higher since the cost of capital borrowings by the private sector is much higher than that by the public sector (Ball et al., 2000; Spackman, 2002; Parker & Hartley, 2003). Doubts have been expressed by supporters of public ownership on the role of changing values between public authority and the private sector, given the nature of the private sector as a business entity which operates mainly for profit (Regan, et al., 2011). PPP also permits private

companies to increase their authority in the government's decision-making process and policy development (Whitfield, 2001).

1.2 Background of the Research

There is no shortage of definitions of PPP in the literature. It has been identified as a tool and strategy for governments around the world to procure infrastructure and services (Public Accounts Committee, 2006; Kwak et al., 2009). Generally, what differentiates PPP from other traditional forms of procurement is the single contract used for the whole development, compared to different contract arrangements for works, maintenance and operations. The bundling of works in a PPP contract explains the very long-term contract period, normally up to 20 to 30 years or more (Grimsey & Lewis, 2005; Gillard, 2008; Parker, 2009; Reeves, 2013). Under PPP arrangements, governments are no longer seen as providing infrastructure to the public, but as buying services from the private sector (Eaton & Akbiyikli, 2005).

PPP encourages the involvement of the private sector in providing infrastructure to varying and increasing degrees: funding; planning; designing; and operating and maintaining the infrastructure. This is especially so in the case of private funding (Hodge, 2004), an innovation which has achieved enhanced value for money for the tax payer. Input from the private sector partner from the early stages of the project through the whole life cycle of an infrastructure development is essential to guarantee value for money. PPP and sub-procurement methods such as Private Finance Initiatives (PFI), Build Transfer Operate (BTO), Design Build Operate Maintain (DBOM) and Design Build Finance Operate (DBFO) have been successfully used by developed countries such as the UK, Australia and the US in procuring services and infrastructure (Kumaraswamy & Zhang, 2001; Siddiquee, 2011; Zhang & Chen, 2013).

Within the context of Malaysia, the attraction of features such as optimising government debt and/or expenditure, risk sharing and gaining value for money has led to PPP being endorsed by the government as one of the best means of procurement for infrastructure projects (Bernama, 2010). The demand for infrastructure delivery is vast in Malaysia, due to the rapidly expanding economy and the Asian urbanisation boom (Man, 2013; Llanto et al., 2015). To facilitate the country's growth, since 1956 Malaysia has phased its economic development in five-year cyclical plans. The Tenth Malaysia Plan was announced in June 2010. Following the outline in this Plan, the government introduced the Economic

Transformation Programme (ETP), a determined, detailed programme to improve and reform the country's economy and ensure the transformation of Malaysia into a developed nation through certain identified sectors. Under this programme, the role of the private sector is crucial in terms of the required contributions, as well as participation in implementation of the ETP, particularly in delivering services and infrastructure to the people. An estimated 92% of the funding for the key areas identified in the ETP will be supported by the private sector with the government assisting in facilitating the delivery of public services through its regulatory actions (Prime Minister's Department, 2011).

Malaysian experience of working with the private sector in infrastructure development began with the incorporated programme and privatisation in the 1980's. Benefitting from the results of the successful privatisation programme in providing infrastructure, the government introduced the PFI as an enhancement to its privatisation programme. Later, it introduced PPP to continue the special relationship with the private sector experienced through privatisation and PFI. In spite of a long history of evolution of PPP in Malaysia, the current mode of PPP and its practice of competition is less understood. Existing literature on PPP activities in Malaysia focuses on the value for money of PPP (Khan et al., 2010; Ismail et al., 2011, 2012; Ismail, 2013a), risk management in PPP (Takim et al., 2009), Critical Success Factor (CSF), challenges in implementing PPP, drivers of PPP implementation (Ismail, 2013b, 2014; Ismail & Haris, 2014b) rather than the procurement process of PPP and implementation of competition mechanism in depth. Rahman et al. (2014) and Zainon et al. (2012) discussed the procurement process of Malaysian PPP, although their research was based on a review of the UK procurement process. Another recent article by Rashid et al. (2016) dedicates a sub-section to the Malaysian PPP procurement process, with the suggestion of referring to the guidelines published by the Malaysian PPP unit.

Despite the vision and targets of the Malaysian government for good governance of the procurement regime, there are still weaknesses that have a negative impact on the campaign and efforts by the government. Nambiar (2009) suggested that Malaysian privatisation lacks good governance, including competition. Nevertheless, currently Malaysia acknowledges the importance of greater competition to entice private investors, thus striving to improve current policies by removing barriers to competition and creating a more liberalised market (PEMANDU, 2010).

1.3 Rationale of Research

According to Burger and Hawkesworth (2011), there are many factors contributing to the success of PPP, one of which is competition amongst private parties. Competition is also deemed as the most important determinant to achieve value for money, apart from risk allocation (Grimsey & Lewis, 2005). They insisted that competition in PPP will lead to better value for money. Competition encourages the competing parties to be more innovative by efficiently using available resources and improving the quality of offers with the incentive of winning the concessions. In addition, competition safeguards the interest of the taxpayers (HM Treasury, 2008a). An effective competition policy in PPP also increases the propensity of attracting the private sector to invest in PPP programmes. As PPP is by its nature a long-term contract amounting to a huge amount of money, PPP is a magnet for potential misconduct of the procurement process to satisfy political or business interests. According to Amaral et al. (2009), most governments insist on competition being upheld in PPP. Without competition and transparency, PPP may be used as a mechanism to legalise the awarding of contracts or projects to a favoured company or party. Therefore the role of government is vital in ensuring and stimulating competition in the PPP procurement process (Office of Fair Trading, 2004).

Unfortunately, despite awareness of the importance of competition in PPP, Zou et al., (2008) and Kwak et al., (2009) stated that current causes of PPP failure are contributed to by the lack of competition in the procurement process. Given PPP's huge and complex characteristics, there is evidence that competition is ignored during bidding exercises, with the result that obtaining efficiency from the private sector may not be fully realised (Pollitt et al., 2002; Bloomfield, 2003). A lack of competition within the procurement process has led to: minimal innovation (National Audit Office & Infrastructure UK, 2010); unethical decision making (Hassim, 2012); corruption (Estache & Iimi, 2008; Anderson et al., 2011); abuse of diplomatic and political power (Søreide, 2006); and failure to achieve value for money (Dudkin & Vällilä, 2005; The World Bank, 2014). Based on Ireland's experience using PPP, Reeves (2013a) listed competition as the one element that needs to be improved in order to achieve economic efficiency and the social welfare offered by PPP.

Although the procurement process of selecting a private partner is vital in order to achieve value for money, there is a gap in organising the competitive environment for awarding PPP contracts (United Nations, 2008). There are different views about the method by which a private partner should be chosen, especially concerning whether PPP concession

should be awarded in the same manner as other public procurement. Pouncey and Brown (2014) suggested that the open tender best suits a simple non-complex contract. A complex contract arrangement such as PPP might not be suitable in achieving the best competitive environment in an open tender procedure, since PPP usually involves a large-scale project (European Commission, 2003); high administration costs (Trybus, 2006); a minimum numbers of bidders to ensure that competition is intense (Shaoul et al., 2008); and the need for negotiation between parties (SIGMA, 2011).

Another ardently debated anti-competitive practice in PPP globally is the unsolicited proposal (Hodges & Dellacha, 2007; Andersen et al., 2010; Verma, 2010). In PPP, an unsolicited proposal is an attempt by a private company to submit a new idea or initiative in return for the exclusive award behind closed doors from the contracting authority. The practice of unsolicited proposals is acceptable in certain countries where it can be a source of innovation, especially where public needs go unnoticed by the government (Meyer, 2012). On the other hand, some countries have barred the practice for its anti-competitive conduct and lack of transparency (UNESCAP, 2010). There are also legal concerns about the proposal's intellectual property rights (Søreide, 2006).

With the introduction of PPP, Malaysia is creating a private-sector led economy. The challenge faced by the government is making PPP an attractive investment opportunity in the eyes of potential investors (Economic Planning Unit, 2010). Malaysia has acknowledged the importance of greater competition to entice private investors, striving to improve current policies by removing barriers to greater competition and creating a more liberalised market (PEMANDU, 2010). Due to the Malaysian ethnicity-based affirmative-action policy which gives preferential treatment to the *Bumiputera* (the majority Malay ethnic group), the government has a huge task in attracting private investors to participate in PPP. The *Bumiputera* policy was originally developed to achieve national unity by narrowing the economic imbalance between different ethnic groups in Malaysia. This policy may be seen as a restriction on the competition exercise among existing players and potential entrants to Malaysian PPP.

In response to the importance of competition in the PPP procurement process and the effort of the Malaysian government to sustain improvement, the need arises for this research, for several reasons. First, the Malaysian context offers a unique perspective of a mid-ranking emerging economy and developing country that has an ethnicity-based affirmative-action policy but at the same time desires to achieve greater economic growth through investment

and co-operation with the private sector by promoting PPP. Second, as little is known about the competition practice within the Malaysian PPP procurement process, the research intends to analyse global and Malaysian PPP practice and the competition incorporated within the PPP procurement process.

1.4 Aim and Objectives of the Study

The research aim is to enhance the procurement process for infrastructure delivery in Malaysian PPP by incorporating competition. Five objectives are developed to fulfil the research aim:

- i. to understand and analyse the PPP procurement process with particular reference to competition;
- ii. to evaluate the challenges to incorporating competition within PPP procurement process globally;
- iii. to appraise and synthesise the PPP procurement process with particular reference to competition adopted by the Malaysian Government for infrastructure delivery;
- iv. to investigate the relevance of competition within the PPP procurement process in Malaysia;
- v. to develop and validate a competition-based PPP framework which targets improvement for Malaysian PPP.

1.5 Scope of the Research

PPP is a multidisciplinary subject, used by public authorities around the world in various sectors. It has been adopted in the health sector, education, defence, housing, transportation, telecommunication, tourism and supply of energy (Asian Development Bank, 2012). In these sectors, PPP is used to procure services and/or infrastructure. It is important to highlight that the current research focuses on the adoption of PPP by the public authority to procure infrastructure in Malaysia. Infrastructure can be categorised as economic or social. The former includes sectors such as transport, utilities, communication, and renewable energy. The provision of a social infrastructure is one of the government's

responsibilities in serving community interests, such as educational, healthcare, social and welfare facilities (Inderst, 2010).

Various sub-procurement of PPP have been adopted around the world (see section 2.3). This study does not intend to cover each of these sub-procurements. Nevertheless, since the development of PPP is linked to privatisation and PFI, these elements are emphasised. Given the claim of lack of competition within the procurement process, this research seeks to study the competition element within the PPP procurement process, both globally and in the context of Malaysia's infrastructure delivery.

1.6 Research Process

To achieve the aims and objectives of this research is challenging. To satisfy the objectives, a qualitative paradigm is adopted to focus on understanding the practice globally and to discover the Malaysian practice by drawing on the experience of involved individuals. The research is divided into several stages: the literature review, case study and framework development. These stages are illustrated in Figure 1.1. The literature review comprehensively examines the concept of PPP and leads to identification of the research problem. In particular, it appraises the concept of competition and its relevance within PPP, to address research objectives 1 and 2 outlined in section 1.4.

Research objectives 3 and 4 are addressed by a case study, designed to study the UKAS procurement process and the competition element incorporated within it. UKAS is the PPP unit set up by the Malaysian government. The case study combines interviews and a document review as the sources of evidence. Primary data was gathered from a total of thirteen semi-structured interviews with participants chosen for their engagement and involvement with the UKAS procurement process. The aim of these interviews was to scrutinise the experience and knowledge of individuals who have first-hand experience of Malaysian PPP. The transcripts of the interviews were organised and analysed methodically. The final stage is the development and validation of the frameworks, from a synthesis of the results of the literature review and the case study. A detailed discussion of the research methodology and methods is presented in Chapter 4.

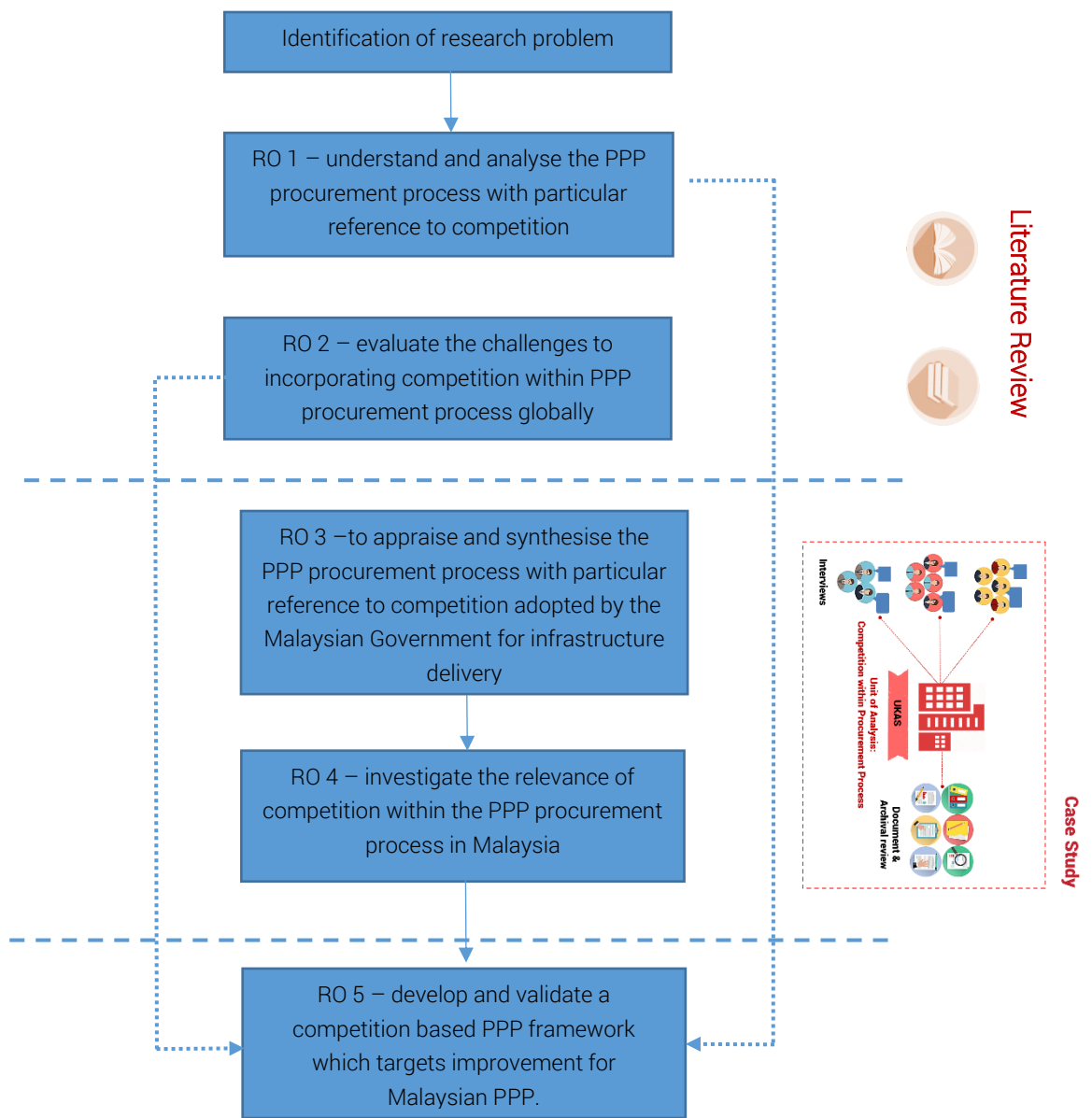


Figure 1.1 – Research Process

1.7 Significance of the Research

Since the use of PPP in the early days (from privatisation to PFI), Malaysia has benefited economically and socially. The government declared the privatisation programme a success, having implemented 698 PPP projects from initiation until December 2014. Since

privatisation, the government managed to save £37.8¹ billion of capital expenditure and £1.8 billion of government operating expenditure (Hamsa, 2015).

Nevertheless, the good reputation of PPP programmes has been smeared by critiques and allegations. Post-privatisation saw allegations that the concessionaire companies were making supra-profits from the government over a prolonged period, due to the lopsided nature of the agreement. There have also been allegations of abuse of power by the ruling government with a lack of competitive bidding in awarding contracts (Jomo and Syn, 2003; Tan, 2008; Wang et al., 2012). These allegations might deter private investors from participating in PPP programmes.

PPP must be seen as an attractive investment opportunity rather than merely a project to the private sector. Outcomes of the research may be used to indicate continuous effort by the government for good governance of public procurement and to suggest improvements to the current system if necessary. Further contributions of the research are presented in section 7.3.

1.8 Structure of the Thesis

This research is structured in seven chapters.

Chapter 1 introduces the research. The nature of the research is explained through an overview of the background, the research problem, and the aim and objectives. The content of this chapter guides the reader in understanding the progress of the research.

Chapter 2 presents the findings of the literature review on PPP, including the practice of PPP and the diversity offered by the procurement globally. The chapter also looks at the evolution of PPP in the UK, which has been identified as the most advance practitioner. The background and evolution of PPP in Malaysia is then examined, proving to be similar to that in the UK.

Chapter 3 is a literature review of the main subject of this study, concentrating on the best practice of competition within the PPP procurement process. The success of the European Union (EU) in organising competition within the procurement process among the many member states is highly regarded and is studied further in this chapter. The challenges faced by PPP practitioners in advocating competition within the PPP procurement process

¹ Conversion is based on July 2016 where 1 Malaysian Ringgit is equal to 0.19 British Pound.

are also investigated. The chapter ends with an overview of the Malaysian practice, as recorded in the literature.

Chapter 4 explains the research methodology. It discusses the selection of the philosophy, research strategy, data collection methods, data analysis and relevant instruments that facilitate meeting the aim and objectives of the research. The chapter also discusses the case study design and procedures.

Chapter 5 presents the outcome of the case study, comprising the findings from the document review and extracts from the interviews. The text from the interviews was analysed using content analysis, with the focus on discovering and understanding the Malaysian PPP practice, in particular the procurement process and competition.

Chapter 6 discusses the case study. It provides in-depth discussion of the data analysed which gives valuable meaning to the findings. Within the Malaysia context, competition within the procurement process is demonstrated as vital in achieving benefits in addition to economic ones. The chapter presents the proposed frameworks which address the aim and objectives of the research, and ends by describing the validation of the frameworks.

Chapter 7 is the final chapter of this thesis. The research objectives are revisited, with a summary of how the study was conducted and what it has achieved. The chapter also describes the value of this research to the literature and to industry. Limitations and recommendations for future research are suggested.

Chapter Two - Literature Review: Public Private Partnership (PPP)

2.1 Introduction

PPP has become a trend worldwide for governments to procure services and infrastructure, and there is no sign that the trend is going to stop soon. This is reflected by the continuing use of PPP today. This chapter reviews the essential literature that forms the foundation of this research. The research context and focus are provided for clarity. Referring to both scholarly articles and government publication as main sources, the literature review is divided into two main themes: PPP (Chapter 2) and competition (Chapter 3).

This chapter commences with an overview of the concept and practice of PPP globally. It includes discussion of PPP's characteristics, reasons to employ PPP and the benchmarking of PPP practice. It focuses on the history and progress of PPP in the UK, identified as the pioneer of PPP in the modern world and currently a leader in its practice, and then evaluates the initiation and progress of PPP in Malaysia. Although PPP implementation in Malaysia is still in its infancy, the country has a long history of working with the private sector to develop the nation. The chapter ends with a summary of findings.

2.2 Understanding PPP

Thirty years ago, there was great excitement over a new procurement. Although three decades may seem like a long time, the pioneer PPP ventures are now on the verge of contractual expiry, as most PPP agreements were designed to be long term, from 25 to 30 years (Tvarnø, 2006; KPMG International, 2007; Hall, 2008; HM Treasury, 2008a; United Nations, 2008; Chinyio et al., 2009; Chong & Callender, 2009; Takim et al., 2009; Cheung et al., 2012).

Despite the widely publicised use of the term in recent years to epitomise the relationship between the public and private sectors, some scholars have argued that this relationship can be traced back to the 18th century (Kumaraswamy & Zhang, 2001; Vining et al., 2004; Hodge & Greve, 2007; Engel et al., 2010). However, PPP has only been used extensively for infrastructure projects since the 1990s (UNCTAD, 2013).

Despite the fact that it has been around in its present form for 30 years, there is still no single agreed legal definition of PPP (European Commission, 2003; PriceWaterhouseCoopers, 2005; Public Accounts Committee, 2006; Chinyio et al., 2009; Andersen et al., 2010; Wang et al., 2012; World Bank Institute, 2012; UNCTAD, 2013). With different types of PPP arrangements, a possible explanation for this diversity is that every nation has tailored the concept of PPP to suit its own needs and complexities. Therefore, as suggested by Perry (1998), this research examined common global elements of PPP approaches in developed and developing countries by contracting authorities. Perry (1998) also warned that definitions by other researchers might be influenced by trivial personal beliefs. Table 2.1 illustrates salient common characteristics of PPP. Although there is no unified definition of PPP, Table 2.1 highlights common elements that are exploited by government organisations and agencies in approaching PPP. Under the rubric of PPP, the majority of organisations emphasise the synergy of bundling elements of PPP which include the maintenance and operation of infrastructure, long-term contracts and risk allocation. The key distinct features of PPP, as opposed to conventional procurement, are the distribution of significant risks and responsibilities of parties, ownership and the conceptualisation of the built asset and the source of project finance/funding (Burger & Hawkesworth, 2011). In PPP, the private sector partner's role is enhanced and is more actively involved in all the stages from planning and development up to maintenance of the completed facility. In addition, due to the bundling of contractual arrangements for the services in all of these stages, PPP is more complex than conventional procurement.

For the purpose of this study, PPP is defined as a partnership arrangement between the public and private sectors to provide infrastructure, where the private sector designs, develops, finances, maintains, and operates the infrastructure over a prolonged period, with payment by the public sector or end user for the services provided. To ensure clear definitions of each party's rights and obligations, the parties involved need to enter into a legal contract with the aim of procuring infrastructure by maximising expertise and innovation through partnership. This contractual arrangement should not to be confused with more conventional affiliations between the public and private sectors to provide infrastructure.

Table 2.1 –Global Common Elements of PPP

Source	Major PPP Elements										Notes
	Contractual relationship	Long term	Funding by private sector	Allocation of risk	Innovation	Asset ownership by public sector	Involve maintenance and operation	Public sector to achieve efficiency	Rewards/incentives to private sector partner	To reduce public sector's debt/surplus/deficit	
United Nations Conference on Trades And Development (UNCTAD) (2013)	●	●		●	●	●	●	●	●	●	a. Public financial institution plays an important role on funding.
Commission of the European Communities (2004)	●	●	●	●	●		●				a. Relationship can be unilateral not contractual b. Funding may come from other sources including public fund
United Kingdom, HM Treasury (2008)	●	●	●	●	●		●	●	●	●	a. Payments for incentives or reward may be charged direct to end user; for example, tolls

Source	Major PPP Elements										Notes
	Contractual relationship	Long term	Funding by private sector	Allocation of risk	Innovation	Asset ownership by public sector	Involve maintenance and operation	Public sector to achieve efficiency	Rewards/incentives to private sector partner	To reduce public sector's debt/surplus/deficit	
Meyer (2012) – The National Council of Public-Private Partnerships	●	●	●	●	●	●	●	●	●	●	a. Faster project delivery
Hawkesworth & Marcel, (2011) - Organisation for Economic Co-operation and Development (OECD)		●	●	●			●	●	●	●	a. Rewards in the form of profit b. Ownership depends on model
Fiscal Affairs Department International Monetary Fund (IMF) (2004)	●	●	●	●	●	●	●	●		●	a. Acknowledges different types of PPP

Source	Major PPP Elements										Notes
	Contractual relationship	Long term	Funding by private sector	Allocation of risk	Innovation	Asset ownership by public sector	Involve maintenance and operation	Public sector to achieve efficiency	Rewards/incentives to private sector partner	To reduce public sector's debt/surplus/deficit	
Public-Private Partnership Unit (UKAS) Malaysia (2009)	☉	☉	☉	☉		☉	☉		☉	☉	a. Payments for incentives or reward may be a charge direct to end user
Felsing & Miranda, (2008) – Asian Development Bank (ADB)	☉	☉	☉	☉	☉		☉	☉	☉		a. Acknowledges relationship but does not mention contractual b. Acknowledges private funding as private investment c. Rewards in the form of profit
European Commission (EC) (2003)	☉	☉	☉	☉	☉	☉	☉	☉	☉	☉	
Ministry of Finance Singapore, (2012)		☉	☉	☉	☉		☉	☉			a. Acknowledges relationship but does not mention contractual

Source	Major PPP Elements										Notes
	Contractual relationship	Long term	Funding by private sector	Allocation of risk	Innovation	Asset ownership by public sector	Involve maintenance and operation	Public sector to achieve efficiency	Rewards/incentives to private sector partner	To reduce public sector's debt/surplus/deficit	
European PPP Expertise Centre (EPEC), (2011)	☉	☉	☉	☉					☉		a. Payments for incentives or reward may be charged direct to end user
Infrastructure Australia, (2008)	☉	☉		☉			☉	☉	☉		a. Receive payments once commenced

2.3 Partnership Arrangement in PPP

Contrary to the traditional role of the government in providing infrastructure for the people, the role has in some ways been shifted to the private sector in the form of PPP. In PPP, the public sector or the government is purely the purchaser of a service provided by the private sector. This change of role was initially driven by governments trying to reduce their fiscal debt level and spending, thus leading them to utilise private sector funding in the form of capital investment (Adair et al., 2011). Furthermore, the private sector is seen as being able to deliver things efficiently in order to achieve returns as a business (Alexandersson & Hultén, 2006; Boles et al., 2013). In return, the private sector receives return from leasing payments of the built infrastructure or direct payment from the user; for example, toll charges.

Another reasons why there is no common universal definition of PPP is that PPP is a very broad generic term, embracing a wide range of partnership arrangements. These partnership arrangements are categorised according to the agreement on risk allocation, the extent of the parties' participation, the responsibilities and ownership of the infrastructure (HM Treasury, 2012). No single preferred partnership arrangement is applied to every project or development (European Commission, 2003). The application of partnership arrangements depends on the particular needs, requirements and suitability of specific infrastructure developments, as each model has its own strong and weak points. Another source of confusion is the different labels employed by different countries for similar contractual arrangements (Wang et al., 2012). This research identifies and synthesises those PPP partnership arrangements commonly used by multiple organisations for infrastructure delivery, as shown in Table 2.2. Although a variety of terms is used by multiple organisations, there are common characteristics that distinguish PPP from traditional procurement. Based on the different partnership agreements listed in Table 2.2, it can be observed that the differences between PPP and traditional procurement lies in funding sources, responsibilities and ownership of the completed infrastructure. The different partnership arrangements of PPP have been developed with different objectives in mind, so governments are not short of choices when opting for PPP. With an appropriate partnership arrangement, PPP can bring the maximum benefit to the development and the stakeholders.

Table 2.2 – Types of Partnership Agreement

Source	Partnership Arrangement	Delivery Method
Eggers & Dovey (2007) for Deloitte	Build Transfer (BT):	<ul style="list-style-type: none"> • Also known as Design and Build (DB); • Based on the public sector's statement of need, the private partner will design and build the facility; • The completed facility will be operated and maintained by the public sector.
	Build Lease Transfer (BLT):	<ul style="list-style-type: none"> • Based on the public sector's statement of need, the private partner will design and build the facility; • Upon completion, the facility will be leased to the public sector until the lease is fully paid; • Public sector will operate the facility during the lease period; • No additional cost for facility ownership transfer.
	Build Transfer Operate (BTO):	<ul style="list-style-type: none"> • Also known as Design Build Operate (DBO); • Based on the public sector's statement of need, the private partner will design and build the facility; • Ownership by the public sector; • Private partner will operate the facility.
	Build Operate Transfer (BOT):	<ul style="list-style-type: none"> • Also known as Design Build Operate Maintain (DBOM); • Private partner is responsible for designing, constructing, operating and maintaining the facility; • Asset will transfer ownership once contract period is complete.
	Build Own Operate Transfer (BOOT):	<ul style="list-style-type: none"> • Private partner will be awarded grant for financing, designing, building and operating the facility; • Asset will transfer ownership once contract period is complete.
	Build Own Operate (BOO):	<ul style="list-style-type: none"> • A private entity will be awarded authorisation for financing, designing, building, operating and maintaining the facility; • Ownership will remain with the private entity.
	Design Build Finance Operate/Maintain (DBFO):	<ul style="list-style-type: none"> • Private partner is responsible for financing, designing, constructing, operating and maintaining the facility. • Long-term agreement; • Asset will transfer ownership once contract period is complete.

Table 2.2 (continued) - Types of Partnership Agreement

Source	Partnership Arrangement	Delivery Method
United Nations (2008)	Build Own Operate (BOO):	<ul style="list-style-type: none"> • The private partner is responsible for financing, building and operating a facility; • Private sector owns the facility. There is no transfer of ownership of facility.
	Build Own Operate Transfer (BOOT):	<ul style="list-style-type: none"> • A private entity will be awarded a franchise for financing, designing, building, operating the facility; • May charge end user for use of facility; • Asset will transfer ownership once contract period is complete.
	Build Operate Transfer (BOT):	<ul style="list-style-type: none"> • Private partner is responsible for financing, designing, constructing and operating the facility; • Long-term concession; • Asset will transfer ownership once concession period is complete; • Similar to BOOT and BLOT except the ownership of asset.
	Build Lease Operate Transfer (BLOT):	<ul style="list-style-type: none"> • A private entity will be awarded franchise for financing, designing, building, operating leased facility; • Charge end user for use of facility against payment of a rent
	Design Build Finance Operate (DBFO):	<ul style="list-style-type: none"> • Private partner is responsible for financing, designing, constructing, operating and maintaining the facility; • Long-term agreement; • Asset will transfer ownership once contract period is complete.
	Finance only:	<ul style="list-style-type: none"> • A private entity funds project, directly or using other financing mechanism; • Normally a financial institution; • Long-term lease or bond issue.
	Design Build (DB):	<ul style="list-style-type: none"> • Private partner to design and build facility based on specific performance requirement by the public sector. • Turnkey basis with a fixed price • Argued as being a typical public works contract rather than one of PPP.

Table 2.2 (continued) - Types of Partnership Agreement

Source	Partnership Arrangement	Delivery Method
Fiscal Affairs Department International Monetary Fund (IMF) (2004)	Build Own Operate (BOO):	<ul style="list-style-type: none"> Private partner to design, build, own, develop, operate and manage facility based on specific performance requirement by the public sector; No obligation to transfer ownership to public sector; Variant of Design Build Finance Operate (DBFO)
	Build Develop Operate (BDO):	
	Design Construct Manage Finance (DCMF):	
	Buy Build Operate (BBO):	<ul style="list-style-type: none"> Private sector to buy/lease an existing facility from public sector; Facility will be upgraded; Private sector will operate; No obligation to transfer ownership to public sector.
	Lease Develop Operate (LDO):	
	Wrap Around Addition (WAA):	
	Build Operate Transfer (BOT):	<ul style="list-style-type: none"> Private partner to design, build and operate facility; Transfers ownership of facility once contract period over; Private partner may rent or lease the facility from the public sector.
	Build Own Operate Transfer (BOOT):	
	Build Rent Operate Transfer (BROT):	
	Build Lease Operate Transfer (BLOT):	
Build Transfer Operate (BTO):		

The partnering arrangements listed in Table 2.2 was designed and subsequently evolved to reflect the context of a country/contracting organisation and the specific technical requirements of the project. In the UK, one of the earliest partnership arrangements was PFI (Demirag et al., 2011). According to Eaton and Akbiyikli (2005), PFI is a subset of PPP which is a generic term used for all partnerships which involve construction. Although using a different label, the elements of PFI match those of the PPP elements as described in Table 2.1. Nevertheless, given the different labels and definitions, Ismail (2009) concluded that PFI and PPP are different. However, she failed to understand that even though the labels are different, the contexts of both procurements are similar. This is supported by the explanation of HM Treasury (2008) which claims PPP as an improved version of PFI to meet new demands. Like

PPP, PFI involves the public sector as a service purchaser from the private sector for a specified time, usually long term with pre-set payment mechanisms (Eaton & Akbiyikli, 2005). PFI is also seen as a financial scheme where private investment replaces traditional funding of traditional construction procurements by the public sector (HM Treasury, 2003). Others may debate whether PPP and PFI are two different items; however, in this research, PFI's role as an important foundation for the creation of PPP is acknowledged. However, the research will focus on PPP and will not be used interchangeably with PFI, since according to Eaton and Akbiyikli (2005) PFI is a sub-set of PPP. In line with the definition embraced by this research in an earlier chapter, this research agrees that Design Build Finance Operate (DBFO) largely mirrors PPP as the arrangements require the private sector to design, develop, finance, maintain and operate the infrastructure over a prolonged period, in consideration of payment by the public sector or end user for the service provided. Figure 2.2 shows selected partnership arrangements with the level of private sector involvement to illustrate the changes in the public sector role under PPP.

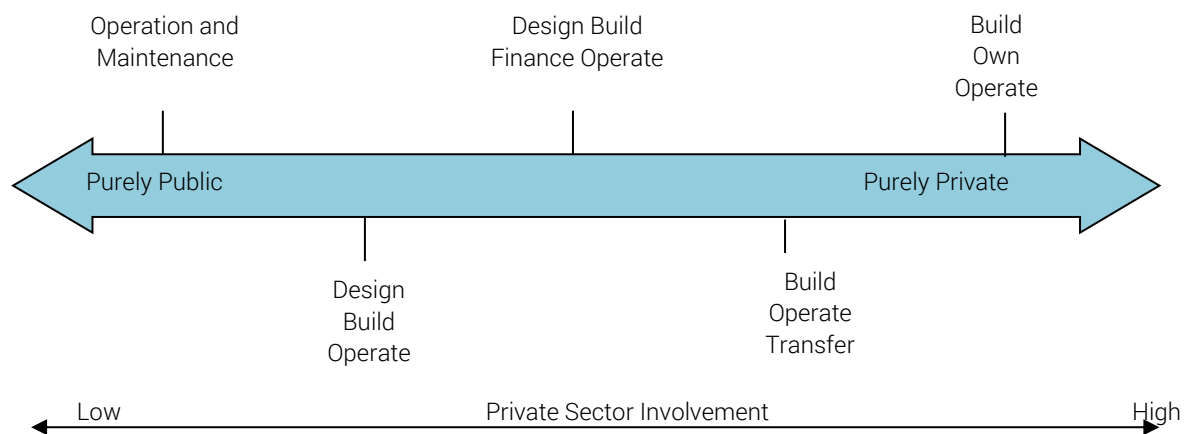


Figure 2.2 – Level of Private Sector Involvement

Source: Kwak, Chih, & Ibbs, (2009)

Referring to Figure 2.2, PPP has indeed changed the public procurement paradigm, encouraging the involvement of the private sector in providing infrastructure to varying degrees. Within PPP, the involvement of the private sector in funding, planning, designing, operating and maintaining an infrastructure has increased.

2.4 Distinctive Diversity of PPP

So why did governments shift to PPP? Many publications have discussed governments' motivations, whether right or wrong, for adopting PPP (McQuaid & Scherrer, 2010). The

diverse features of PPP compared with traditional procurement have been recognised through theoretical research and actual case studies. Nonetheless, PPP has been designed to accommodate and allocate the needs of the public sector and the rewards for the private sector partner (European Commission, 2004; Chinyio et al., 2009; Ministry of Finance Singapore, 2012). The motivation for PPP is therefore driven by the diversity offered by this type of procurement.

2.4.1 Optimal Sharing of Responsibilities, Resources & Risk (3R)

An essential objective of public procurement is to achieve efficiency (Akbiyikli et al., 2012). Enhanced efficiency could lead to further remuneration and profitable returns. In a competitive and profit-oriented environment, unlike the public sector the private sector works to obtain profit. Private sector entities are more creative and innovative in their approach to a task with less wastage of resources (Bovis, 2013). Hence, forming partnerships with the private sector increases efficiency by means of distributing responsibilities and risks to the most capable party.

An infrastructure project or development involves activities which comprise responsibilities and risks for the parties. Their allocation means assigning them to the partner who is best able to manage them. One of the main conventional responsibilities of the public sector in public procurement is to provide funds for infrastructure development (Commission of the European Communities, 2005a). Under PPP, the selection of private financing and funding was always considered as a favourable option. The private partner is expected to explore untapped sources of funding and resources from financial institutions, which the public sector is unable to achieve. Utilising private capital allows cash-strapped countries to spread the cost of providing the infrastructure. This will benefit the public sector in terms of reducing public spending in direct recourse to public money since PPP projects are generally on a large scale and in need of large upfront funding. However, such private funding may increase the overall cost of development compared to exclusively public funding (Chinyio et al., 2009; Engel et al., 2010; Wang et al. 2012). Driven by profit or incentives from the investment, the private partner will work creatively around available resources to ensure cost effectiveness of the development to achieve revenue and hence profit. With a long-term contract in hand, the private partner is happy to receive a steady cash flow over time. Public funding or private capital investment will have implications for the development. It is best for the parties to decide the most appropriate selection by considering the project goal.

Demirag et al. (2011) identify four categories of risk that have to be dealt with in a PPP project: design and development; finance; operation; and ownership. The magnitude of the risks varies during different stages of PPP development. These risks should be allocated between the partners. Although there are no standard rules for distributing the risks, empirical approaches to risk allocation have been developed by various researchers to identify which party is best able to manage them (Bing et al., 2005; Wibowo & Alfen, 2013). The identification and allocation of potential risks is fundamental to realising the value for money achieved from PPP (Bing et al., 2005). Well equipped with advanced technology, management skills and construction ability, the private sector is seen as more capable in managing most of the risk and uncertainties. However, the public sector should be aware that shifting risk substantially to the private sector is not cheap (Dewatripont & Legros, 2005).

2.4.2 Maximising Value for Public Stakeholders

In an era where cash is king and time is gold, the public currently demands better value for money from public procurement. PPP offers the public sector an opportunity to deliver value for money better than by conventional procurement for its stakeholders (Chinyio et al., 2009). Value for the public stakeholders can be in different capacities. Nonetheless, PPP has constantly been associated with value for money.

There are many definitions of value for money. Jomo et al. (2016) emphasise that value for money in the PPP context should refer to the cost and quality of the service obtained. As the cost of PPP is higher than for traditional procurement, the quality received should be at par. Heald (2003) proposed that value for money is built around efficiency and effectiveness. HM Treasury (2003) goes further, describing value for money as *the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user requirement*. This view is similar to that of Burger and Hawkesworth (2011) who characterise value for money as an *optimal combination of quantity, quality, features and price expected over the whole of the project's lifetime*. In other words, value for money can be seen as the expectation of a buyer or stakeholders of the quality of the purchased product at the best price. Although expectations may differ based on the partnership agreements and consideration of many other factors, according to Infrastructure Australia (2008) PPP offers value for money through:

- a) Optimal risk transfer;
- b) Management synergies;

- c) Encouraging innovation;
- d) Efficient asset utilisation;
- e) Integrated life cycle asset management.

Most countries use value for money to justify PPP adoption with the concept of acquiring a better quality product with an economical design and cost-effective operation and maintenance, compared to the traditional procurement. PPP promotes early involvement of the private sector in the procurement process as a strategy to allow the private sector partner to utilise its proficiency in designing the whole life cycle of the infrastructure into a potential cost-saving development. This move also helps to minimise design risk and uncertainties (Felsing & Miranda, 2008). This will lead to the creation of incentives for the private sector.

Different approaches to ensure value for money have been adopted by countries. Grimsey and Lewis (2005) identified that these approaches nevertheless share similarities when comparing two procurements measured by the lowest cost offered. A common tool used globally is the Public Sector Comparator (PSC), where a comparison of cost is made between a traditional public financed procurement and a privately financed PPP (Ismail et al., 2012; Wang et al., 2012).

2.5 PPP Structure

A typical PPP structure is considered as a more complex system than traditional procurement (UNESCAP, 2010; Wang et al., 2012). It was established for full integration with a single point of responsibility to accommodate the creation for exclusivity of the financing arrangement and the bundling of contract strategies. A transformation of traditional procurement to PPP saw the formation of Special Purpose Vehicles. A Special Purpose Vehicle is a legal entity established by a single company or consortium of companies with the responsibility of delivering the infrastructure development to a specified standard. There are also circumstances in which the Special Purpose Vehicle is established by the public sector (government-owned companies) (Jayaseelan & Tan, 2006; Wang et al., 2012) or a joint collaboration of public and private sectors (Alfen et al., 2009). The Special Purpose Vehicle holds the single point of responsibility and will be accountable entirely for the design, building, operating and maintaining of the completed infrastructure (European Commission, 2003). Nevertheless, Special Purpose Vehicles generally sub-contract the construction, operating and maintaining works. A construction contract will be formed to deliver the

infrastructure development, and after completion an operation and maintenance contract will be formed to carry out the operation and maintenance work for a specified time. A typical PPP structure is illustrated as Figure 2.3.

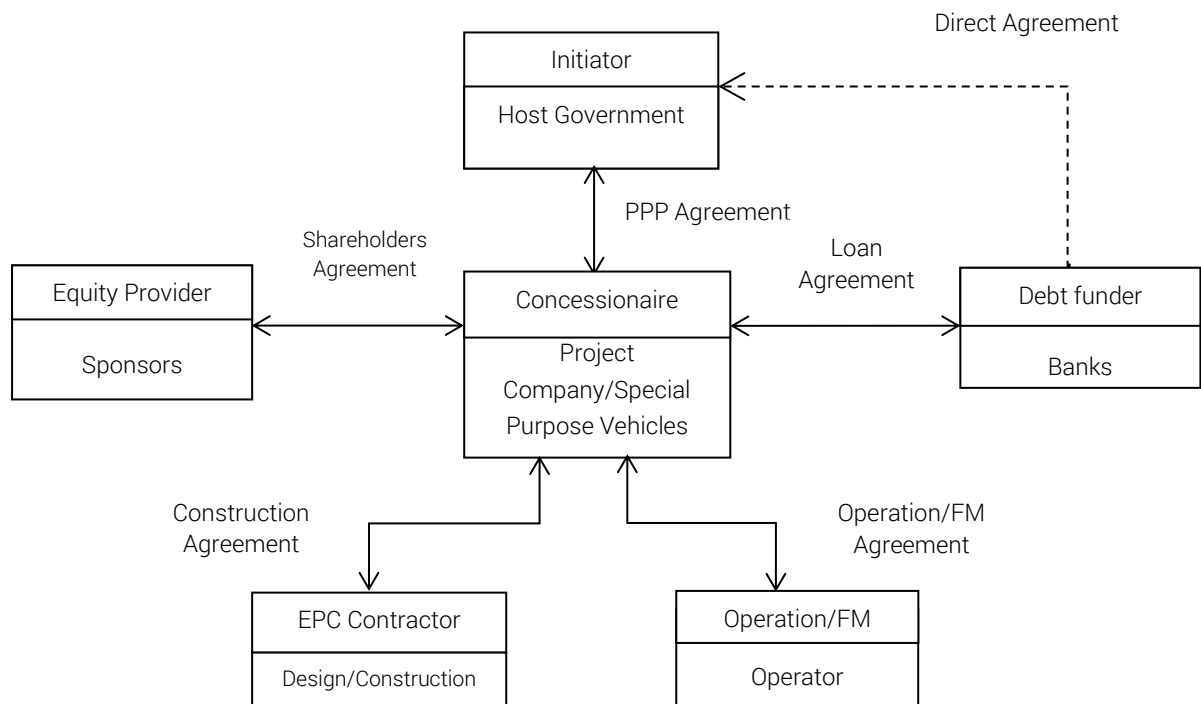


Figure 2.3 – Typical PPP Structure

Source: World Bank Institute (2012)

As shown in Figure 2.3, the role of the Special Purpose Vehicles does not end there, but will normally, under the PPP agreement, be required to secure finance for the development and enter an agreement with the financial institution (Grimsey & Lewis, 2007; Yescombe, 2007). The financing of the project may be from mixed sources, single sourced from loans, in the form of investment from a private equity firm, or be a combination of different private equity firms that also be shareholders. Although receiving a much criticism in some countries, there are also facilitation funds or viability funds made available by the governments to attract the private investor's participation in PPP and to kick-start the project (Aziz & Khaderi, 2010; Department of Economic Affairs, 2010; Wang et al., 2012; Yee, 2013).

Although most of the significant responsibilities and risks are transferred to the Special Purpose Vehicle, the public sector as a purchaser still plays a critical role in providing and specifying clear requirements and output specifications for the infrastructure. However, the Special Purpose Vehicle should be given freedom in the delivery method to allow innovation and cost minimisation to happen. The public sector as the purchaser should also sustain a payment regime to the Special Purpose Vehicle as specified in the PPP agreement. Although

PPP relies heavily on the efficiency of the private sector, it is fundamental for the PPP to be well structured with clear obligations and rights of parties to create a mutually beneficial environment for all parties involved.

2.6 PPP Globally

The estimated cost needed for infrastructure development globally is massive. An approximate amount estimated by EY (2015) to meet the infrastructure demand until 2030 can reach up to £38.6 trillion². An estimated amount of £500 billion is needed by the UK until the year 2020 for infrastructure development (Helm et al., 2009), while the Asian Development Bank (2012) forecast that investment of £6.3 trillion is needed in the Asian region between 2010 to 2020 for infrastructure development. The amounts forecast for providing infrastructure are daunting for governments to provide.

With the shortfall in government reserves worldwide, PPP has been identified as the future direction to address the burgeoning infrastructure demand. PPP procurement is well established in most developed countries and has been widely used to procure infrastructure. Encouraged by these fruitful results of PPP, the enthusiasm of developing countries in procuring infrastructure services through PPP has grown (Cheung et al., 2012; Ng et al., 2012; Hwang et al., 2013; Reeves, 2013a)

Eggers and Dovey (2007) introduced the PPP market maturity curve, which is a model used to identify a nation's PPP growth, based on nine criteria:

- i. Awareness of risk transfer principles;
- ii. Public sector PPP experience;
- iii. Private sector PPP experience;
- iv. Community and stakeholder support;
- v. Market size;
- vi. Stable and supportive public sector environment;
- vii. Available funding;
- viii. Recognising and achieving outcomes and innovation;
- ix. Legal framework and commercial structures.

² Conversion is based on July 2016 where 1 US Dollar is equal to 0.77 British Pound.

In detail, a country's growth will be evaluated against the benchmarks, complexity and accomplishments achieved using PPP. Although each country has its own template for developing the PPP market, with this model it can be evaluated based on the same parameters for private investors and as an indicator for other stakeholders.

Stage One	Stage Two	Stage Three
<ul style="list-style-type: none"> • Establish policy & legislative framework; • Initiate central PPP policy unit to guide implementation; • Develop deal structures; • Get transactions right & develop public sector comparator model; • Begin to build marketplace; • Apply early lessons from transport to other sectors. 	<ul style="list-style-type: none"> • Establish dedicated PPP units in agencies; • Begin developing new hybrid delivery models; • Expand and help shape PPP marketplace; • Leverage new sources of funds from capital markets; • Use PPPs to drive service innovation; • PPP market gains depth—use is expanded to multiple projects & sectors. 	<ul style="list-style-type: none"> • Refine new innovative models; • More creative, flexible approaches applied to roles of public & private sector; • Use of more sophisticated risk models; • Greater focus on total lifecycle of project; • Sophisticated infrastructure market with pension funds & private equity funds; • Public sector learns from private partner methods as competition changes the way government operations function; • Underutilized assets leveraged into financial asset; • Organizational & skill set changes in government implemented to support greater role of PPPs.

Figure 2.4 - Benchmark for PPP Market Maturity Curve

Source: Eggers & Dovey (2007) for Deloitte

According to the standards set in the PPP market maturity curve (Figure 2.4), the growth of the PPP market in the UK has achieved the highest level of maturity with PPP practice widespread in every available industry, and steady availability of finance for PPP projects. The UK is a step ahead in procuring infrastructure through PPP. It has developed a strong institutional framework, a robust project pipeline and is supported by market confidence (EY, 2015)

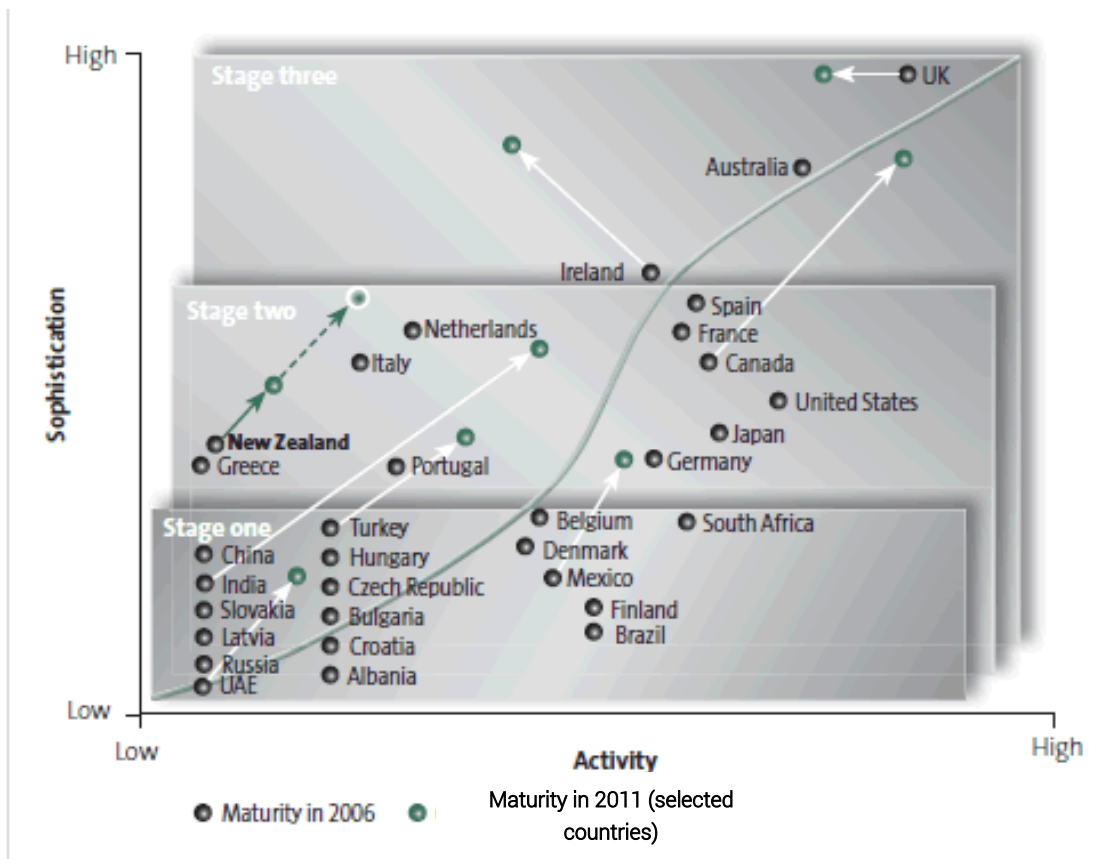


Figure 2.5 - PPP Market Maturity Curve

Source: Modified from Deloitte in Controller and Auditor General (2011)

Based on Figure 2.5, very few countries are identified as having reached stage three of potential PPP market maturity. Top of the list is the UK. Following the UK is Canada, which made substantial progress from 2006 to 2011, with Australia and Ireland trailing. According to the EY (ibid) report, the Canadian government provides a funding programme and financial mechanism to assist the viability of large infrastructure development. Through its PPP programme, Canada is anticipated to save a significant amount of money (Asia-Pacific Economic Cooperation, 2014). The government of Australia's strong dedication made its PPP programme consistently joint world leader with the UK. An earlier OECD (2007) report even listed Australia as the most advanced PPP practitioner, ahead of the UK and Canada. The countries listed at stage three have leveraged significant numbers of infrastructure through PPP, attracting interest from domestic and international investors. At stage two, most of the countries are from Europe, plus the US, Japan and New Zealand.

2.7 PPP Law

According to Burger and Hawkesworth (2011), PPP implementation in most countries is governed by existing legislation and the regulations for conventional public procurement. However some countries, including Spain, Ireland and South Korea, have established a different set of laws specifically for PPP (CMS Legal Services EEIG, 2010; PPIAF, 2012).

A sound legal framework helps to facilitate the PPP mechanism, supports the PPP programme consistently, provides better enforcement of PPP policy and promotes PPP partnership (Dutz et al., 2006; Eggers & Dovey, 2007). Consistent specific legislation will also improve the understanding and interpretation between PPP stakeholders, resulting in efficient PPP implementation (Adair et al., 2011). Although most public procurement legislation has stipulations on competition, the competition policy as applied in such public procurement may not be adequate for PPP (Verma, 2010). For example, how do public procurement laws deal with unsolicited proposals?

At stage one of the PPP market maturity curve (section 2.6), a country should develop its own PPP laws and establish a legal framework dedicated to supporting PPP implementation. Since PPP is a complex procurement process which involves: multiple dynamic activities, long-term contractual obligations and large contract sums, some current legislation might not be suitable or adequate for a PPP programme (United Nations, 2008). Suggested legislation pertaining to procurement, financial/budgetary considerations, competition and contract requirements might need to be reviewed or specifically set up for PPP. Specific legislation and regulations for PPP are recommended to define PPP and its arrangement, hence maintaining a consistent legislative framework. According to Verhoest et al. (2015), a specialised PPP law and regulatory framework is a form of government support for the PPP programme.

Despite the UK being an early mover in PPP, the implementation of PPP and PFI are well regulated through current public procurement regulations and PPP policy issued by HM Treasury. As the leading nation in PPP implementation for more than a decade, the UK relied on existing public procurement laws, with no specific laws passed for PPP. Similarly, another leading PPP practitioner, Australia, did not establish any specific laws or a statutory framework for PPP implementation at the federal level. Although the national programme is guided by the National PPP Policy, most of the PPP developments are implemented and facilitated by state legislation; with New South Wales and Victoria the leading states in adopting PPP (Siddiquee, 2011; Son, 2012).

Currently at the second stage of the market maturity curve, Germany also did not pass any explicit legislation covering all aspects of PPP administration. An act was passed for implementation of user charge concessions including tolled highways, bridges, tunnels and road sections (CMS Legal Services EEIG, 2010). Other implementations of PPP in Germany are dependent on Federal Budgetary Regulations, the national public contract regime, a Green Paper; a report by the Commission of the European Communities on PPP (Essig & Batran, 2005).

Making good progress by moving to the second stage of the market maturity curve, India has no specific laws on PPP at the federal level, and the current public procurement laws allow PPP to be implemented. PPP was defined and included in India's latest Public Procurement Bill 2012. Realising the benefits of a specific law for PPP, some states in India, including Gujarat, Andhra Pradesh and Punjab, have passed legislation for better implementation of PPP (Dutz et al., 2006).

Belief in the need for a specific law for PPP is not strong, as the leading countries have been successfully implementing PPP without them. PPP is governed by their own public procurement laws, policy documents, and guidance notes and in the design of the PPP contracts. However, there are also countries that have passed new PPP law. For example, one of the leading nations in the PPP market maturity curve, Ireland has shown rapid progress since its first PPP project was introduced in 1999 (Reeves, 2013a). To facilitate the implementation of PPP, the Irish government established a PPP unit and passed specific legislation. The first was the State Authorities (Public Private Partnership Arrangements) Act, 2002, which clearly outlined the role of the state and empowered the state authorities to enter into PPP agreements (Petersen, 2011). The act also dealt with other complex PPP features such as payment mechanism, contractual issues with financiers and the transfer of assets. Further legislation to complement the first act was the National Development Finance Agency Act, 2002, which was subsequently revised in 2007. This act established the legality of financing issues of PPP including raising funds via the creation of a Special Purpose Vehicle and providing financial advice.

As one of the leading economies in Asia, South Korea is among the countries that have developed specific laws for PPP. South Korea relied on individual laws related to public procurement before 1994. However, the Private Capital Inducement Act was passed in 1994 to facilitate and promote private sector involvement in public infrastructure projects. In

response to the Asian financial crisis of 1997, the Act on Private Participation in Infrastructure was introduced in 1998 to replace the former. The new act was needed to improve determinants for private investment in public infrastructure projects such as limitation on the maintenance and operation of publicly owned facilities (PPIAF, 2011). The new act also introduced rules dealing with unsolicited proposals and incentives to private investors; it was revised in 2005 but the details relevant to this research were unchanged.

The EU has no specific legislation on PPP implementation. Given the many variants of PPP, different types are subjected to different sets of rules. Overall, the implementation of PPP comes under the Treaty on the Functioning of the European Union (TFEU), European Union Public Procurement Directives and relevant case law of the European Court of Justice (ECJ) (Ebrecht & Werner, 2012; Son, 2012). According to the PPP's nature and mechanism, PPP arrangements fall under either public contract definitions and service concessions, or contracts that are excluded from the scope of the Directive (Commission of the European Communities, 2004; Shaoul et al., 2008; SIGMA, 2011).

From the context of co-operation between public and private sector agreements, PPP falls under the category of public contracts which are bound by the rules of public procurement (Kalbe, 2005). For public contract types of PPP, the relevant EU public procurement directives are applicable, as shown in Table 2.3. These regulations must be followed by the contracting authority of the country members and upheld by their judiciary. The mechanism of PPP does not make it an easy task to conform to standard public procurement regulations, since by its very nature PPP is a complex agreement.

Table 2.3 - Relevant European Union Public Procurement Directives

Directives	Function
New Public Sector Directive (2014/24/EU)	Co-ordinating guidelines for procedures for the award of public works contracts, public supply contracts and public service contracts.
New Utilities Directive (2014/25/EU)	Coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
Concessions Directive 2014/23/EU	Procedures for the award of works and services concession contracts.

Source: Modified from Ebrecht & Werner (2012) and Broerse, Peelen, & Vis (2013)

Early implementation of PPP in the EU was confused and saw cases regarding: unfair competition, partisanship and questions over PPP procedures brought to the European Court of Justice (Kalbe, 2005; Son, 2012). Although some members have suggested that the EU establish specific laws for clear PPP implementation between members, the EU parliament decided to do the opposite (Son, 2012). Table 2.4 sets out the EU members listed in the market maturity curve with specific national PPP laws.

Table 2.4 - European Union Members with Specific PPP Laws

Member States	PPP Law	Member States	PPP Law
Belgium	△△	Netherlands	-
Czech Republic	△△	Portugal	△△
Denmark	-	Spain	△△△
Finland	△	United Kingdom	-
France	△△		
Germany	-		
Greece	△△		
Hungary	△		
Ireland	△△△		
Italy	△		
Latvia	△△		

Legend -
 △ - Legislation being proposed
 △△ - Comprehensive legislation being drafted / some sector-specific legislation in place
 △△△- Comprehensive legislation in place

Source: Modified from PriceWaterhouseCoopers (2005), CMS Legal Services EEIG (2010), Petersen (2011)

The difference between the UK and some other European countries which have established PPP laws results from national legal structures. The UK operates common law, unlike most of European which adopted civil law. Common law is generally based on court cases while civil law is based on written rules or the civil code, and both have different approaches to PPP implementation. In a civil law country, a new written code is needed to enable the government to enter a PPP contract and address other limitations on PPP implementation. On the other hand, common law allows parties to form a PPP agreement and govern their own relationship by only providing changes to existing relevant regulations (CMS Legal Services EEIG, 2010; World Bank Institute, 2012; European PPP Expertise Centre (EPEC), 2014).

The next section highlights the emergence of PPP in the UK. As discussed in section 2.6, it is acknowledged that the UK is the father of PPP, the most advanced practitioner internationally, and is also actively improving PPP implementation (HM Treasury, 2012b), so it is appropriate to gain from its experience. Learning from the UK is not new for Malaysia; as a former

British colony, Malaysia's public administration services are based on and adopted from the British administration system.

2.8 PPP in the United Kingdom

The UK has been successfully using PPP to meet the modern demand for infrastructure, mainly schools, hospitals and prisons (Li et al., 2001). The idea of cooperation between the public and private sector in infrastructure delivery was not new, as there was extensive privatisation before cooperation in the form of PPP took over as a preferred partnership arrangement. The policy of privatisation, a paradigm shift, was mooted in the early 80s, when public management was introduced to replace the long-held practice of public administration (Eaton & Akbiyikli, 2005). Public management saw the penetration of private-sector involvement in public services, in an attempt to imitate the efficiency of private sector management (Bovis, 2013). Bovis added that the reason for the change was to improve the efficiency and quality of public service, to promote innovation and achieve value for money and flexibility in the public service. PPP seemed attractive in its ability to fulfil these aims. Gaining a better understanding of the background and development of PPP in the UK would not be complete without discussing PFI, one of the earliest forms of PPP (Allen, 2001).

2.8.1 Before PPP

Allen (2001) and Eaton and Akbiyikli (2005) wrote a comprehensive background to the progress of PPP in the UK. They identified that it all started with concern for issues clouding the nation's growth, such as project delays, budget overruns and the increasing cost of infrastructure development in the 80s. The demand for basic amenities and infrastructure such as public transport, schools, hospitals, housing and roads could not be ignored (Parker, 2009). Thus, the situation required the government to be more creative and innovative with the available resources in addressing the demands for infrastructure, without contributing more to the Public Sector Borrowing Requirement (PSBR). The government, led by Margaret Thatcher, introduced a privatisation policy (Heald, 2003) which encouraged the involvement of the private sector in infrastructure delivery. Privatisation was thus related to the pressure on government to reduce government debt (Pollitt et al., 2002).

While privatisation has been embraced at the cost of some national assets (The Economist, 2014), the involvement of private capital in infrastructure was rethought by the government

and resulted in formulation of the Ryrie Rules. The Ryrie Rules were established in 1981 to restrict the potential involvement of private finance in the nationalised industries (Akbiyikli, 2005; Eaton & Akbiyikli, 2005). Acknowledging that private finance is more expensive than public finance, their basic principle was to ensure the practice of fair competition in public procurement, and value for money. Priority for project delivery using traditional procurement was to be given if the use of private financing did not economically benefit the country compared with traditional procurement (Allen, 2001; Spackman, 2002; Eaton & Akbiyikli, 2005). The Ryrie Rules were revised in February 1988 with the introduction of contracting out, opting out, mixed funding and partnership schemes. Allen (2001) highlighted the fundamentals for private financing with public works upheld at that time:

- i. restricted use of private finance unless where cost effectiveness can be proven to be achieved;
- ii. privately financed projects for public sector programmes still had to be recorded by the government in its public expenditure planning or Public Sector Net Debt (PSND).

However, a year later, the Ryrie Rules were rescinded by the government to permit greater involvement of the private sector in public investment, due to the benefits received by the government through efficiencies brought by the private sector (Pollitt et al., 2002; Grimsey & Lewis, 2005). The government also recognised the value for money offered by the involvement of the private sector (Allen, 2001).

2.8.2 Second Thoughts

With an end to the Ryrie Rules, cooperation between public and private sector was made possible through the introduction of PFI. In the 1992 budget statement, PFI was formally introduced by the Chancellor of the Exchequer, Norman Lamont. With the introduction of PFI, private finance in public-sector works was no longer restricted (Eaton & Akbiyikli, 2005; Chinyio et al., 2009). It was introduced after increased concern over the increasing public debt and public spending constraints. This amounted to a cry for help from the public sector to the private sector (Allen, 2001). The private sector was needed to jointly bear the responsibilities and risks of development. Under PFI, the role of the public sector started to change; it no longer provided infrastructure in the traditional way, but became a service purchaser from the private sector. The public sector specified the output specifications and left it to the private sector partner to deliver. However, the underlying principle of priority to use conventional

procurement unless private finance brought superior added value still stood, until it was set aside by the Labour government in 1997.

Nevertheless, there was a lack of response from the private sector to the introduction of PFI, and the autumn statement failed to attract private sector involvement in PFI projects (Eaton & Akbiyikli, 2005). Further efforts had to be taken to stimulate the interest of the private sector to participate. The Private Finance Panel was set up. Other measures taken to promote PFI included the prerequisite of considering private finance for public projects as a source of funding for public works, and training civil servants in PFI procurement as a measure to develop expertise (Pollitt et al., 2002). Attracted by the ability to lure private investors, the Local Authority Associations of England and Wales initiated a Public Private Partnership Programme (4Ps) in 1997.

2.8.3 A New Lease of Life

When the Labour Party came to power in 1997, the PFI process was reviewed in depth to give the procurement a new lease of life (Allen, 2001; Eaton & Akbiyikli, 2005), and the concept of PPP was introduced (Spackman, 2002). New PPP guidelines were established. All public projects prioritised the use of PPP without the need for comparison for value for money with public finance (Whitfield, 2001; Spackman, 2002). A taskforce under HM Treasury was set up to investigate and analyse PFI implementation by appraising significant projects. Based on their findings, a series of documents were published in support of PFI. A follow-up review was made by the government resulting in the formation of Partnership UK in 2000 to replace the earlier task force. Partnership UK was formed with the aim of improving the PPP process, negotiations and completion (Allen, 2001; Eaton & Akbiyikli, 2005). Partnership UK was run with a 49% share by the government, the remaining shares going to private sector investors who qualified for PPP under Partnership UK. Since then PPP has become the most popular procurement mechanism to provide infrastructure (Akbiyikli et al., 2012; Kateja, 2012). Partnership UK was dissolved in 2011 with the formation of Infrastructure UK (IUK) which was absorbed in the Treasury (Ågren et al., 2013). Infrastructure UK plays a much bigger role than Partnership UK, focusing not only on PPP, but also being responsible for national infrastructure delivery (CMS Legal Services EEIG, 2010), including facilitating private investment for infrastructure (Istrate & Puentes, 2011). However, in a more recent development, Infrastructure UK was merged with the Major Projects Authority (MPA) to

form the Infrastructure and Projects Authority. The new agency is expected to manage and deliver major economic projects (Cabinet Office, 2015).

2.9 PPP in Malaysia

2.9.1 The Transformation of a Nation

Thanks to the strong economy inherited from the post-colonial era, the transformation of infrastructure development in Malaysia has been impressive (Leeds, 1989). Since independence in 1957, Malaysia has adopted and adapted various methods to deliver infrastructure. Much effort has been made by the government to bring high-quality infrastructure to the people. Even though the government has been successful in meeting the demands for modern infrastructure, the development has not been spread equally throughout the country. Peninsular Malaysia flourishes more than the eastern part (Naidu, 2008), so in addition to building infrastructure to promote economic growth, the agenda for infrastructure development also focuses on upgrading accessibility for rural areas to improve lives and eradicate poverty.

Systematically, Malaysia has planned development through consecutive five-year development plans. The Malaysia Plan is a comprehensive blueprint which incorporates details of a five-year macro-economic map of policies, frameworks, programmes and budget allocation by activity (Wang et al., 2012). The First Malaysia Plan was commenced in 1966, and a significant amount of money has always been allocated for infrastructure development in this and subsequent Plans (Naidu, 2008). In the Tenth Malaysia Plan announced in June 2010, £13billion³ was allocated for physical infrastructure development (Mansor, 2010). The figure shows the commitment made by the government to spur the growth of the nation's infrastructure.

2.9.2 Malaysian Government Administration

In explaining the development of PPP in Malaysia, the geographical context is significant. When Malaysia achieved independence from the British in 1957 it was named *Persekutuan Tanah Melayu*. and comprised nine states. The government inherited many of the British administration principles and style of governance (Berman et al., 2011; Chin, 2011).

³ Conversion is based on July 2016 where 1 Malaysian Ringgit is equal to 0.19 British Pound.

Six years later, the Federation of Malaysia was formed, with the accession of Sabah and Sarawak to form East Malaysia. Malaysia is a constitutional monarchy which comprises a parliament combined with monarchy. Currently, Malaysia comprises thirteen states, three of which are Federal Territory States. The formation of Malaysia saw a three-tiered government comprising three complementary administrations. The tiers of administration are:

a) *Federal Government*

The federal government is steered by three bodies, executive, legislative and judiciary, each vested with different powers. The separation of powers between the bodies is intended to ensure no overlap of powers (Jain, 1989). The executive body is the branch responsible for the government's daily affairs and enforces laws enacted by the legislation. Executive power is held by the cabinet of ministers and headed by the prime minister, who are responsible to parliament where members are elected by the people. The cabinet is empowered to carry out their duties conferred by the *Yang di-Pertuan Agong* (King) through specific statutes. Each minister in the cabinet has different responsibilities depending on the portfolio assigned by the prime minister (Harding, 1996). The ministers are advised by government machinery such as ministries, departments and statutory bodies to implement government policies.

b) *State Government*

The structure of the state government mirrors that of the federal government. The executive powers in each state are exercised by the councils of executive officers (EXCO) and headed by the *Menteri Besar* or chief minister (in certain states) (Siddiquee, 2005).

c) *Local Authority*

The term local authority refers to local government in Malaysia, the third tier of administration which under the Federal Constitution falls under the jurisdiction of the state government (except for federal territories). This means that the state has legislative power to control the local authorities (Berman et al., 2011). Prior to 1965, local councillors were elected, but this is no longer practised. Currently, councillors are selected by the state

government, and most are political appointees (Harding, 1996). However, the president of the council is a post reserved for a civil servant from either the federal or state level. According to Singaravelloo (2010), this is why the term local authority is used in Malaysia rather than local government. Although the local government seems to hold some autonomous power, it still relies on the higher tiers, financially (Berman et al., 2011), politically and economically (Nooi, 2008).

2.9.3 Privatisation Policy

According to Rashid (2014), the privatisation policy was the beginning of the PPP era in Malaysia. In line with worldwide practice, the responsibility for providing infrastructure in Malaysia has always been the core business of the public sector, and public finance was used to stimulate growth. Table 2.5 illustrates the timeline of policy development for private sector involvement in the national development plan.

Table 2.5– Malaysia PPP Policy Timeline

Market-led economy		State-led economy			Liberalisation	Towards a developed nation - Vision 2020				
Independence 1957-1965	1st MP (1966- 1970)	2nd MP (1970- 1975)	3rd MP (1976- 1980)	4th MP (1981- 1985)	5th MP (1986-1990)	6th MP (1991- 1995)	7th MP (1996- 2000)	8th MP (2001- 2005)	9th MP (2006 - 2010)	10th MP (2011- 2015)
					Privatisation Malaysia Incorporated Policy (1983) Privatisation Policy (1983) Guidelines on Privatisation (1985) Privatisation Masterplan (1991)				PFI PFI (2006) Treasury Guidelines (2006) Guidelines on PPP (2009) New Wave PPP (2010)	
					Implementing agency Economic Planning Unit (EPU)				Implementing agency Unit Kerjasama Awam Swasta (UKAS)	
*MP - Malaysia Plan										

Source : Modified from Wang et al. (2012)

In the 1980s Malaysia was not spared from the global economic recession, which saw the nation's debt worsening (Rashid, 2014). To make it worse for a country that relied on export-

led growth, in 1985 the price of raw commodities such as rubber, tin and palm-oil declined significantly due to the global recession. Malaysia had relied heavily on these commodities since independence (Jomo & Syn, 2003; Naidu, 2008). In response to the economic turmoil, public spending was reassessed, and there was a shortage of available public funds for infrastructure development. To avoid further undesirable consequences to economic growth, Malaysia needed to fill the gap and utilise available resources to continue to progress.

In response, on 25 February 1983 the Malaysian government established Malaysia Incorporated to encourage close ties between the public and private sectors. The private sector was invited to work together to build the nation and spur economic growth. The strategy was largely inspired by the success of the privatisation launched in the UK by Margaret Thatcher's government. Malaysia's Prime Minister, Mahathir Mohamed, launched the nation's own privatisation policy in March 1983. The objective of privatisation was to ease the financial burden on the public sector and facilitate the return to the economic growth track.

The decision to privatise was motivated by the need to realign the balance between the private and public sectors (Leeds, 1989). This policy allowed market forces to govern economic activities, by changing the way resources were used. Slowly the role of the government in the development of infrastructure was reduced. According to Economic Planning Unit (1996), privatisation in Malaysia is defined as *transfer of activities and functions that traditionally rested with the government to the private sector*. This definition is generic. However, based on its implementation by government up to the present day, privatisation involves activities such as transfer of government shares, takeover of public services or utility providers and investing in public works in return for charges to the end user (Rashid, 2014). The privatisation policy was mooted as an important tool for private sector involvement towards Malaysia Incorporated (Singaravelloo, 2010).

Milne (1986), however, viewed Malaysian privatisation from a political context and believed that it was merely a language game. The decision to start privatisation was political rather than economic. His view was supported by other authors (Jomo & Syn, 2003; Tan, 2008, 2012), who viewed privatisation as created to support and complement the New Economy Policy (NEP) which was used to empower and upgrade the socio-economy of the *Bumiputera*. Netto (2006) and Rashid (2007) observed that Malaysian privatisation was infested with cronyism, monopolistic practice and poor transparency. Most of the concessionaires enjoyed excessive profits, with the government having to bear the losses.

Some notable privatisation projects which can be seen as beneficial to the people are the construction of roads and highways. From its initiation until 2012, 1,679 km of highways have been completed through the privatisation programme (Wang et al., 2012). This network of highways connects most of the cities and rural areas in Malaysia, supporting the domestic economic activities, and can be seen as a positive gain and improvement to the socio-economy of the people in rural areas. Nambiar (2009) applauded the privatisation effort by the government, stating that the introduction of the policy was at the right time. This view was shared by Anuar (2012), who suggested that the achievement within just 30 years was remarkable. Without the privatisation programme, today's completed highway system may not have been realised (Ward & Sussman, 2005; Ong'olo, 2006).

Table 2.6 –Highways Completed in Malaysia Using Privatisation

Highway	Length (km)	Opened (month/year)	Concession Period (period)
Penang Bridge North	13.5	9/1987	24 yrs 8 months to 5/2018
North South Highway	823.0	5/1988	48 yrs to 5/2038
Shah Alam Highway (KESAS)	34.5	9/1998	28 yrs 9 months to 8/2022
Seremban – Port Dickson	22.7	12/1998	Not available
Second Link Malaysia – Singapore	44.7	8/1998	Not available
Kuala Lumpur – Karak Highway	60.0	4/1999	27 yrs to 5/2021
Butterworth – Kulim Highway	17.0	11/1996	30 yrs
Cheras – Kajang Highway	11.7	1/1999	Not available
Kajang SILK Highway	37.0	6/2004	Not available
Damansara-Puchong Highway	40.0	1/1999	Not available
Selat Kelang Utara Baru Highway	17.5	3/2002	Not available
Ampang Elevated Highway	7.9	12/2000	Not available
Sungai Besi Highway	16.7	1/1999	Not available
Butterworth Outer Ring-road	12.1	2/2007	30 yrs
Skim Penyuraian Trafik KL-Barat	26.0	6/2001	Not available
New Pantai Highway	19.6	4/2004	Not available
Guthrie Corridor Highway East	25.0	4/2005	Not available
East Coast Highway (Phase 1)	169.0	8/2004	Not available

Highway (continued)	Length (cont'd) (km)	Opened (cont'd) (month/year)	Concession Period (cont'd) (period)
East West Link Expressway	17.0	8/2003	Not available
SMART Tunnel	3.0	4/2007	Not available
KL-Putrajaya Highway	26.0	12/2007	33 yrs
Senai – Desaru Highway	77.0	10/2009	Not available
Kajang – Seremban Expressway	44.3	10/2009	33 yrs
Duta – Ulu Klang Highway	18.0	1/2009	Not available
Kamuning – Shah Alam Highway	14.7	8/2006	Not available
Kuala Lumpur – Kuala Selangor Highway	31.0	8/2006	Not available
East Coast Highway Phase 2	79.0	Not available	Not available
East Johor Bahru Highway	81.0	1/2012	Not available
North Kinrara – Shah Alam – Old Klang Road	0.5	Not available	Not available

Source: Wang et al. (2012)

Table 2.6 lists the highways completed since 1983 under the privatisation programme till to date. Its length suggests that Malaysia has been dependent on the private sector to build major networks of highways through privatisation and the PPP programme. There is no sign of the government of Malaysia stopping the use of privatisation and PPP in infrastructure development, given the number of highways built annually. Anuar (2012) suggested that the introduction of this privatisation marked the end of the role of the government in building highways, adding that most were built under a Build Operate Transfer agreement where toll charges are imposed on the end user.

2.9.4 Malaysian Private Finance Initiative (PFI)

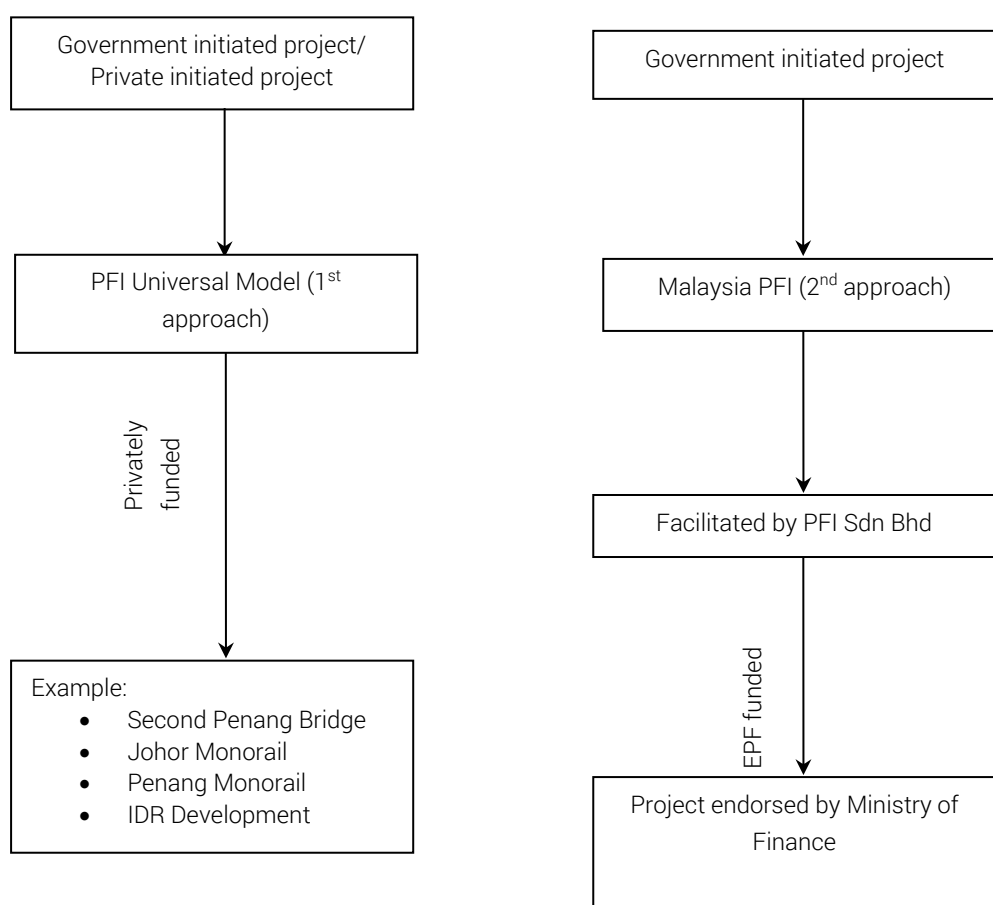
The good reputation of the privatisation programme has been smeared by critiques and allegations of the programme's problem. Post-privatisation saw the concessionaire companies making excessive profits from the government over a long period, due to unbalanced agreement terms. There have been allegations of abuse of power by the ruling government, with a lack of procedures for competitive bidding in awarding contracts (Jomo & Syn, 2003; Tan, 2008; Wang et al., 2012). Following its experience of privatisation, Malaysia introduced

the Private Finance Initiative (PFI) in March 2006 as part of the strategy of the Ninth Malaysia Plan (Public-Private Partnership Unit, 2009). According to the Economic Planning Unit, (2005) PFI is defined as:

.....transfer to the private sector of the responsibility to finance and manage a package of capital investment and services including the construction, management, maintenance, refurbishment and replacement of public sector assets such as buildings, infrastructure, equipment and other facilities, which creates a stand-alone business.

Considering the positive gains from private-sector involvement in previous privatisation programmes, PFI is another model which allows the private sector to continue to contribute to public-sector projects to spur economic growth. PFI was publicised as the improved version of privatisation (Wang et al., 2012; Abdullah et al., 2014), leading to improvement of the procedures and emphasising performance criteria, restructuring the implementation method, enhancing feasibility through distribution of risk and responsibilities, strengthening the institutional and regulatory framework, and increasing *Bumiputera* participation (Economic Planning Unit, 2005). These strategies show the commitment of the government in creating an attractive partnership model for the private sector to invest in.

There are several versions of the Malaysian approach to implementing PFI (Rashid, 2007; Takim et al., 2009; Zainon et al., 2012), as illustrated in Figure 2.6. The first approach adopted the model widely used by the international community with the principles of arrangement of risk and resources in delivering a better infrastructure. According to Rashid (2007) this first approach was under the purview of the Economic Planning Unit and used the UK PFI model as its benchmark. Projects implemented were not in the Ninth Malaysia Plan project pipeline. It is also suggested that this approach targeted mega-projects (Zainon et al., 2012).



Source: Synthesised from Aziz & Khaderi (2010) Rashid (2007), Ismail (2009)

Figure 2.6 – Malaysian Approaches to PFI

Under the second approach, a company owned by the Ministry of Finance Malaysia, Pembinaan PFI Sdn. Bhd., was established as the Special Purpose Vehicle to undertake and administer all PFI projects under the Ninth Malaysia Plan. Contrary to the first approach, this second approach to PFI targeted small and medium-scale projects (Zainon et al., 2012). Pembinaan PFI Sdn Bhd was responsible for seeking funding and overseeing the implementation of projects. £3.8⁴ billion were provided by the Employees Provident Fund (EPF) for loan purposes to Pembinaan PFI Sdn. Bhd to finance the implementation of projects (Jayaseelan & Tan, 2006; Aziz & Khaderi, 2010). However, it was reported in the Malaysian Parliament that EPF invested £4.8 billion in Pembinaan PFI Sdn. Bhd. EPF is an agency under the Malaysian Ministry of Finance. Another government-linked source for PFI projects was the Pension Trust Fund (PTF) (Wang et al., 2012). Although no details were revealed,

⁴ Conversion is based on July 2016 where 1 Malaysian Ringgit is equal to 0.19 British Pound.

these investment were said to be guaranteed by the government (The Star Online, 2015). The money would then be channelled to the Accountant General's Department for management of progress payments.

Under this approach, Pembinaan PFI Sdn. Bhd was not responsible for the procurement and construction works of the infrastructure. All projects were supervised by government technical agencies, such as the Public Works Department or the Department of Irrigation and Drainage as the implementing agency (Rashid, 2007; Ismail, 2009; Zainon et al., 2012). Unlike the ideal principles of PFI practised globally, the second approach of Malaysian PFI took its own dubious route. Instead of a genuine collaboration between the public and private sectors in developing infrastructure, the second approach to PFI is simply a label used by the government to reduce the government's debt and spending from the annual budget sheet. Instead of transferring the risk of financing the development to the private sector, Malaysia PFI placed the financing responsibility back with government-owned agencies. It was confirmed by the Prime Minister that £2.25 billion was needed annually off budget until 2020 to pay nine government-owned companies, including Pembinaan PFI Sdn. Bhd (Palansamy, 2015). This invited much criticism of the approach taken, since most of the responsibilities and risks were still borne by the public sector or the people, since EPF is the Malaysian employees' retirement savings (Jayaseelan & Tan, 2006; Netto, 2006; Wang et al., 2012). The modus operandi of its contracting methods even followed the government design and build (Rashid, 2007). Instead of opting for the second approach, the government could use traditional procurement with a cheaper borrowing rate. The decision may be closely related to the fact that PFI allows a different source of finance to be explored. In order to ease the financial burden, the government owed the money to another agency, much like a credit card. The strategy was also linked to the New Economic Policy to empower the *Bumiputera* since a certain number of the PFI projects should, in preference, be awarded to *Bumiputera* companies (Jayaseelan & Tan, 2006). In a way, thinking forward, the Malaysian PFI approach to regulate the market and expose the *Bumiputera* companies to PFI implementation could be beneficial in terms of the experience and skill gained. (Yahya & Chee, 2007). Furthermore, according to Zainon et al. (2012), due to the fact that the scale of the projects targeted under this approach is less bankable, companies may have difficulty in acquiring funding from commercial financial institutions.

Similar to the second approach, Rashid (2007) revealed that another company, Pembinaan BLT Sdn Bhd, was incorporated under the Ministry of Finance to undertake PFI projects

under the Ministry of Home Affairs. Adopting the Built and Lease Transfer arrangement, Pembinaan BLT Sdn Bhd was responsible for financing and providing identified infrastructure for the Ministry of Home Affairs, such as police quarters, police stations and other works for the Royal Malaysian Police. It was also reported that funding for the company was initially provided by the EPF in the form of loans (Wang et al., 2012). The difference between the second approach and this one is that, besides being responsible for providing funding for Pembinaan BLT Sdn. Bhd to undertake a bigger role by managing the procurements and the construction of the infrastructures, these infrastructures were owned by the Pembinaan BLT Sdn Bhd and leased to the government (Ismail, 2009).

2.9.5 Public Private Partnership (PPP) in Malaysia

The government of Malaysia is committed to continuing the special relationship with the private sector in privatisation and PFI in developing the nation. Hence in the Tenth Malaysia Plan, the government introduced PPP targeted to increase the number of PPP projects, establishing a facilitation fund and achieving balance between government, Government-Linked Companies (GLCs) and the private sector (Economic Planning Unit, 2010). Although the term PPP was officially introduced in 2010, Malaysia has been engaging in privatisation since 1983, and in other forms of PPP such as build–lease–transfer (BLT), build–operate–lease–transfer (BOLT) and build–operate–transfer (BOT) (Rashid, 2014). PPP is described by the Public-Private Partnership Unit (2009) as:

the transfer to the private sector of the responsibility to finance and manage a package of capital investment and services including the construction, management, maintenance, refurbishment and replacement of public sector assets such as buildings, infrastructure, equipment and other facilities, which creates a standalone business. In these PPP projects, there is a contract for the private party to deliver public infrastructure-based services over a long period of time. The private party will raise its own funds to finance the whole or part of the assets that will deliver the services based on agreed performances. The public sector, in turn, will compensate the private party for these services. In some PPP projects, part of the payments may flow from the public users directly.

Eaton and Akbiyikli (2005) acknowledge PFI as a subset of PPP, as the two definitions are similar. Yescombe (2007) stressed that the term PFI used in Malaysia PPP is just a matter of

terminology which he identified as alternative to the term PPP. PPP was mentioned in the Tenth Malaysia Plan as a new wave of privatisation (Economic Planning Unit, 2010).

The features of Malaysian PPP and privatisation are compared in Table 2.7. In the list, the government of Malaysia indicated that the difference between privatisation and PPP is the focus on financing, risk allocation and the role of government. The impact of private financing for PPP is acknowledged to be borne by the public and spread throughout the concession period. Second, in PPP, risks are allocated to the party who is best able to manage them, rather than transferring all risk to the private sector. There is also a difference in the role of the government in the partnership; in privatisation, the government acts as the regulator, and in PPP its role is identified according to agreement and spelt out as Key Performance Indicators in the concession.

Table 2.7 – Features of PPP and Privatisation in Malaysia

Procurement	
Privatisation	PPP
Funding via private resources without implicit or explicit public sector guarantee	Funding via private resources without public sector's explicit guarantee
No impact on the level of public sector expenditure	Impact on public budget spread over the duration of the concession
Risks are entirely borne by the private sector	Risks are allocated to parties which can manage them most efficient
Government acts as regulator	Public sector's involvement is through enforcement of pre-agreed key performance indicators (KPIs)
Long duration of relationship with private contractors	Long duration of relationship with private contractors
Applicable for projects with high commercial viability where public sector is not the main purchaser of the output	Applicable for projects that are commercially viable where public sector is the main purchaser of the output

Source: Public-Private Partnership Unit (2009)

Besides the common benefit of PPP such as value for money and effective delivery, the government of Malaysia believes that PPP is a panacea for problems dealt arising from conventional procurement, such as project delay and cost overrun (Hamsa, 2014). This is achieved through allocation of risk to the party best able to manage it. In contrast, one survey found that respondents from among PPP practitioners perceived that the government adopted PPP because of the high demand for infrastructure, private participation and lack of public

funding (Ismail, 2014). These are, however, textbook drivers and no different from those in other countries. Ismail nevertheless admitted that this may not be the best method to identify Malaysian PPP drivers, since the survey adopted a questionnaire and list of drivers adopted from different countries.

Table 2.8 – List of Major Projects

1	Development of Women & Children Hospital	15	Development of UiTM Campus - Satelit C, Puncak Alam Selangor
2	Children Specialist Hospital, UKM	16	Development of IIUM Foundation Studies Phase 3, Gambang Pahang
3	Teaching Hospital for IIUM Kuantan Pahang	17	Development of Pagoh Higher Educational Hub
4	Development of UiTM Campus - Kota Samarahan, Sarawak	18	Development of hostel (10,000 capacity) for UiTM Campuses
5	Development of UiTM Campus - Tapah, Perak	19	Development of hostel for 7,000 Polytechnic students in Malaysia
6	Development of UiTM Campus - Puncak Alam, Selangor	20	Development of hostel for University of Perlis Malaysia (UNIMAP)
7	Development of UiTM Campus - Pasir Gudang, Johor	21	Extension of Damansara-Ulu Klang Expressway (DUKE)
8	Development of UiTM Campus - Seremban 3, Negeri Sembilan	22	West Coast Highway
9	Development of UiTM Campus - Jasin, Melaka	23	Kuala Lumpur Outer Ring Road (KLORR) Highway
10	Development of UiTM Campus - Mukah, Sarawak	24	Second Penang Bridge
11	Development of UiTM Campus - Pusat Asasi Dengkil, Selangor	25	Development of LKIM Fishing Complex in Kuching, Sarawak
12	Development of UiTM Campus - Raub, Pahang	26	Little India, Brickfield, Kuala Lumpur
13	Development of UiTM Campus – Training Institute in AKEPT, Nilai, Negeri Sembilan	27	Penang Port
14	Development of UiTM Campus - Rembau, Negeri Sembilan	28	Redevelopment of Razak Mansion Affordable Homes, Sg. Besi Kuala Lumpur

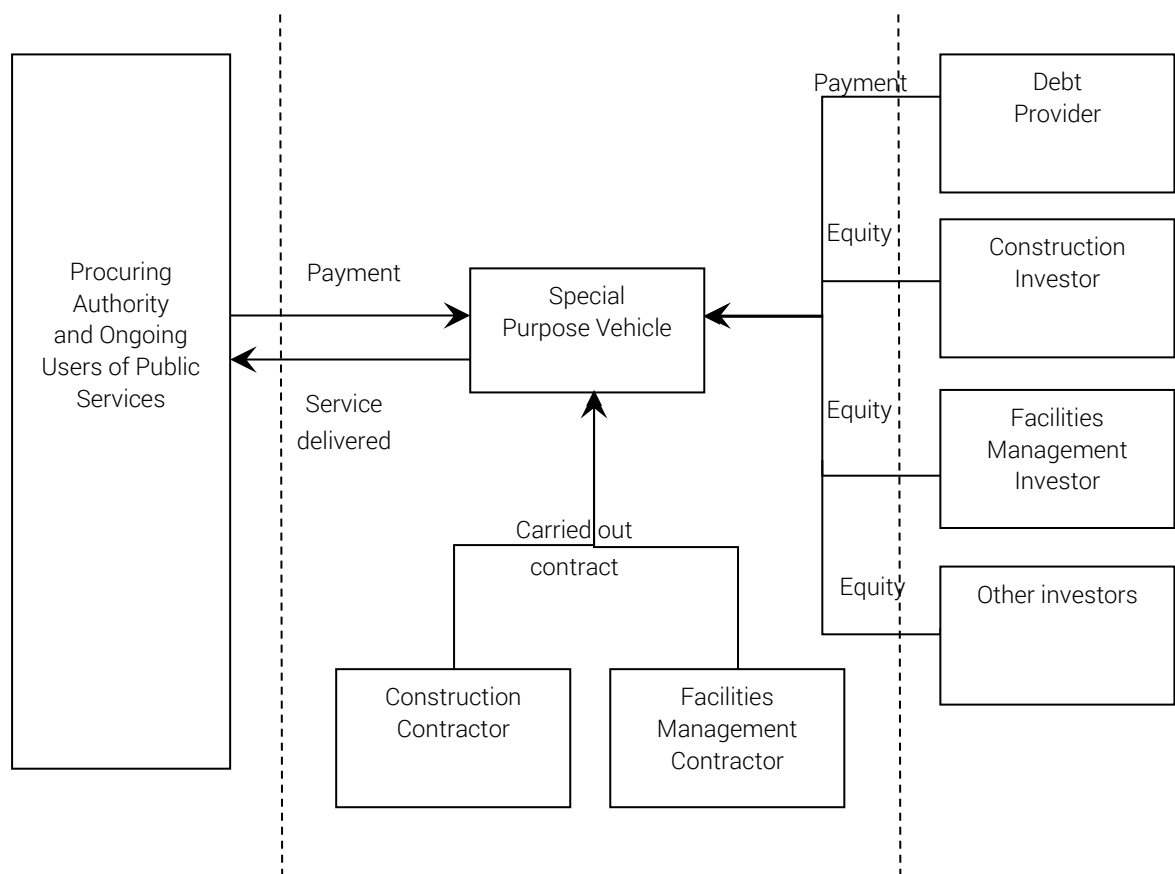
Source: UKAS (2016)

Malaysia uses PPP in numerous industries including transportation, health, highways and education (Baker & McKenzie, 2015). However, there is no definitive list of PPP projects planned or launched; the lists mentioned in most articles are cited from each other and confusing. However, according to the Economic Planning Unit (2010), a total of 52 projects with an estimated value of £12.14⁵ billion has already been tabled for approval. In a speech by

⁵ Conversion is based on July 2016 where 1 Malaysian Ringgit is equal to 0.19 British Pound.

the Chief Secretary of Malaysia, he boasted that up to December 2014, 698 PPP projects had been successfully realised, saving the government a total of £40.93 billion (Hamsa, 2015). The major projects on the Malaysian PPP unit website are listed in Table 2.8. Based on this list, major projects focus on the social infrastructure which benefits the public at large. At the top of the list is infrastructure for the education sector, with 16 projects, with the health sector and highways development coming next. It is unfortunate that details of these projects are not publicly available.

The organisational structure of a typical PPP introduced in the Tenth Malaysia Plan is similar with the best practice internationally. The structure comprises the government, Special Purpose Vehicles, lenders, private investors, works contractors and facilities maintenance contractors. The roles and responsibilities of the parties in Malaysian PPP are very like their counterparts' worldwide. The typical PPP structure proposed by the Public-Private Partnership Unit (2009) is shown in Figure 2.7.



Source: Public-Private Partnership Unit (2009)

Figure 2.7 – Typical PPP Structure in Malaysia

2.9.6 Unit Kerjasama Awam Swasta (UKAS)

One of the indicators of the PPP market maturity curve in stage one is to initiate a central PPP policy unit to guide the implementation of PPP. In stage two, a nation is required to establish dedicated PPP units in agencies (Eggers & Dovey, 2007). To be included as a measurement of market maturity indicates the importance of the establishment of a dedicated PPP unit in a nation.

Subsequent to the Privatisation Policy of 1983, Rashid (2014) suggested that with the large number of privatisation projects to be supervised, a Privatisation Special Task Force was initiated in the Economic Planning Unit of the Prime Minister's Department to take charge of the privatisation implementation. Prior to that, ten senior government officials from various ministries met in an inter-ministerial committee under the chairmanship of the Director General of the Economic Planning Unit to monitor the implementation of privatisation (Leeds, 1989). Since then, the government determined that a special team is needed to undertake the implementation of privatisation, hence the formation of the Privatisation Special Task Force. After the Privatisation Master Plan was introduced, the task force changed its name to the Privatisation Section and still operates under the Economic Planning Unit. Although the section was intended to be dedicated solely to the national privatisation implementation strategy, constraints faced at that time included a lack of expertise in the core subject matter, privatisation (Leeds, 1989).

In 2009, the Privatisation Section was set to be given a bigger role and additional authority. It was upgraded into a new government agency under the prerogative of the Prime Minister's Department and rebranded as the Privatisation and Private Finance Initiative Unit – PFI (Public Private Partnership Unit, 2014). Later, the name was changed to Unit Kerjasama Awam Swasta (UKAS) (Wang et al., 2012; Public Private Partnership Unit, 2014; Rashid, 2014). UKAS was formed as an initiative with continuous commitment by the government to facilitate and ensure success of the programme. It is a federal government agency responsible for coordinating and supervising national PPP implementation (Saron et al., 2013; Public Private Partnership Unit, 2014).

2.9.7 Malaysian Legal Framework in Relation to PPP

Typical public procurement falls under legislation implemented at independence in 1957. However, since PPP projects are not financed by the government, there is uncertainty as to

whether they fall under the jurisdiction of the public procurement legislation. However, the published guidelines of UKAS stated that PPP is a public procurement model. Therefore, this research assumes that it falls under the public procurement legislation, with which it must fully comply.

Although the highest financial authority in Malaysia is the Minister of Finance, the responsibility for public procurement administration falls under different ministries and agencies. Each ministry and agency has been delegated with different functions and different roles. PPP projects are also included in these ministries and agencies. The hierarchy of the major regulations and their roles are explained in Table 2.9.

Table 2.9- Significant Malaysian Acts and Regulations for Public Procurement

Laws/Regulations	Descriptions
Financial Procedures Act (1957) (Amendment 1972)	The act outlines procedures for the collection, custody, and payment of the public monies and procedures for the purchase, custody and disposal of public property and related matters.
Government Contract Act (1949) (Revised 1973)	The act empowers ministers in their respective ministries to enter into contracts and delegate powers to government officers to enter into contracts on behalf of government.
Treasury Instructions	The document outlines in detail financial and accounting procedures and regulations that have to be followed in managing and using public funds including procurement.
Treasury Circulars	The circulars are issued from time to time to inform, clarify, implement, improve and amend certain policies, rules, and procedures regarding the management and use of public money.
Federal Central Contract Circulars	The circulars are issued to outline several items that are decided to be centrally purchased.

Source: Synthesised from Jones (2006) and Adham & Siwar (2012)

Public procurement is regulated by major statutes, such as the Financial Procedure Act, 1957 (Amendment 1972); Ministerial Functions Act, 1969; Government Contracts Act, 1949 (Revised 1973); and Delegation of Powers Act, 1956. These statutes are reinforced for reference by Treasury Instructions, Treasury Circular Letters, Federal Central Contract Circulars, Treasury Circulars, Treasury Instruction Letters, and the manual and guidelines (a detailed step-by-step approach). These regulations are compulsory for federal government agencies, state agencies, local authorities under state administration and semi-government agencies (Abdullah et al., 2010; Adham and Siwar, 2012; Jones, 2013).

UKAS was set up as the agency to spearhead the implementation of PPP in Malaysia. PPP project proposals are prepared by ministries or agencies and submitted to UKAS for

consideration and facilitation of approval. Proposals from the private sector are also encouraged (Wang et al., 2012). Private initiative proposals fall under the category of unsolicited proposals (Unit Kerjasama Awam Swasta, 2014), although there is lack of details available from UKAS on the policy and practice for unsolicited proposals. Based on an analysis of the UKAS website, the approval of unsolicited proposals is most likely to be processed similarly to proposals from ministries and agencies. If approved, issues of competition and transparency will need to be addressed by the government. The case study (Chapter 5) will further explore how the Malaysian government deals with unsolicited proposals.

There is neither a new legal framework nor specific legislation for PPP in Malaysia. Some relevant statutes and regulations have been revised and specifically set up for the implementation of privatisation (Wang et al., 2012). Such privatisation legislation is statutorily applicable in the implementation of PPP proposals. The specific legislation involved is:

- a) The Federal Roads Act, 1959 (Revised 1989);
- b) Tolls (Road and Bridges) Act, 1965 (Revised 1989);
- c) Port Authorities Act, 1963 (Revised 1992);
- d) Abattoirs (Privatisation) Act, 1993;
- e) Sewerage Services Act, 1993;
- f) Highway Authority Malaysia (Incorporation) Act, 1980;
- g) Ports (Privatisation) Act, 1990;
- h) Water Services Industry Act, 2006;
- i) National Water Services Commission Act, 2006;
- j) Street, Drainage and Building Act, 1974;
- k) Town and Country Planning Act, 1976;
- l) Local Government Act, 1976.

Zen et al. (2014) applauded the ability of the government to procure infrastructure through PPP without enacting a specific PPP law. They believe that it is possible because Malaysia has a stable business environment and framework adhering to certain international standards.

2.9.8 New Economic Policy (NEP)

Numerous policies have been initiated by the government of Malaysia for the management of national economic growth. One of the most important is the New Economic Policy (NEP) (Economic Planning Unit, 2004). The New Economic Policy was initiated by the government in early 1970 in response to the race riots of 1969. These riots occurred because of the dissatisfaction of certain ethnic groups with the economic disparities and imbalance of the socio-economy (Mun, 1987; Snodgrass, 1995; Jomo, 2004; Gul, 2006). Therefore the New Economic Policy was aimed to achieve national unity by re-structuring the socio-economic position of the ethnic people of Malaysia (Economic Planning Unit, 2016). To achieve this, the policy was designed to eradicate poverty and eliminate the existing gap and disparities between the ethnic groups. Lee (2011) sees it as a wealth distribution exercise. According to Ramli et al. (2013), the New Economic Policy is about supporting the society and economy of the *Bumiputera*. The term *Bumiputera* is used for the majority Malay ethnic group. The New Economic Policy is an attempt by the government to increase *Bumiputera* participation in mainstream economic activities with the target of at least 30 percent *Bumiputera* (Ariff & Abubakar, 2003).

Before the New Economic Policy, the Malaysian economy was dominantly controlled by the Chinese (Gul, 2006). Ramli et al. (2013) suggested that this was due to the divide and rule policy during British colonisation, which segregated economic activity along racial lines. The British supported the Chinese in trading, while the Malays were left to operate self-sustaining economy in the villages, mainly with agricultural activities (Ariff & Abubakar, 2003).

Under the public procurement regulations, *Bumiputera* companies are given preferential treatment in terms of the percentage of work reserved for them, with extra points for evaluation purposes (McCrudden, 2004; Ministry of Finance Malaysia, 2013a). When privatisation was announced, one of the objectives was to fulfil the aim of the New Economic Policy by increasing the equity of *Bumiputera* shareholders and strengthening the *Bumiputera* entrepreneurs (Economic Planning Unit, 1994). This feature makes Malaysian privatisation unique. However, there have been mixed reviews of the implementation of the New

Economic Policy within the privatisation programme. Post-New Economic Policy, a more balanced economy emerged, with an increase in *Bumiputera* participation in economic activities, although still not achieving the corporate equity target (Roslan, 2001; Khalid & Abidin, 2014). Nevertheless, although the aim is to create more *Bumiputera* conglomerates and strengthen the *Bumiputera* role in business, in reality the programme and the policy only benefit small numbers of politically connected businessman (Milne, 1992; Jomo & Syn, 2003; Haneef, 2008). Contracts awarded to the *Bumiputera* companies are also leaked (sold) to non-*Bumiputera* and foreign companies (Ariff & Abubakar, 2003). Jomo (2004) also suggested the combination of New Economic Policy and privatisation involved rent-seeking activities and concessions awarded based on cronyism, given the abuse of the policy and programme to benefit certain quarters mentioned above (Kim et al., 2014).

There is no indication of how the New Economic Policy is implemented within PPP by UKAS. Abdullah et al. (2014) hinted that the practice of the New Economic Policy is also alive in PPP implementation. Rusmani (2010) even suggested that the preferential treatment of *Bumiputera* companies in PPP implementation has caused problems to the programme. Further protection for *Bumiputera* interests in industry is seen as restricting the benefits and potential growth the government can achieve in a liberalised market, such as the forthcoming Trans-Pacific Partnership (PPP), in which Malaysia is one of the parties involved (Su-Lyn, 2015).

2.10 Summary

This chapter, reviewing the literature on PPP practice, clearly shows why PPP has been preferred by governments to procure infrastructure. PPP offers public authorities certain features that cannot be achieved through conventional public procurement. The adoption of PPP saw a greater involvement of the private sector, including the alternative funding which is very valuable to cash-strapped governments. The involvement of the private sector through PPP is also expected to elevate the quality of the infrastructure delivered, by exploiting the expertise and innovation brought by the private sector.

PPP has been successful in the UK. The chapter examined the history and progress of procurement in the UK, the most advanced PPP practitioner, Although Malaysia developed its own form of PPP, and the initiation of the programme was similar to the UK's. Both governments needed alternative funding to meet the demand for infrastructure, and both

realised the benefits of involving the private sector. By acquiring private-sector expertise and innovation, the governments were able to ensure value and efficiency. Although the programmes received criticism, both countries were committed and have benefited hugely from the implementation of privatisation.

For Malaysia, its unique ethnicity-based affirmative-action policy means an uphill task if the government is to get the best out of PPP while achieving the aim of the New Economic Policy. Based on the literature review, the Malaysian government is succeeding in delivering infrastructure and reducing the inequality gap between the ethnic groups. However the programme suffers from alleged abuse of power and serious ethical misconduct. In order to understand this further, the next chapter discusses the practice of competition within the procurement process.

Chapter Three - Literature Review: Competition

3.1 Introduction

Money spent by the government deserves attention due to the large amount of transactions annually. Although there are number of options that can be employed by the government, driven by the motivation to attain greater efficiency and value for money, governments worldwide have been innovatively searching for the best methods of procurement to deliver goods, services and infrastructure to the public. Public procurement should always preserve the principle of good governance, which includes transparency, accountability and competition, as it is the responsibility of the government to use available resources wisely. Researchers have identified competition as an essential element in the public procurement to achieve best value for the taxpayer's money and to safeguard the taxpayers from the danger of ethical misconduct.

This chapter explores and synthesises the research subject, competition and procurement. The literature review is structured to examine international best practice before focusing on Malaysia. As the EU is deemed to be a cornerstone in organising competition in public procurement, the chapter pays special attention to its principles in public procurement and PPP.

The chapter starts with examining the concept of competition in general and its application within procurement. Since the concept of competition is wide, in addressing the research objectives only the aspects of competition concerning policy making, governance and implementation in the procurement process is discussed. The procurement procedures employed for PPP and the procurement process are then examined. This is followed with presentation on the challenges faced in incorporating competition within the procurement process for PPP. The chapter concludes with a summary of the literature review.

3.2 Understanding Competition

Competition can be related to different areas of life, from biology to economy. Competition in economics is the equivalent of natural selection in biology (Hodgson, 2002). According to McNulty (1968), competition can be considered as the most important concept in the economy, and the concept was recognised long before modern times. People commonly recognise competition by price competition and the type of market structure, such as perfect competition, monopoly, monopsony and imperfect competition (Dickson, 1992).

This leads to the perception that the concept of competition is the opposite of a monopoly (McNulty, 1968). McNulty added that the concept of competition in a market structure is a combination of economic terms and business behaviour. To add to the confusion over the definition, Dickson (1992) pointed out that Adam Smith viewed competition as rivalry between sellers to satisfy the demand of a buyer in the same market. The rivalry is a result of the uniqueness of the supply and demand equilibrium. However, the concept of competition in terms of rivalry between sellers originated decades before Adam Smith (McNulty, 1967).

Adam Smith, the classic economist, referred to competition as a regulatory force which may influence price by its existence or absence (Stigler, 1957; McNulty, 1967, 1968; Vickers, 2003). In his famous *Wealth of Nation* (1776), he declared that competition was based on the race between sellers and buyers, which he described as...*the forcing of market price to its 'natural' level or to the lowering of profits to a minimum.* Stigler (1957) points out that five characteristics meet Smith's definition of competition:

- a) The competitors must be individual units and not joint ventures;
- b) The number of competitors, prospective as well as present, must be adequate to reject extraordinary gains;
- c) The economic units (buyers and sellers) must have knowledge of the market opportunities;
- d) There must be freedom (from social restraints) to act on this knowledge;
- e) Sufficient time must elapse for resources to flow in the directions and quantities desired by their owners.

On the other hand, the idea of market structure was introduced formally by Antoine Augustin Cournot, a French mathematician and philosopher, and was hailed by Stigler (1957) as a clearer view of competition. He described Cournot's work as more precise and elegant than Smith's. Considered as the modern view of competition, Cournot's work was based on the predicted result of a mathematical equation between cost and price rather than as the behavioural process defined by Smith (McNulty, 1967). In Cournot's work, market price and quantity are determined by the buyer's demand and supply relationship. His work on competition leads to today's idea of perfect competition, monopoly, monopsony and imperfect competition. A simple explanation of the market structure is given below:

i) Perfect competition

Perfect competition can be recognised in a competitive industry which has a large number of firms competing to sell homogenous products or services. The firms in the relevant industry will produce the optimum number of outputs at the minimum possible cost per unit. No single firm will affect the price in the market (Stigler, 1957; Mas-Colell, 1998; Hayes, 2008)

ii) Monopoly

A monopoly exists when an industry is controlled by a single firm. Since there is no competition in the industry, the firm is able to manipulate the situation by reducing the product output and to increase the price to achieve maximum profit (Price, 1989; Hyman & Kovacic, 2004; Hayes, 2008)

iii) Monopsony

As opposed to monopoly where a single firm exercises market power, in a monopsony market a single buyer has the absolute market power, i.e. there is only one buyer and multiple sellers. The buyer can choose to purchase from any seller (Hyman & Kovacic, 2004; Gibbon, 2005).

This research will not redefine competition, but by reviewing available definitions it gives an insight into the characteristics of a competitive nature and anti-competitive conduct. Following the definitions of competition and the types of market related to competition, this research will explore and synthesise the application of competition in the PPP procurement process.

PPP is a part of public procurement. The type of market identified for PPP is neither perfect competition nor monopoly but has significant features of monopsony. The primary argument for this type of market for PPP lies in the traits of the purchaser. In perfect competition or monopoly, the pool of purchasers is large and a single purchaser has no effect on the product price in the market. However, the public sector is the single purchaser in the PPP monopsony market. The market structure of PPP is clearly a mirror of the public procurement market which carries the traits of a monopsony market (Bovis, 2010). Like monopoly, where a single seller controls the industry, the underlying principle of monopsony is an industry controlled by a single purchaser with a large pool of sellers. Given the theoretical bargaining power as the only purchaser, the public sector should be able to provide people with the best service at the cheapest option available.

3.3 Understanding Procurement

There is confusion over the concept and different meanings of procurement by different industries (Dewulf et al., 2012). The term procurement is commonly interchangeable with the terms purchasing and supply management (Chartered Institute of Procurement and Supply, 2013). Basically, the root of procurement is the word procure which is defined as *to get possession of: obtain by particular care and effort* (Merriam-Webster, 2016a). Meanwhile in Merriam-Webster, (2016b) procurement is described as the act or process of procuring. In practice, procurement has been described as *an active process to achieve an outcome* (Mak, 2014). It was viewed as a system of organisation (Rashid, 1998) or a resourcing strategy to explore the supply market in order to obtain the best product or service to be delivered to stakeholders (Chartered Institute of Procurement and Supply, 2013).

According to McDermott (1999), a practical definition of procurement was agreed by the practitioners and researchers in the International Council for Building Research Studies and Documentation (CIB) as *the framework within which construction is brought about, acquired or obtained*. In other words, procurement comprises a wide range of activities from initial identification of the need for a service or item until the termination of the service or cessation of the item (Baily et al., 2015). Therefore, the confusion of the term procurement and purchasing should not arise since procurement is beyond purchasing. Purchasing is just one of the activities in the process. Procurement is a term to describe process and multiple activities.

This can be confirmed by looking at the application of the term procurement by academics and organisations in describing public procurement. Several describe public procurement as the process of acquiring goods, service and works for the government (Office of Fair Trading, 2004; Csáki, 2008; Office of Government Commerce, 2008; Chong et al., 2010). Alternatively, some use the term government procurement. In detail, Abdullah et al. (2010) suggest that goods and services in public procurement normally include consultancy, professional services, construction, maintenance and material supply contracts, facilities contracts, capital equipment, property and leasing arrangements. Most of these acquired goods, services and works will be provided for the public. Contrary to this view, instead of providing acquired goods and services, the Office of Government Commerce (2008) sees government as actually buying on behalf of the public as taxpayers.

The definition applied in practice for PPP is also in line with the term used in public procurement, described by Dewulf et al. (2011) as the process of selecting the private partner to obtain the infrastructure. Taking into consideration the discussion above, within this research procurement is seen as the systematic activities conducted to acquire a particular outcome; in this context, the outcome is the infrastructure.

3.4 Competition within Procurement

The public procurement market is large and central to a nation's economy. For instance, public procurement transactions are estimated to be worth €1,000 billion a year (European Commission, 2014) in world trade. In 2013, public procurement accounted for an average of 12.1% of OECD members' Gross Domestic Product (GDP)(OECD, 2015). From 2013 to 2014 the UK government spent an estimated £242 billion on public procurement (Booth, 2015). These numbers demonstrate the significant amount spent by governments in procuring for the public.

The EU public procurement is one of the largest in the world (Trybus, 2006). In 2014, its projects were worth £450 billion (Plimmer, 2014). The EU's successful management of public procurement is something that they can be proud of. The creation of a single free market for 27 state members has managed to stimulate businesses in a diverse and competitive environment, thus benefiting member citizens. The EU has developed a comprehensive legal framework in the form of directives to ensure the free of movement goods and services. Its procurement emphasises how governments spend their resources,

rather than what the money is spent on (Farnell & Booth, 2014). Through EU law, the Treaty on the Functioning of the European Union (TFEU) and European Union Public Procurement Directives, the EU is very particular about making the procurement market between members open and competitive (Andersen et al., 2010; Pouncey & Brown, 2014).

The importance of competition practised in public procurement and PPP by EU members can be seen in the case of *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*⁶. There was confusion about the PPP mechanism (in this case it was the concession agreement) and the procurement directives. Even though the Court of Justice of the European Union (CJEU) held that a concession is exempted from the directives' procedural requirements, EU members were still restricted by the TFEU fundamentals on freedom of movement. In this case it was about the principles of non-discrimination and transparency in awarding government contracts (Kalbe, 2005; Arrowsmith et al., 2010; Sundstrand, 2012).

Considering the large amount of money spent, the goal of the EU procurement law is to procure the best value on behalf of the taxpayers, thus implying that competition is the best tool to achieve the goal. Every member of the EU is entitled to a fair and equal opportunity to participate and win a public contract. None of the member states is allowed to protect their domestic market, which could be seen as being anti-competitive. The only way to ensure non-discriminative and equal access to a public contract is by conducting an open contract award exercise which maximises competition. Competition is a substantial element in reducing the cost of infrastructure to a public authority (Herpen, 2002; Estache & Iimi, 2008). Advocating competition within procurement does not only benefit the public authority and the taxpayers, it also creates a fair business opportunity for the private sector. Competitive procurement drive innovation and efficiency from business entities as it discourages anti-competitive behaviour.

The EU rules and principles for public procurement are also applicable to the implementation of PPP. PPP does not automatically benefit the government in terms of efficiency and value for money, but has to be earned. According to Burger and Hawkesworth (2011), there are a number of factors contributing to the success of PPP, significantly competition amongst private parties. Grimsey and Lewis (2005) added that competition is the most important determinant in achieving value for money. They insisted that without competition in PPP,

⁶ Case C-324/98 [2000] ECR I-10745

procurement would not achieve better value for money. Failure to organise a competitive tender exercise prevents the market forces of demand and supply from determining prices, hence the government may not achieve the full benefit expected since there will be fewer choices of realistic bids that mirror the actual market price (Alexandersson & Hultén, 2006), which will encourage opportunistic behaviour by bidders in charging excessive profit from the public authority (Iossa, 2015). This will also prevent the economy from expanding, as the anti-competitive practice discourages new entries to the market and dampens existing sellers' incentive to be innovative and efficient. An effective competition policy in PPP increases:

- the propensity to attract the private sector to invest in PPP programmes
- freedom from corruption (bid rigging/kickbacks/misrepresentation, etc.)
- recognition of intellectual property rights
- ethical decision making.

According to Zitron (2006), there is a relationship between the presence of competition in procurement and the behaviour of bidders. The competitive tension created in procurement drives bidders to bid aggressively in order to enhance their chance of winning, sometimes with a low price. It also gives the advantage to the public authority to be able choose the most suitable bidder, compared to ad hoc selection. Competition in PPP can be implemented during selection of the private partner through a competitive procurement process which encourages the bidders to deliver innovative, cost-effective, commercially attractive, high technology and operational methods to a project. The creation of intensity of competition during the bidding process make it an ideal tool for the government to promote competition in PPP (Eaton et al., 2007; Asian Development Bank, 2012). Braun (2001) believes that competitive pressure should be put on the service provider throughout the whole PPP development in order to maximise the management skills of the private sector.

Besides giving equal access to the award of a public contract, the aim of the competitive tender exercise in a PPP procurement process is to encourage innovative solutions, both technical and financial, by the bidders to achieve improved value for money (Grimsey & Lewis, 2005; Infrastructure Australia, 2008; Graells, 2012; Ministry of Finance Singapore, 2012). It is also important to ensure the appropriate use of resources and enhance efficiency (Zhang & Chen, 2013)

There are multiple ways of organising competition within procurement. Link and Scott (2001) suggested that competition policy in PPP should be able to stimulate innovation in the private sector. Vickers (2002) suggested that a good competitive exercise emphasises the bidding rules and the access to information. On the other hand, Amaral et al. (2009) suggested that in principle it should be seen as fostering competition and preventing any anti-competitive behaviour. Furthermore, they relate in their case study that these measures were taken in organising tenders in the bidding for bus routes in London and France. The measures are:

- a. Promoting competition: the public procurement process should be designed to promote competition. The most common strategy is to create competition intensity between the bidders, achieved by organising large-scale competitive bidding where a higher number of bidders results in reduction in the bidding price. Therefore, attracting bidders to participate in the bidding exercise should foster competition in procurement. In order to attract participations, the public authority should facilitate a platform where bidders can believe that they are competing in a sound and transparent framework with little barrier to entry. This motivates bidders to bid effectively, hence benefiting the public authority by acquiring high quality bids. Another type of incentive to attract participation is compensation for tendering costs.
- b. Eluding collusive behaviours: collusive behaviour is a strategy adopted by bidders to circumvent competition. Among the collusive behaviour that can be found within a procurement is price fixing. One of the methods of collusive behaviour is restricting new entrants to the bidding exercise, keeping the number of bidders low and with the same companies participating. A small number of bidders makes the process vulnerable to collusion, as it is easier for the bidders to make an arrangement. It can also lead to corruption. Organising a large competitive procurement to achieve sufficient competition is a good strategy, hindering collusion through conspiracy and receiving smaller shares.
- c. Eliminating corruption: there is always a threat of corruption in public procurement, and PPP is no exception. Lack of transparency and competition within the process tends to corruption. Corruption in a procurement may result in distortion in competition due to impartiality of the contract award. The impact of corruption can greatly impair the whole system for society and the nation. Corruption leads to

inefficient use of resources. Hence to achieve competition in the procurement process, it must go hand-in hand with efforts to combat corruption.

- d. Exploiting economies of scale and scope: through competition, the public authority may achieve best value reflecting the actual market price. This may be realised by exploiting economies of scale and the scope of the project. Besides financial benefit, the client may also benefit in terms of increased standards of bids and innovation.

It is worth noting that the measures explained above indicate that government support to stimulate and uphold competition within procurement is essential. Such commitment from the public authority is needed to safeguard the public interest, including obtaining value for money, discouraging corruption and encouraging innovation resulting from high-quality offers and efficiency.

3.5 Selection of the Private Sector Partner

Selection of an appropriate private partner for PPP is vital in order to achieve value for money (Office of Government Commerce, 2008; Craven, 2011), and may determine the failure or success of the concession (EPEC, 2011b). There are many different views of how a private partner in PPP should be chosen. On one side are those in favour of fully open competition procedures, and on the other are the parties in support of direct appointment and negotiation (Saussier et al., 2009). In certain countries, adopting a competitive procedure to select the private partner is required by law (Yescombe, 2007). As PPP is categorised as public procurement, the selection of the private partner commonly falls under the public procurement procedures (United Nations, 2008).

As one of the largest markets for public procurement in the world, the EU has developed broad regulations with which its members must comply. Members are free to choose the method of awarding the contract, but they are bound by the underlying principles and requirements of the TFEU (Commission of the European Communities, 2004; Essig & Batran, 2005; Kalbe, 2005), such as the freedom of establishment and the freedom to provide services, and the encompassing principles of transparency, equality of treatment, proportionality and mutual recognition. Stolfi and Murniati (2014) suggested that these qualities should be emulated by developing countries, including Malaysia.

Under the EU directives four types of procurement procedure are commonly used by contracting authorities to procure public contracts and PPP (EPEC, 2011b). These are open, restricted, negotiated and competitive dialogue procedures. According to Yescombe (2007), under the World Trade Organisation (WTO) Agreement on General Procurement (GPA) three types of procurement are allowed for PPP. These are classified under public procurement as open, selective and limited procedures. Similar to the principles adopted by the EU on procurement, the WTO GPA aims to create a liberal, competitive and fair procurement market among its members (Andersen et al., 2010). The difference between the WTO GPA and the EU procurement procedures is that the EU has introduced the competitive dialogue procedure as an option to deal with PPP complexity. This is designed to address the lack of flexibility in dealing with the complex nature of PPP; within the competitive dialogue, the public authority is permitted to discuss and refine its need (Andersen et al., 2010).

Table 3.10 - Comparison on Key Attributes of Four Procurement Procedures in the European Union

	Open Procedure	Restricted Procedure	Negotiated Procedure	Competitive Dialogue
Possibility to limit number of bidders	No prequalification or pre-selection is permitted. Any interested companies may submit a bid.	The number of bidders may be limited to no less than five in accordance with criteria specified in contract notice. (Pre-qualification and shortlisting permitted).	The number of bidders may be limited to no less than three in accordance with criteria specified in contract notice. (Pre-qualification and shortlisting permitted).	The number of bidders may be limited to no less than three in accordance with criteria specified in contract notice (prequalification and shortlisting permitted)
Discussions during process	The specification may not be changed during the bidding process, and no negotiations or dialogue may take place with bidders. Clarification is permitted.	The specification may not be changed during the bidding process, and no negotiations or dialogue may take place with bidders. Clarification is permitted.	Negotiations permitted throughout process. Successive stages can be used to reduce the number of bidders (further short-listing)	Dialogue with bidders permitted on all aspects (down-scaling bidders permitted between successive stages of the dialogue). When dialogue is concluded, final complete bids must be requested based on the solution(s) presented during the dialogue phase.
Discussions after final bid is submitted	No scope for negotiations with a bidder after bids is submitted.	No scope for negotiations with a bidder after bids are submitted	Not relevant because The negotiations can continue until the contract is agreed. There need be no "final bid" per se	Only permitted to clarify, fine tune or specify a bid or confirm commitment. No changes permitted to basic features
Basis for award	Lowest price or most economically advantageous tender	Lowest price or most economically advantageous tender	Lowest price or most economically advantageous tender	Lowest price or most economically advantageous tender

Source: European PPP Expertise Centre (EPEC), (2011a)

There is no one-size-fits-all procedure, and the selection of procurement procedures to adopt depends on the characteristics of the project and the suitability of the attributes of the procedures to meet the objectives of the public authority or stakeholders (Jeppesen, 2013). However, competitive procedures give the public authority an advantage to gain economic benefit (Polydoropoulou & Rouboutsos, 2009). The European PPP Expertise Centre (2011b) indicated that with the introduction of competitive dialogue, EU members adopted this procedure more often than any other, followed by open and negotiated procedures. A comparison of the key attributes of these four procurement procedures is given in Table 3.10.

Among the differences among the procedures is, in an open procedure, a contract is awarded in a full competitive bidding exercise, while in the other three it is awarded through a combination of pre-qualification and subsequent negotiations. Another difference is that an open procedure is conducted without a dialogue or negotiation process. These procedures are discussed further in the following sections.

3.5.1 Open Procedure

The open procedure gives opportunities to interested parties to participate in the tender exercise within specifically defined parameters (Soliño & Gago de Santos, 2010). As highlighted in Table 3.10, one of its key attributes is that the proposal or offer submitted by the bidders is considered binding, with no, or rare, opportunity for negotiation (Craven, 2011).

The open procedure promotes the values of competition, transparency, non-discrimination and at the same time achieves value for money (Trybus, 2006). Together with the restrictive procedure, the open procedure is regarded as the most transparent process in EU directives. This is also in line with international best practice set out in the WTO GPA. Contracts are normally awarded either to the lowest price or to the bidder with the most economically advantageous offer.

Although the fundamentals of the TFEU and the directives prefer open procedures, they best suit simple, non-complex contracts (Pouncey & Brown, 2014). The contra-argument is that a complex contract arrangement such as PPP might not be suitable for the open procedure since it usually involves a large-scale project (European Commission, 2003) involving driving up administration costs (Trybus, 2006; Zhao et al., 2011), a minimum numbers of bidders to ensure the competition is intense (Shaoul et al., 2008), and the need for negotiation between parties (SIGMA, 2011). Some scholars have a different view, that an open procedure is not

immune to corruption, collusion and even favouritism (Pashev et al., 2002; Chong et al., 2010). Although an open procedure is regarded in the literature as the most recommended route for EU member states, it has been identified as the most preferred PPP procedure only in Spain (EPEC, 2011b; Zhao et al., 2011)

3.5.2 Restricted Procedure

The restricted procedure involves two-stage tendering. Similar to the open procedure, an invitation to interested parties to join the bidding is advertised (Broerse et al., 2013). This stage is also known as the prequalification stage (Hartmann, 2006). The objective of this first stage is to shortlist the qualified interested parties to enter the second stage. The participants will be filtered based on financial and professional capabilities. A minimum number of five bidders is required for the next stage of bidding (Braun, 2001).

Following the evaluation of the first stage, short-listed bidders will be invited to participate in the second round where the contract will be awarded based on the most advantageous offer. Similar to open procedures, the contracting parties are not allowed to negotiate before the contract is awarded (Pouncey & Brown, 2014). The shortfall of this exercise is the possibility of obsolete data about shortlisted parties, if there is a long gap between the first and second tendering stages. Again like open procedures, the restricted procedure is seen as suitable for straightforward cases where the public authority is definite on the specification at the outset of the procedure, enabling bidders to submit a comprehensive offer (Craven, 2011).

Contrary to the EU restricted tender exercise which needs to be publicly advertised, under the United Nations Commission on International Trade Law (UNCITRAL) model on procurement of goods, construction and services, a limited number of participants can be invited to tender exercise (Arrowsmith et al., 2010). Although this would shorten the tender exercise period, this move is against the principles of competition and transparency.

3.5.3 Negotiated Procedure

A negotiated procedure is an option when the public authority prefers to conduct a negotiation with their preferred party or parties (Bovis, 2010). As PPP is a complex procurement with a large requirement for investment, according to the World Bank Institute (2012) direct negotiation may be suitable in these situations:

- i. Where, normally in small projects, the cost to the bidders of entering the competitive process is higher than the expected revenue from the project;
- ii. Lack of competition in a certain industry means there are only a few main players;
- iii. The need for speedy execution rather than value for money, normally for disaster or emergency procurement.

There are two types of negotiated procedures in the EU procurement directives: with and without prior publication of a contract notice (Arrowsmith et al., 2010; Ebrecht & Werner, 2012). Member states are only allowed to conduct a negotiated tender exercise without notice in exceptional cases, as laid down in the EU procurement directives; for example, when there is only one possible bidder, failure of the chosen procurement process (open or restricted), or a huge degree of extreme urgency (Broerse et al., 2013). For a negotiated procedure with prior publication of the contract notice, a minimum of three candidates must be shortlisted (Bovis, 2010). The difference between the negotiated procedure with notice and without notice is the degree of competition and transparency applied in the selection of parties to negotiate with; if possible, there must be at least three shortlisted parties (Pouncey & Brown, 2014).

This procurement procedure involves negotiations between the public authority and the prequalified or selected company with the aim of finding the best solution to fit the need of the public authority. It may take one or a series of negotiations until the public authority manages to identify the right candidate to proceed to the final phase of negotiations (Yescombe, 2007; Soliño & Gago de Santos, 2010). During the negotiations, it is essential for the contracting party to stay focused on the aim and scope to avoid a lengthy process (European Commission, 2003).

Even though the negotiated procedure offers some flexibility for PPP, there are concerns over the perceived misuse of the procedure that may lead to issues of transparency and limited competition. Lengthy negotiations with a single preferred bidder after the contract has been awarded are seen as undermining the competitive process (World Bank Institute, 2012). Instead of an opportunity to clarify terms with the preferred bidder, in practice the final negotiation phase may result in substantial amendments made to the original bid, hence distorting competition and being unfair to the unsuccessful bidders (HM Treasury, 2006; Yescombe, 2007; Soliño & Gago de Santos, 2010). Often, the final negotiations phase may

leave the public authority with little bargaining advantage and a less favourable decision for the public (Burnett, 2005).

3.5.4 Competitive Dialogue

The implementation of the EU public sector procurement directives on PPP has become blurred by the complexities of the contractual and financial nature of PPP. The difficulties of producing a definite intended output specification before the tendering procedure makes the use of open and restricted procedures for PPP inappropriate (Andersen et al., 2010). Therefore, prior to the introduction of the competitive dialogue, PPP frequently resorts to awarding a contract under the negotiated procedure. To make this permissible under the EU public sector procurement directives, PPP has been justified as being complex with no sufficiently precise specifications, and classified as a services contract (Craven, 2011).

Combining elements of competition and negotiation, the competitive dialogue procedure was introduced as a procurement procedure for the award of particularly complex projects which includes PPP (Burnett, 2009; Petersen, 2010). Competitive dialogue was an attempt by the EU to balance transparency and flexibility for members pursuing PPP. The flexibility comes from the interaction with pre-qualified bidders and discussions to ensure clarity of information; especially on the requirements of the public authority (Sundaraj & Eaton, 2013). According to Brennan et al. (2016), the competitive dialogue procedure was introduced to restrict the use of the negotiated procedure, given its misuse in PPP. As in the EU's competitive dialogue, public authorities in Australia may opt for an interactive tender process in which the authority is also allowed to hold a series of dialogue sessions with the shortlisted bidders to discuss the proposals in detail with the aim of producing a high-quality outcome (Commonwealth of Australia, 2008; Infrastructure Australia, 2008).

The competitive dialogue procedure is not exclusively for use with PPP. It can also be applied in different types of contract arrangement. According to the European Commission (2005) the description of particularly complex in the directives is described as:

Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects

involving complex and structured financing the financial and legal make-up of which cannot be defined in advance.

This description of particularly complex is suitable to the nature of PPP (EPEC, 2011b), although the procurement is not exclusive to PPP. The competitive dialogue procedures comprise three phases: advertising and short listing, dialogue and the final award. The contracting authorities are permitted to start a dialogue with short-listed potential private partners (a minimum of three) to identify a suitable partner based on the requirements. The dialogue phase is considered the key element in the procurement since all aspects of the proposed contract will be discussed and negotiated (Commission of the European Communities, 2004; European Commission, 2005). The need of a dialogue for PPP before award of the contract is necessary since there is a need for flexibility to clarify a party's proposal, which might be different from others' making comparison difficult.

The parties will be required to submit their final offer or proposal to be evaluated with the same criteria and requirements stated in the notice (Commission of the European Communities, 2004). Although there is a view that the negotiated procedure has not changed in any way (Commission of the European Communities, 2005b), since the introduction of competitive dialogue one positive effect is better communication between parties, with enhanced competitive tension and better price discipline (EPEC, 2011b). According to the European PPP Expertise Centre, (2011a), competitive dialogue is the preferred PPP procedure in the UK, France and the Netherlands.

Despite similarities between the negotiated and competitive dialogue procedures in allowing for dialogue, one of the difference is that the latter does not allow further substantial negotiation after the submission of final bids (Shaoul et al., 2008). These substantial negotiations are common practice in the negotiated procedures, where dialogue with the preferred bidder often involves substantial negotiation and major amendments to the original bid before finalising the deal. On the other hand, after submission of the final bid, dialogue with the preferred bidder focuses on clarification and refining the agreement (Bovis, 2006; Sundaraj & Eaton, 2013). A similar practice of competitive dialogue is practiced in Australia and Canada under the label of interactive tender process (KPMG Corporate Finance (Aust) Pty Ltd, 2010; The World Bank et al., 2014)

3.6 Procurement Process for PPP

The procurement process is essential in the development of any project since it defines the inputs and outputs of the development. The complexities of PPP makes conventional procurement process appear largely irrelevant. The PPP procurement process is lengthy, costly and complicated for both public and private sectors (OECD, 2013). Distinguishing features of PPP, such as bundled contracts, a long contract period and multiple stakeholders make the procurement process much more complex than conventional procurement. Complexity in PPP is added to by difficulties in determining the specifications and technical requirements (Hartmann, 2006), and arrangements for the financial structure (Shaoul et al., 2008).

Summarising the case studies conducted by Songer et al. (2012), the PPP procurement process is a multiphase arrangement from prequalification to shortlisted bidders and the award of the concession. Bing et al. (2005) suggested that a PPP cycle consists of three stages: preparation, procurement and contract management. The preparatory stage covers project identification and detailed preparation; comprehensive planning and preparation ensure that the PPP cycle runs smoothly. The second stage is the critical process of acquiring goods or services. Last is the contract management stage. Although competition can be applied to the whole process, as suggested by the Office of Government Commerce (2008), for public procurement the procurement process stage is the most crucial since it is here that intense competition occurs. Besides achieving value for money, competition in the procurement process demonstrates the integrity of the whole procurement procedures and can be used as a measure to deter corruption (Anderson et al., 2011; Zhang & Chen, 2013).

There are numerous procurement processes practised globally. Table 3.11 demonstrates the different term used to describe them, and the different activities or processes involved. PPP procurement, like most other schemes in PPP, is country specific. This is due to multifaceted factors such as the legal framework, political landscape and economic situation. Nonetheless, in promoting good governance, PPP procurement should share the conventional public procurement processes, structured to achieve transparency, public accountability and market competition (Office of Government Commerce, 2008).

Table 3.11 -Comparison of Procurement Processes Globally

Term Used Sources	Procurement Process	Procurement Process	Transaction Phase	Selection of preferred bidder	Procurement Process	Procurement Process
<p>a) Pre-qualification b) Bid process c) Negotiation with bidders d) Basis for award.</p>	<p>a) Issue OJEC notice b) Shortlisting bidders c) Discussion with bidders on requirements d) Issuance of Invitation to Tender (ITT) or Invitation to Negotiate (ITN) e) Evaluate tenders f) Select preferred bidder g) Conduct final negotiations h) Award contract</p>	<p>a) Transaction process b) Shortlist qualified bidders c) Risk transfer and value for money d) Payment mechanism/performance e) Request for proposal f) Finalise project agreement g) Preferred bidder selection and negotiations h) Financial close</p>	<p>a) Invitation to tender, b) Tendering c) Evaluation and selection the preferred bidder</p>	<p>a) Advertisement b) Tendering c) Assessment and award of tender based on price</p>	<p>a) Request for Qualification b) Shortlist bidder c) Request for Proposal d) Proposal Evaluation e) Award Contract</p>	<p>a) Request for Qualification b) Shortlist bidder c) Request for Proposal d) Proposal Evaluation e) Award Contract</p>
<p>Notes</p>	<ul style="list-style-type: none"> • Generic suggestion by three established bank • Similar practice by the UK, Canada and Australia. 	<ul style="list-style-type: none"> • Suggested findings from the United Kingdom practice 	<ul style="list-style-type: none"> • Suggested findings from the United States of America practice 	<ul style="list-style-type: none"> • Suggested practice of Japanese PFI Association 	<ul style="list-style-type: none"> • Suggested practice in Spain 	<ul style="list-style-type: none"> • Suggested practice in Canada

As reflected in Table 3.11, there are similarities and differences between the procurement processes practised globally. Even though the label used by certain countries may be different, nonetheless such labels are used to illustrate the activities required by the public authority to obtain the infrastructure. This research will adopt the term procurement process as it is widely used by the PPP community, to describe the activities established to obtain the infrastructure.

The differences identified mainly result from different terminology and the amount of activities involved, while the processes themselves comprise similar basic activities with some variation. The number of activities is distinguished by the level of competition incorporated in the procurement process (Felsing & Miranda, 2008). A competitive procurement process is typically adopted by the government to avoid favouritism by giving equal opportunity to interested parties to participate. Generally, the selection of the procurement procedures determines the subsequent procurement process (Sulaiman, 2008). Most of the processes featured in Table 3.11 are generic, summarising common procurement procedures. This can be seen by the inclusion of prequalification and negotiation in some. On the other hand, Carbonara et al. (2012) suggested that the procurement process is not standard, the design of the procurement process depending on the objective of the public authority. In examining competition within the PPP procurement process globally, this researcher acknowledges that the PPP industry is heterogeneous and most of the PPP procurement processes are unique. The discussion focuses on the procurement process with particular reference to competition incorporated within it.

3.6.1 Official Notification

For EU state members, a work concession procurement process starts formally with official notification by the public authority: advertisement of a procurement notice (EPEC, 2011b). The official notification is required to be published in the Official Journal of the European Union (OJEU) (Andersen et al., 2010). Among the reasons for official notification is announcing to interested companies and the public the intention of the authority to obtain the infrastructure (Arrowsmith et al., 2010; Craven, 2011). For a business entity, participation is a business opportunity. In open competitive bidding the advertisement calling for participation is called the Request for Proposal. An advertisement for the prequalification exercise is called an Expression of Interest or Request for Qualifications (Yescombe, 2007). The prequalification exercise is commonly conducted for restricted, competitive dialogue and negotiated procedures. For open competitive bidding, through the promulgation of a

procurement notice, the public authority is able to attract a wide range of participation for the bidding exercise, choosing the best bidder from the private sector. For procurement procedures that involve prequalification of bidders, the advertisement calls for prospective bidders to join the prequalification process to demonstrate their capability and qualification to undertake the contract opportunity (Yescombe, 2007).

Advertisement is one of the ways the public authority gains best value for money, through the competition tension created in the open invitation to the private sector to participate in the tender or bidding exercise (HM Treasury, 2010; Dinapoli, 2014). It can be considered as the core task in seeking competition, as the advertisement enables competition to take place (SIGMA, 2011; Dinapoli, 2014). Braun (2001) commented that the European Court of Justice ensured that competition was created through advertisement when every interested party was given an equal chance to bid for the project. The advertisement is also an opportunity for the public authority to demonstrate their commitment and capability to conduct an efficient procurement process, hence increasing the private sector's confidence to participate (HM Treasury, 2010).

According to Gordon et al. (1998), the advertisement is also in line with the principles of EU public procurement, transparency and non-discrimination. Although the content of the advertisement depends on the legal requirements of a country (Felsing & Miranda, 2008), within the advertisement the public authority should disseminate project information, specifying the requirements with enough information to elicit interest from the private sector (Farquharson et al., 2011). The information contained in a procurement notice should also be optimal for the private sector to produce a custom solution. In line with the principles of transparency and competition, equal information such as prerequisite qualifications and evaluation criteria should be included in the advertisement to ensure that the award of the concession is on an objective basis and eliminating any discriminatory decisions (Gordon et al., 1998; Braun, 2001).

3.6.2 Request for Proposal

The term Request for Proposal is used in PPP, similar to the request for tender used in conventional tendering (Chamberland, 2012). Vrooman (2012) describes the Request for Proposal as the exercise to solicit the potential private sector partner. In unsolicited proposals,

the exercise of soliciting proposals from other interested parties is called the Request for Alternate Proposal (RFAP) (Kim et al., 2011).

The exercise of Request for Proposal allows the public authority to procure competitive offers from the private sector and select the one that best suits the requirements and is in the best interests of the public (Farquharson et al., 2011). Submissions from the private sector often comprise comprehensive details, including technical and financial proposals (Dewulf et al., 2012). At this stage, Quium (2010) suggested that the submission should include:

- a) Proposed concept;
- b) Approximate cost;
- c) Business plan with forecast;
- d) Proposed financing package or model;
- e) Risk management plan;
- f) Technical and financial capability of the proposer.

In an open procedure, the Request for Proposal document is issued to interested parties who respond to the advertisement calling for participation. In contrast, with restrictive, negotiated and competitive dialogue procedures, the document is issued to prequalified bidders.

The quality of the information made available to the bidders affects their competitiveness in putting forward a proposal to win the concession (Drew, 1994). The content of a high-quality Request for Proposal document should include the background of the project (World Bank Institute, 2012), public authority requirements, performance expectations, how the shortlist will be compiled (Ho & Hsu, 2012) and the payment mechanism (Commonwealth of Australia, 2008). In other words, the document notifies potential bidders of the governance of the proposed concessions, the expected submission from the bidder and the basis of selection of the bidders, sufficient for the bidders to conduct a due diligence preparation of a comprehensive proposal. The inclusion of the evaluation criteria in the Request for Proposal document is essential to demonstrate transparency. It will also establish that, although there is competition, the selection of a Special Purpose Vehicle is objective according to the evaluation criteria set out. This will attract participation from the private sector. A Request for Proposal document may also include a pro-forma concession agreement (World Bank Institute, 2012; Zen et al., 2014).

Competition within the Request for Proposal exercise is dependent on the number of bids received (Drew, 1994; Clerck et al., 2012). Competition is engendered by the tension created

between the bidders to produce a fresh and innovative proposal to win the concession (Farquharson et al., 2011; Iossa, 2015). In a comprehensive study, Amaral et al. (2013) suggested that the bidding price be reduced with the increased number of bids received, as a small number of bidders might not guarantee value for money in the bidding exercise (McAfee, 1986) and may lead to collusive behaviour (Marques & Berg, 2011). In the absence of competition, the public authority might not be able to drive the bidders to offer the best solution and value for money (HM Treasury, 2008b). On the other hand, although a large number of bidders increases competition (Ho & Hsu, 2012), it might also deter some bidders from participating due to the increased possibility of losing. Hence, for PPP the aim of competitive bidding is to maximise competition rather than maximise the number of bidders.

There is no agreed minimum number of bidders to achieve the required degree of competition; it is subjective. Multifaceted considerations need to be considered, including the nature of the project, the PPP market and the choice of procurement procedures. This is where the role of the public authority in stimulating competition is vital. EU member states are governed by the public sector procurement directives to ensure genuine competition in the bidding exercise (Craven, 2011). It is stated in Directive 2014/24/EU that the minimum number of candidates to invite for a restricted procedure is five, and for competitive and competitive dialogue procedures, three (European Parliament, 2014). These numbers can be reduced if the number of participants is limited or there is evidence that competition is achieved with a lower number of bidders (Hartmann, 2006). Similarly, in the UK, under the recent Public Regulations Contracts 2015, the minimum number of shortlisted bidders for restrictive procedures is set at five, and three for competitive dialogue and negotiated procedures (UK Parliament, 2015). Amaral et al. (2006) suggested that the minimum number to achieve competition is five bidders. The importance of competition in EU public procurement can be seen with the requirement for negotiating with a suggested number of shortlisted bidders.

3.6.3 Dialogue with Bidders

As discussed in section 3.5.4, in the EU both negotiated and competitive dialogue procedures permit interaction between the public authority and the prequalified bidders before final submission of the bid. The interaction process is commonly known as dialogue and negotiations. Despite the similar pattern of the dialogue phase before submission of the final bid, Losch (2007) indicated that the dialogue for the negotiated procedure is based on initial

tenders which include the contract specifications and expected requirements. On the other hand, the dialogue phase for competitive dialogue is based on open output specification (Petersen, 2010). Therefore, the dialogue is used as a platform to discuss development of a proposal to meet the needs of the public authority. This research will use the term dialogue to describe the dialogue session under competitive dialogue, to avoid confusion with other types and phases of interaction with bidders.

Dialogue sessions within competitive dialogue were designed for the parties to discuss matters regarding the formation of the contract, and finalising the project specification (Shaoul et al., 2008). According to Sundaraj and Eaton (2013), the dialogue should be comprehensive, covering all aspects related to the project. These dialogues may benefit both the public authority and the potential bidders. Foster (2013) suggested that interaction with bidders before the submission of bids is essential to ensure that the bidders are able to understand the requirements of the public authority. As PPP itself is complex, the public authority itself needs the dialogue to consult with potential bidders on available solutions to address their needs (Andersen et al., 2010). Through clear communication between both parties, higher-quality bids are expected as the end product.

The introduction of competitive dialogue was publicised to fill the gap left by the absence of a proper mechanism to deal with the complexity of PPP; the gap includes the alarming misuse of negotiated procedure that is said to undermine the principle of competition. Hence the dialogue in competitive dialogue process emphasises the principle of equality in dispersing information to all bidders to ensure a healthy competitive environment. Bidders who obtain more information may have an advantage over competitors (Burnett, 2005). Under the Directive⁷, the confidentiality of each bidder's solution and ideas should be preserved and the information may not be transmitted to other bidders, as each bidder uses his own resources and invests time in participating in the dialogue stage. This will create an environment in which bidders compete in proposing the best solution for the public authority (Hodkinson & Essen, 2015).

⁷ Art. 29 par. 3

3.6.4 Tender Evaluation

The impact of evaluation criteria in creating the market appetites is substantial. To attract participation from the private sector requires a platform where they can have a greater certainty of the impartiality and transparency of the procurement process so they can compete fairly and estimate their chance of winning (Iossa, 2015). This includes openness in evaluating and selecting the best bid process where the evaluation criteria are known in advance to the bidders (Mandri-Perrott & Stiggers, 2013).

Advance notification of the evaluation criteria and method makes the bidders aware of the basis on which their proposal is evaluated, so they can fairly determine their own score for the solutions they propose (Mak, 2012). In some legislations such as the EU, advance notification regarding the evaluation criteria is obliged by directives to be included in the official notification and the Request for Proposal document (Arrowsmith et al., 2010). Furthermore, under the EU directives⁸, the member states shall disclose the evaluation criteria and the methods used in evaluating the proposal; even to the detail of the range of weighting fixed for each criterion. Besides motivating the bidders to submit high-quality bids, the obligation for advance notification upholds the principle of transparency and equality of treatment between bidders. It is demanded by the Court of Justice of the European Union (Procurement Lawyers' Association, 2010; Sundstrand, 2012)

For procedures involving a pre-qualification exercise, the evaluation criteria focus on the capabilities of bidders, such as their financial and technical capacity, while the proposal is scrutinised during the evaluation for award phase. Numerous available evaluation criteria are used in assessing a proposal. According to Zhang and Chen (2013), the public authority commonly translates their objectives into a set of criteria to evaluate the capability and offer from the bidders. The evaluation criteria determined by the public authority should be robust and the criteria set should avoid encouraging bidders to propose speculative and unrealistic bids (Department of Economic Affairs, 2010). It is also recommended that the evaluation criteria be designed to be objective and to stimulate competition between the bidders (Kim et al., 2011). Table 3.12 summarises evaluation criteria suggested by guidelines, the literature and actual projects.

⁸ Art. 53 par. 2

Zhang (2004) suggested that among the methods used in evaluating competitive PPP tenders are the Net Present Value (NPV) method, simple scoring method, Kepner-Tregoe decision analysis technique, multi-attribute analysis and the two-envelope method. There are also cases where multiple methods are combined. This is also supported by Wang and Dai (2010), who also added another method, the Least-Present-Value of Revenue (LPVR) method.

Under the simple scoring method, each criterion is given predetermined maximum points. The proposal is compared with the criteria selected and given marks against the predetermined maximum. The concession is awarded to the bidder scoring the highest total. Multi attribute analysis also identifies criteria by which to evaluate bids, but it is more detailed and includes packages with sub-criteria. The tender is compared with these packages and awarded scores, and the highest wins. The NPV method is used to evaluate financial packages and the commercial aspects of a tender, commonly for toll/tariff-related projects (Zhang, 2004) where the difference between the value of the concession is compared with the present value. The tender with the lowest positive NPV will be selected. The Kepner-Tregoe decision analysis technique is the most difficult (Wang & Dai, 2010). It identifies the MUST and WANT criteria from the proposal, appropriately weighted, before a decision is made.

There is no right or wrong evaluation method. Through a survey conducted with experts and practitioners, Zhang (2004) identified that the NPV and multi-attribute methods are the most frequently used. The Kepner-Tregoe decision analysis technique has been used in Hong Kong projects (Wang & Dai, 2010), and the UK government uses NPV and multi-attribute analysis in evaluating tenders (Kwak et al., 2009). Torta (2005) highlighted the use of the simple scoring method for the Brescia-Milano highway concession.

Source	The World Bank et al. (2014) and World Bank Institute, (2012)	Hong Kong Institute of Surveyors (2009)	Zhang, (2004)	Wang et al. (2007)	Kumaraswamy & Zhang (2001)	Torta (2005)	Iossa (2015)
Evaluation Criteria	<ul style="list-style-type: none"> • Price offered; • Financial • Technical elements 	<ul style="list-style-type: none"> • Compliance and conformity • Tenderer's presentation • Financial Evaluation • Infrastructure proposal evaluation • Service delivery 	<ul style="list-style-type: none"> • Financial; • Technical; • Health, safety and environment issue • Managerial 	<ul style="list-style-type: none"> • Financial • Ability to perform (design, build, manage and operate), • Sustainability of health, safety and environment issues • other factors 	<ul style="list-style-type: none"> • Robustness of the solution proposed • Financial sustainability • Impact of the proposed solution to the society. 	<ul style="list-style-type: none"> • operation procedure • technical ability • evaluation toll level for users • concession period • construction period • economic return (operative costs/charge revenues average ratio, with reference to concession period) • sub-concession transfers 	<ul style="list-style-type: none"> • Tariffs charged to users; • Governmental contribution and shadow tolls; • Net present value (NPV)/Present Value of Revenues (PVR); • Duration of the contract; • Allocation of risks; • Government revenue share.
Remarks	<ul style="list-style-type: none"> • The aim is to achieve value for money • Guideline by reputable financial institutions 	<ul style="list-style-type: none"> • Guideline by the Hong Kong Institute of Surveyor for the government of Hong 	<ul style="list-style-type: none"> • Four major category suggested based on 83 criteria. • Suggestion was based on comprehensive literature review and interview with practitioners. 		<ul style="list-style-type: none"> • Suggestion based on highway project in Hong Kong • Awarded using BOT in the 90's. 	<ul style="list-style-type: none"> • Suggestion based on A4 highway project (Brescia-Milan) 	<ul style="list-style-type: none"> • Author focus on the economic variables evaluation criteria • Suggested for highways project

Table 3.12 - Comparison of Evaluation Criteria from Selected Literature

3.7 Unsolicited Proposals

Unsolicited proposal is acknowledged and recognised in the biggest international procurement frameworks, including the United National Commission on International Trade Law (UNCITRAL), the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank and The World Bank (Hodges & Dellacha, 2007; Verma, 2010). In PPP, an unsolicited proposal is an attempt by the private sector to submit a new idea or initiative with the request for an exclusive award from the public authority. It is a business entity seeking a business opportunity (Yun et al., 2015). The practice is acceptable in certain countries where it can be a source of innovation, for example Indonesia, India, Philippines, South Korea, Argentina, Chile, and others where public needs go unnoticed by government (Hodges & Dellacha, 2007a; Infrastructure Australia, 2008; Meyer, 2012). It is also accepted practice in most states/territories in Australia (Chew, 2015) and some US states. A direct negotiated unsolicited proposal is claimed by Yun et al. (2015) and Liu et al. (2016) to be faster in certain departments. For example, in one highway development project, preparation of an unsolicited proposal took only 34 months compared to 54 months for a solicited proposal. Despite the benefits, country such as the UK and do not permit unsolicited proposals, for their anti-competitive aspects and lack of transparency (UNESCAP, 2010). There are also legal concerns about the proposal's intellectual property rights (Søreide, 2006).

Perception of unsolicited proposal practices tends to be negative, linked with anti-competitive behaviour such as favouritism, corruption, abuse of government resources and incompetence (Farquharson et al., 2011; Delmon, 2015). However, the practice may not always be anti-competitive, and despite lingering issues, there are countries that have managed to introduce effective frameworks to authorise unsolicited proposals and at the same time incorporate transparency and competition. Nevertheless, the effectiveness of unsolicited proposals still depends on the nation's whole PPP system. General anti-competitive conduct and lack of transparency may lead to abuse of power, corruption and a diminution of the competition nature of the entire PPP procedure.

Those countries, listed above, which anticipate maximising the competency of the private sector and potential of PPP, encourage the private sector to approach the government with beneficial unsolicited proposals (Hodges & Dellacha, 2007).

Common procurement procedures identified as being practised internationally to manage unsolicited proposals are the Bonus System, the Swiss Challenge System (UNESCAP, 2010) and the Best and Final Offer System (Hodges & Dellacha, 2007). These mechanisms involve multiple tendering in order to incorporate competition within the procurement process. Depending on the mechanism adopted, incentives are offered to the original proposer to be used as an advantage during the bidding stage.

The process is similar to that for the procurement process of government-initiated proposals. Hodges and Dellacha (2007a) suggested that after the approval stage, the procurement process includes competitive bidding and challenge or counter-proposal. Generally, upon receiving an unsolicited proposal, the public authority will conduct a preliminary assessment on its viability. If the proposal is deemed to fit the nation's development plan, a pre-defined advantage will be offered to the proponent in consideration of the execution of a competitive bidding exercise. Request of Alternative Proposal is obtained whether through an advertisement or by invitation. How the procurement process is conducted depends on which procedure is selected.

In a Bonus System, the advantage given takes many forms. Common forms are adding theoretical value to the proposer in the bidding process. Proposers may join the competitive bidding process with an advantage, possibly winning by being within a stipulated percentage of a lower bid, by additional points in the technical and financial evaluations or even by additional points added to the total evaluation score (Hodges & Dellacha, 2007). In Chile, the original proponent may also sell the bonus and transfer it to another bidder. The original proposal is normally selected as the winner if in the competitive process it falls within a certain percentage of the defined best offer (Hodges & Dellacha, 2007b). Among Bonus System practitioners are Korea and Chile.

The Philippines and India adopted the Swiss Challenge method. As in the Bonus System, the proposer may join the competitive bidding exercise with an agreed advantage. However, instead of an added theoretical value, the advantage is in the form of the ability to counter-match the best offer received by the public authority (Quium, 2010). In the Best and Final Offer System the proposer is given advantage to advance of the final stage of the tendering exercise, even though he may have failed in earlier rounds (Hodges & Dellacha, 2007a; Delmon, 2015). The first round of bidding would be a screening process, ranked based on their offer. Two of the best offers progress to the next stage where they must submit their best

offer before the preferred bidder is selected (Hodges & Dellacha, 2007b). Furthermore, in the event that the winner is not the original proposer, the winning bidder must compensate the original proposer by an agreed amount.

Despite the effort to introduce competition for unsolicited proposals, Hodges & Dellacha (2007a) stressed that the original proponent will always have the competitive advantage in terms of time and resources already spent on the proposal. However, they added (2007b) that it is still worth the effort even if the original proposer wins the concession. In the event that the original proposer fails to accomplish the financial closure or deliver the contract, the public authority will have extra leverage of choices.

3.8 Challenges in Incorporating Competition

PPP features such as bundled contracts, a long contract period, multiple numbers of stakeholders, the determination of specifications, technical requirements, the financial structure arrangement, makes the PPP procurement process complex. Therefore, to strike a balance between introducing competition within the procurement process and getting the best out of PPP is indeed challenging. This research examines the challenges faced by public authorities globally in incorporating competition within the procurement process. These challenges are seen as the factors that might hinder a competitive procurement process from being organised.

3.8.1 Complexity of PPP

PPP procurement is significantly more complicated than traditional procurement. Although, as revealed in section 3.5, there are several common procedures that can be adopted by the public authority in acquiring infrastructure through PPP, the features of PPP as described in section 2.2 require specialised resources and custom protocols, increasing complexity.

A procurement process under open and restricted procedures is best suited when the public authority is able to provide clear and comprehensive requirements for bidding purposes (Soliño & Gago de Santos, 2010). This is quite challenging since the scope of PPP is so wide and subjective as it involves financing, design, constructing and operating the infrastructure. Although the procurement process under open and restricted procedures injects competition into the process, it leaves little space for flexibility to address the complexity of PPP (Doni, 2006) hence making it less preferable among practitioners. In contrast, the negotiated

procedure is adopted for its flexibility. However, the alleged misuse of the negotiation process with the preferred bidder undermines the competition principle upheld in public procurement (Yescombe, 2007; Soliño & Santos, 2010).

In an effort to balance the need for competition and to reduce the complexity of PPP, competitive dialogue was introduced by the EU for its member states for complex projects, including PPP. The procedure aims to preserve competition and achieve the benefits of flexibility (Mandri-Perrott & Stiggers, 2013; Iossa, 2014). Flexibility within the process is in the form of dialogue where the public authority is permitted to discuss and develop solutions with the bidders (European Commission, 2005; Mandri-Perrott & Stiggers, 2013). Nevertheless, competitive dialogue is not without criticism. In the early years of its introduction practitioners compared its flexibility with negotiated procedures, concerned about the confidentiality of data transferred between bidders and the complexity of the process (Commission of the European Communities, 2005b). Other feedback regarding competitive dialogue (PriceWaterhouseCoopers, 2005) includes concern over the ability of the public authority to organise an efficient procurement process and equal treatment of bidders throughout the whole process. Notwithstanding the efforts undertaken to uphold competition within the complex PPP procurement process, complexity itself may restrict the use of the competitive exercise. As a result, public authorities might be tempted to take the easy way by continuing the use of negotiated procedure, for its flexibility.

3.8.2 Tendering Cost

The high cost of bidding is mentioned in the majority of publications. As discussed in section 3.4, the tension created in a competitive procedure impacts the behaviour of bidders and motivates them to produce innovative and attractive proposals. Nevertheless, in preparing their proposals, bidders invariably incur high costs (Saussier et al., 2009; The World Bank et al., 2014). According to KPMG Corporate Finance (Aust) Pty Ltd, (2010), the cost of bidding in Australia can be 0.5 to 1.2% (winning bid) and 0.35-1.0% (losing bid) of the project's capital value. It is higher in the UK, 5-6% and 2-3% of capital value respectively. However, this depends on variants such as the size of the project. The cost of tendering grows in proportion to the size of the project (Yescombe, 2007; Farajian, 2010).

Grieken and Morgan-Payler (2014) suggested that in preparing the proposal the highest costs are for design, followed by the cost of conducting due diligence, and seeking legal and

financial advice (Zhao et al., 2011). Iossa (2014) suggested that the PPP proposal is different from traditional procurement as it is more complex. The proposal needs to address the complexity of the bundling nature and long term of PPP contracts, which requires more time, effort and huge resources in preparing the proposal. These constitute hurdles for interested parties, resulting in a small number of bidders. Competition works when there is participation, but a small number of bidders undermines competition and encourages anti-competitive behaviour such as collusion.

Nonetheless, although most of the literature mentions that the cost of bidding is high for PPP, Muineacháin (2008) suggested that it is still bearable by large companies bidding as a consortium. For PPP supporters, the high cost of bidding can be seen as a grievance, undermining the benefits (Ball et al., 2000). Realising the importance of competition, some approaches address the issue of high cost of tendering by including reimbursement of part of the cost of bid preparation (Yescombe, 2007; The World Bank et al., 2014). In Canada, losing bidders are reimbursed for the cost for design and the legal components, to a maximum of half the external bid costs. Losing bidders may also be reimbursed for the design cost and according to the stages in which they participated. This is adopted in France (KPMG Corporate Finance (Aust) Pty Ltd, 2010), where the costs of winning bids are often recovered throughout the concession, reflected in the concession agreement signed (Pollitt et al., 2002; Farquharson et al., 2011). Another approach, apart from reimbursement, is the practice where the bid preparation is funded by a special budget or even a third party (Farquharson et al., 2011).

Besides the transfer of capital expenditure costs incurred by the winning bid, the public authority might also need to bear part of the financial consequences incurred by losing bids. According to Dudkin and Väilä (2005), like the private sector bidders, the public authority also incurs high costs in organising the bidding process, especially if it involves hiring external legal, financial and technical advisors.

3.8.3 Lengthy Process

The PPP procurement process is not only complex but is also protracted. Despite all the methods described above to ensure competition within the procurement process, the bidding and negotiation stage in a competitive exercise is deemed to be lengthy and demotivating (Gunnigan, 2007; Yescombe, 2007; Reeves, 2013b). The longest time PPP procurement

process exercise in the UK took nearly five years, and the shortest just under two years (HM Treasury, 2012). In Ireland they found that the average procurement process is almost three years and in Canada 16 to 19 months depending on the sector (KPMG Corporate Finance (Aust) Pty Ltd, 2010; Reeves et al., 2014). The risk of a lengthy procurement process is that it presents the bidders with an expensive bill and requires a discouragingly large amount of resources, financial and in personnel (Saussier et al., 2009). Failure to achieve a sufficient number of bidders undermines the essential competition.

According to Craven (2011), besides the high cost incurred by bidders, other risks are associated with a lengthy process, including deterioration of the financial capacity of a bidder. For example, a prequalified bidder may be shortlisted with a strong financial resources, but the situation might be different by the time the bidder is awarded the concession. Another risk is change of ownership or management in any of the companies, affecting the financial or technical capacity. These changes in key variables may have a significant impact on the whole process of establishing the partnership.

Public authorities have nothing to gain from a lengthy process. The longer the time taken in finalising the deal with the private sector, of the greater the cost to the public authority, including construction costs and related fees (Yescombe, 2007). Prices submitted by the bidders reflect the actual market with forecast estimates. Nevertheless, they are still subjected to inflation indexing and variable interest rates charged by financial institution. Failure to start the project within a certain target date might lead to changes in the key terms and even renegotiation.

3.8.4 Renegotiation

Renegotiation in PPP is conducted if there are variations to the terms of the concession agreement (Guasch et al., 2014). This can be seen either as a flaw in PPP or an opportunity to amend the needs of the project (Delmon, 2015). Numerous reasons have been identified in the literature for renegotiation: an unexpected economic recession (Ward & Sussman, 2005), discovery of errors (Engel et al., 2010), the Special Purpose Vehicle having financial difficulties (World Bank Institute, 2012; Iossa, 2015), requirements changes and new information, unjustifiable repayment levels (Pollock & Price, 2013) and contract restructuring to address contract incompleteness (Nikolaidis & Roumboutsos, 2014). Some renegotiation may be seen as ensuring the continuity of the development and keeping the Special Purpose

Vehicle from insolvency. In Korea, renegotiation is also pursued when the government feels there is a need to strike a balance with the PPP project (Kim et al., 2011). Finally, the public authority should pursue renegotiation if it is necessary to safeguard the public interest.

In practice there is potential for renegotiation during the post-award period (Chong, 2006; Iossa, 2015; Menezes & Ryan, 2015). The diversity of PPP arrangements and the long-term concession period makes the competitive procurement process challenging and vulnerable to renegotiation post-award. Often the winning bid is based on unrealistic beliefs based on too many uncertainties (Alexandersson & Hultén, 2006; Lalive & Schmutzler, 2008; Saussier et al., 2009); in addition to the complexity of PPP, these might be the result of a lack of information access during the bidding exercise, with dissimilar and incomparable assumptions made by bidders (Marques & Berg, 2011). Offers might underestimate or overestimate key variables in the concession agreement, such as forecast revenue or the cost of construction. For this reason, the winning bid might not have been the best bidder. In this event, either party may seek renegotiation shortly after the award, undermining the principle of competition. Engel et al. (2010) suggested that a thorough contract conveyed to the bidders in the bidding exercise may avoid the possibility of renegotiation.

Renegotiation is often triggered by the private sector and is seen as opportunistic behaviour (Chong, 2006; Guasch et al., 2014). There are instances where a low-cost strategy was planned all along during the bidding stage, with the expectation of renegotiation later to recover the intended profit margin or an opportunity to make extra profit (Engel et al., 2010; Marques & Berg, 2011). According to Iossa (2015), the private sector knows that the public authority will normally try to save the project by avoiding any termination process, and accept the request to renegotiate the concession agreement in favour of the Special Purpose Vehicle. Amendment due to renegotiation is obviously a distortion to the competitive procurement process. It also diminishes the benefit gained from the competition effect. The winning bid is no longer the best offer, as other bidders might submit different offers.

3.8.5 Intellectual Property Right

The need for dialogue before the award of the concession is acknowledged to address the complexity of PPP by being more flexible. Competition is retained by conducting dialogues with more than one bidder. The introduction of dialogue with more than one bidder before the award no doubt stimulates the competition tension between bidders. However, there are

concerns over how these dialogues are conducted, especially with the possibility of unauthorised circulation of any intellectual property and any sensitive commercial information from one bidder to another (Commission of the European Communities, 2005b). A comprehensive list of items constituting intellectual property in this context is well described by Commonwealth of Australia (2008):

Inventions, original designs and practical applications of good ideas protected by statute law through copyright, patents, registered designs, circuit layout rights and trademarks; also trade secrets, proprietary know-how and other confidential information protected against unlawful disclosure by common law and through additional contractual obligations such as confidentiality agreements.

In the event that a bidder may acquire any unauthorised transfer of intellectual property, the prospect of gaining a competitive advantage over rival bidders is high, again undermining the competitive process (Foster, 2013). This will no doubt discourage bidders from participating in any competitive dialogue exercise. Andersen et al. (2010) stressed the importance of protection of certain information, but it is crucial that this does not prevent any competition. Throughout a dialogue process, bidders need to obtain information on the required specification and the output expected, in order to propose the best solution to the public authority. A clear identification of secrecy and an appropriate manner in handling the intellectual property issue will allow the competition pressure to exist, while the public authority is able to achieve value for money from the project (Public Accounts Committee, 2006). Convincing potential bidders of a fair procurement process with a guaranteed protective policy for intellectual property attracts bidders.

As discussed in section 3.7, unsolicited proposals encourage submission of innovative proposals from the private sector, but dealing with them can be difficult (Delmon, 2015). With unsolicited proposals, the challenge in organising the competitive tender exercise is due to the request for an exclusive award of the project, given the original proposer's claim to safeguard his intellectual property rights (Hodges, 2003). Some proposers also claim proprietary rights to a technology or technique proposed, to avoid their proposal being exposed in a competitive process.

The dilemma faced by the public authority is whether to reward innovation by directly awarding the concession to the original proposer without any competitive process, or if

permitted to organise a competitive procurement process in order to uphold good governance. Preferring to award the concession directly to the original proposer results in losing bargaining power with a potentially excessive price. However, failure to give the award to the original proposer discourages the private sector from submit innovative proposals (Yescombe, 2007). Countries which regularly accept unsolicited proposals seem to be able to manage to retain the competition pressure, while addressing the concerns over intellectual property. In Victoria, Australia the original proposer is required to identify any information or intellectual property that is sensitive and needs protection before the call for competitive bidding. Typically, according to Hodges and Dellacha (2007b), compensation is given to the original proposer in the event of their not being the winning bidder, to ensure the transfer of ownership of the proposal to the public authority.

3.9 Governance of Malaysian Procurement

Despite the current global uncertainties, Malaysia's economy is performing steadily (Asian Development Bank, 2015). Although hit by global economic stagnation, which affected the nation's export trade, Malaysia turned its direction to strengthening its local domestic demand and domestic economic growth. Public procurement has been used to stimulate the economy with the launch of projects under the country's Economic Transformation Programme (ETP) (IMF, 2013), and government procurement has been identified as one of the core components of the ETP activities.

The public procurement system as practised by the Government of Malaysia complies with international standards (Jones, 2013). This is a result of the nation's efforts to improve its public procurement process (Economic Planning Unit, 2010) by being actively involved in international organisations such as the Government Procurement Experts Group (GPEG) under the Asia Pacific Economic Cooperation (APEC) grouping; the Procurement Working Group under the United Nations Commission on International Trade Law (UNCITRAL); and as a party to the United Nations Convention against Corruption (UNCAC) (Ministry of Finance Malaysia, 2014a).

Public procurement in Malaysia is defined as in other nations, referring to the process of the acquisition of goods and services (Adham and Siwar, 2012), practising the underlying principles of good governance, public accountability, transparency, best value for money, open competition and fair dealing (Ministry of Finance Malaysia, 2007; Adham and Siwar,

2012; Jones, 2013). PPP shares the same vision. Although there might be different methods of procuring and administrating PPP, the objectives of procurement are to provide infrastructure to the people. According to the official document by UKAS, PPP is considered a public procurement model (Public-Private Partnership Unit, 2009).

Despite the vision and targets by the government for good governance of the procurement regime, there are still weaknesses that have a negative impact on the campaign and efforts by the government. Identified weaknesses in Malaysian procurement are: fragmented procurement procedures; the lack of procurement expertise; the absence of open and competitive tendering, especially for foreign suppliers; widespread corruption; lack of transparency (Adham & Siwar, 2012; Jones, 2013); corruption; bid rigging; kickbacks; misrepresentation of facts; proxy companies (Othman et al., 2010); and unethical decision making (Hassim, 2012).

To demonstrate that the government is committed to improve current policies, the government intend to remove barriers to such competition and creating a more liberalised market (PEMANDU, 2010). The government also passed its first Competition Act in 2010 to show its commitment to improving competition, whereby businesses will compete on the basis of quality, innovation and value. UKAS has acknowledged that competition in PPP implementation is one of the most important components in achieving value for money (Public-Private Partnership Unit, 2009).

The government's procurement plays an important role in infrastructure delivery in Malaysia (Adham & Siwar, 2012). Procurement is divided into three categories: works, supply and services. In line with its objectives, this research focuses on procurement for works, which includes: civil engineering works such as new construction or upgrading infrastructure; building facilities; and associated mechanical and electrical activities.

For work procurement, methods are categorised according to the value of the proposed contract. For low-value procurement, the acquisition of works can be made through the petty cash, direct purchase, quotation, federal central contracts/panel contracts, requisition and communal work. Under the government procurement regulations, to qualify for procurement for infrastructure works, a company set up under the Malaysia Company Act (1965) should be registered with the Contractors Service Centre (PKK) and Construction Industry Development Board (CIDB). This registration is related to government monitoring of construction companies. There are three broad types of procedure:

- i. Open tender;
- ii. Selective tendering;
- iii. Direct negotiation.

Each infrastructure project is unique, so each case should be assessed on its own requirements.

3.9.1 Open Tendering Procedure

This approach for choosing a private sector partner can be seen as the most competitive. According to the Ministry of Finance Malaysia, (2013), an open tender should be conducted for work above the threshold of £95,000⁹. Work not exceeding £5.6 million is reserved to Malaysian-owned companies, while work exceeding this threshold may be carried out by a Malaysian owned company with certain foreign equity.

A large number of bidders would benefit the government in terms of lower prices and innovative solutions. The invitation to tender for a specific job is advertised in major newspapers and on government websites. Along with their offer, interested bidders need to submit supporting documents to demonstrate that they possess the necessary financial and technical capabilities. Tenders are filtered based on the submitted price and shortlisted before an evaluation of the technical and financial capabilities is conducted.

During this process, no interaction or dialogue with the bidders is allowed until the decision is made known to the public (Hui et al., 2011). The challenge in this bidding process is to identify the *bona fide* bidders. Although on paper most of the bidders appear well qualified, they might be a shell company or a proxy company (Hassim, 2012), leading to the work being sub-contracted. To date, there is no efficient way to remedy this matter.

Another issue raised by Jones (2006) in Malaysia's open tendering exercise concerns the factors and criteria used by the relevant tender boards in choosing the winning bid; there are publicised cases where the contract was awarded to a bidder who did not appear to provide the best value for money offer. Although the winning bidder is commonly chosen based on

⁹ All Conversion is based on July 2016 where 1Malaysian Ringgit is equal to 0.19 British Pound.

the offer most beneficial to the government, Hui et al. (2011) found that there are cases where the decision for awarding a contract may be made to avoid the creation of a monopoly.

The lowest price does not necessarily win the tender; holistically, the government will choose the winning bidder based on a combination of factors if the offer fulfils the technical specification and the bidder possesses the financial and technical capability required (Ministry of Finance Malaysia, 2014b). For example, one bidder may demonstrate exceptional innovation, but this might incur additional costs over a more traditional solution.

A competitive selection process is recommended for PPP if the goal is to achieve value for money (World Bank Institute, 2012). Given the mandate by the Malaysian people, the government should always ensure that the public procurement process is conducted with effective competition, although this does not necessarily imply the lowest initial bid. Ensuring the procedural fairness of the procurement process is also required. Research by Ismail (2013) showed that a competitive tendering is one of a number of important drivers for value for money in Malaysian PPP. A minimum of three shortlisted companies is required under traditional regulations, and Ismail (ibid) recommended that the government should increase this number to put more pressure of competition. In contrast, Lubis and Majid (2013) state that since PPP is significantly different from conventional procurement, open competition is not suitable for PPP in Association of South East Nation (ASEAN) countries, including Malaysia. They justified this because of the relatively small pool of potential bidders in the PPP market, making open tendering uneconomical in the Malaysian context.

3.9.2 Direct Negotiations Procedure

Malaysian procurement legislation allows the possibility of direct negotiation with one party under certain circumstances (Abdullah et al., 2010; Stolfi & Murniati, 2014). According to the Ministry of Finance Malaysia (2013b), an application for direct negotiation is allowed if any of these conditions is fulfilled:

- i. There is urgency or desperation to acquire the work in the public interest;
- ii. In conjunction with previous contracts, there is a need to obtain proprietary supplies for uniformity, and these are only available from one source;
- iii. There is only one expert or supplier in the area;

- iv. The project involves national security;
- v. The contract is with a *Bumiputera* company.

According to Jones (2013), the reports of the Malaysian Auditor General's Office regarding direct negotiation practice are negative, allowing situations where the contract price is higher but performance is unsatisfactory. PPP projects in Malaysia are also identified for award through this mode (Naidu, 2008; Abdullah et al., 2014). According to Beh (2010), 38% of the £40.8¹⁰ billion approved for PFI/PPP projects allocated under the Ninth Malaysia Plan was awarded through direct negotiations

This mode of awarding a contract will no doubt limit competition in public procurement (Abdullah et al., 2014). However, according to the European Commission (2003), negotiated tenders have been used internationally in certain circumstances and with certain PPP arrangement, if they can secure an adequate combination of: value for money; optimum risk allocation; innovative solution; and low bid price. In PPP, direct negotiation is considered if the proposal comes from the private sector. Whereas some countries prohibit unsolicited proposals, Malaysia welcomes and encourages them (UKAS, 2009).

Contrary to maximum competition in an open tender exercise, and due to its restrictive competition nature, negotiable tendering is most vulnerable to potential corruption (Doyle, 2012). The continued use of direct negotiation by the Malaysian government is linked with political interference by politicians with vested interests in the projects. The perception of direct negotiation procedures is also due to cases of alleged irresponsible abuse of power, and the exaggerations of bad publicity concerning lack of transparency (Jones, 2013).

3.9.3 Selective Tendering Procedures

Another alternative to open tendering in the Malaysian public procurement regime is selective tendering. A small number of qualified companies are invited to participate in the government's tendering process, drawn from a prior prequalification process or selection from the government's own independent prequalified bidder's database.

The criteria and selection determinants for choosing the subsequent winning bidder are similar to those practised in open tendering. In PPP projects in Malaysia, either a specific

¹⁰ All Conversion is based on July 2016 where 1Malaysian Ringgit is equal to 0.19 British Pound.

prequalification exercise or a request for a general proposal exercise for approved status on the government's database is normally conducted. Resulting from the government assessment of bids submitted under the exercise, potential prequalified companies may be shortlisted for further elements of the selective tendering process for the specific project. These further elements should be faster since the technical and financial evaluation process was done during the prequalification procedures.

Understanding the available procurement procedure used by the Malaysian government helps in understanding the procurement process involved. The procurement process for Malaysian PPP is discussed in Chapter 6.

3.10 Summary

The purpose of this chapter is to address Research Objective 1: to understand and analyse the PPP procurement process with particular reference to competition; and Research Objective 2: to evaluate the challenges to incorporate competition within PPP procurement processes globally. This chapter therefore investigated competition within the procurement process practice globally and the challenges faced in incorporating competition within the PPP procurement process. Literature on the procurement process involved in PPP procurement was reviewed. Further, within the procurement process discussed, the researcher examined the competition element and its relevance within the process.

Throughout the literature, competition between private bidders is acknowledged to be significant within the PPP procurement process. Although the nature of PPP is different from the traditional procurement to finance infrastructure, institutions such as the EU and governments worldwide have been seen trying to uphold competition within PPP. In the event that competition is absent or weak, the public authority is vulnerable, with the private sector gaining more advantage from the PPP programme. Challenges faced by governments globally in incorporating competition within the PPP procurement process were positively identified. These challenges may deter governments from emphasising competition for PPP. With regards to the challenges identified, the chapter also presented some of the ways other governments have addressed them. The chapter ends with a snapshot of Malaysian governance of PPP procurement obtained from the literature review. In the next chapter, the research methodology is discussed.

Chapter Four - Research Methodology

4.1 Introduction

There is certainly no easy way to achieve the aim and objectives of this research. This chapter discusses the rationale and justifications for the research design selected, with the objective of providing an understanding of the setting for the research. Although many labels are used by different schools of thought for research methodology concepts and stages, one similarity is the acknowledgement of the significant impact of the choice of methodology used to fulfil the research objectives (Saunders et al., 2015).

This chapter will describe and clarify the chosen research strategy, what data is required and how the data will be collected and analysed; the details of the research process are considered. The chapter is structured as follows:

- Research design;
- Research philosophy;
- Research approach;
- Choice of methodology;
- Research strategies;
- Time horizon;
- Data collection procedures.

4.2 Research Design

This research adopted the research 'onion' approach by Saunders et al. (2015). The onion layers (Figure 4.8) demonstrate the research design clearly and will be discussed in detail in the following sections. The research onion is layered in six stages comprising the outer layers: the research philosophy and approach; and the core layers: the choice of methodology, time horizon; techniques and procedures. The decisions made or assumptions that can be formed from the outer layers will define the context and boundaries for selection of the core layers, such as data collection techniques and analysis procedures. It is recognised that the

implementation of an inappropriate research methodology may produce outcomes that are beyond the context of the research (Holden and Lynch, 2004). This is due to the tenets and underlying principles that come under each chosen paradigm which outlines the assumptions that the thesis will rest on. The layers of the research onion adopted here are presented in Figure 4.8. They act as a guide and framework of reasoning for the researcher in his search for answers. The details of these layers are discussed further in a subsequent section in this chapter.

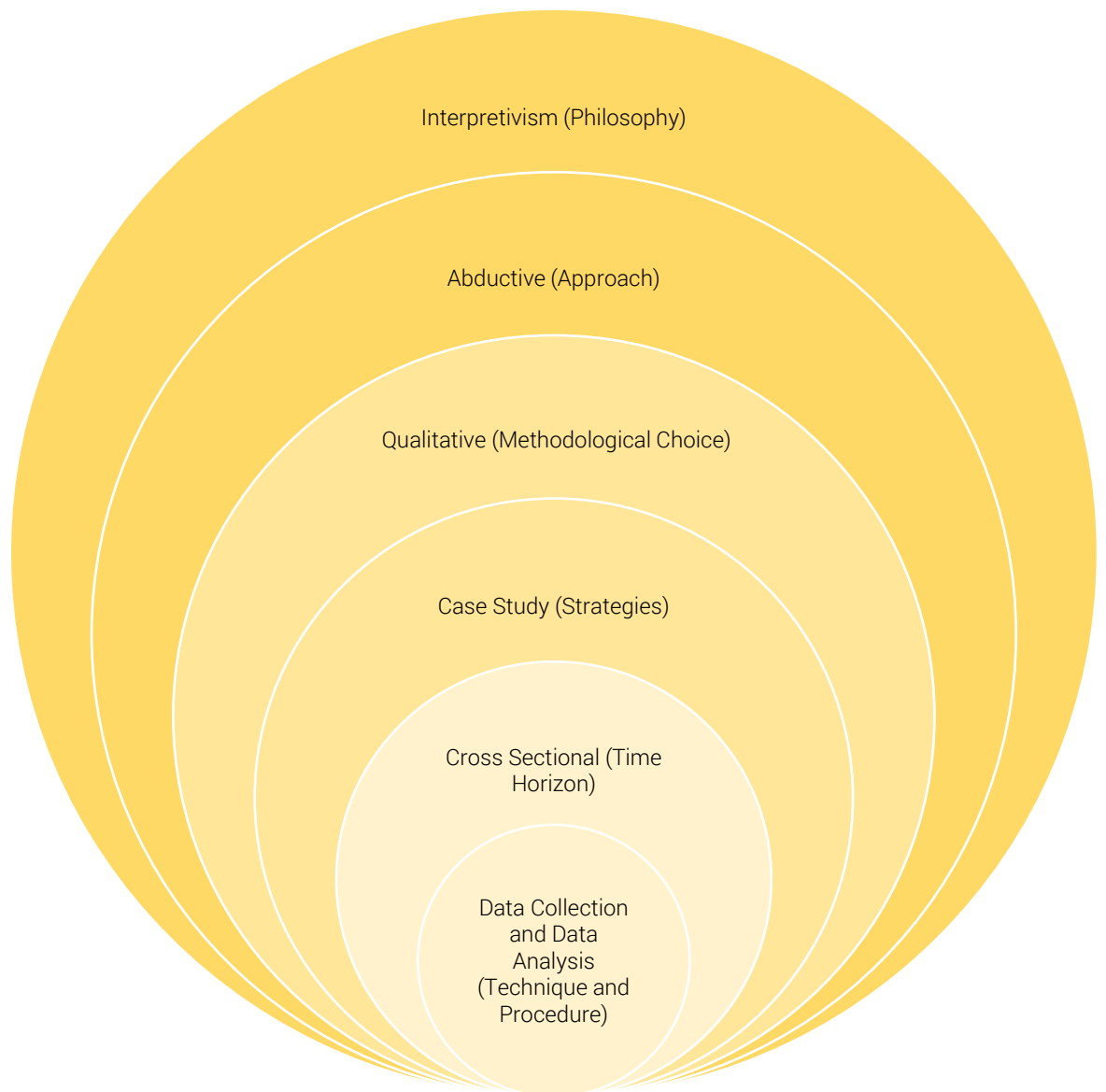


Figure 4.8- The Research Onion

Source –Modified from Saunders et al. (2015)

4.3 Research Philosophy

The outermost layer of the research onion is represented by the research philosophy, the representation of the researcher's view of what constitutes acceptable knowledge; this view will have a great impact on the validity of the research through the strategy and methods chosen (Saunders et al., 2015). Positivism and interpretivism have been described as the primary opposite poles of a continuum with selection of the research philosophy aligned between them (Easterby-Smith, 2003; Saunders et al., 2015). The difference between these two paradigm is clearly justified by Robson (as cited in Petty et al., 2012a). The attributes can be seen in Table 4.13.

	Positivism	Interpretivism
Ontology	<ul style="list-style-type: none"> • One objective reality. • Social reality is ordered and these uniformities can be observed and explained. • Deterministic view of social life such that social action and interaction are the product of external forces on social actors. 	<ul style="list-style-type: none"> • Multiple realities (perspectives). • Reality is socially constructed. • Reality is preinterpreted, intersubjective world of cultural objects, meaning and social institutions
Epistemology	<ul style="list-style-type: none"> • Only accepts what can be directly observed by the senses. Observation is theory neutral. • Discover a reality that will be known imperfectly and probabilistically due to limitations of the researcher. • Absolutist: objective knowledge possible through observation, uncontaminated by theory. Value-free knowledge. 	<ul style="list-style-type: none"> • Understand the multiple social constructions of meaning and knowledge. • Requires insider status; researcher being immersed, to learn the local language, meanings and rules. • Relativist: ultimate truths are impossible. • Knowledge is value laden
Knowledge	<ul style="list-style-type: none"> • Objective knowledge (facts) can be gained from direct observation or experience, but is imperfect and fallible. • Theories, hypotheses, background knowledge and values of the researcher influence what is observed. 	<ul style="list-style-type: none"> • Observation involves interpretation
Purpose of research	<ul style="list-style-type: none"> • Deductive reasoning strategies tests hypotheses. • General laws and theories that explain and predict. • Results can be generalized. 	<ul style="list-style-type: none"> • Inductive reasoning strategies to explore, describe, understand, explain, change, evaluate. • Analysis of the frames of meanings of social actors obtained from everyday concepts, meanings and accounts; abstraction leads to explanation. • Findings are specific to time and place

	Positivism (continued)	Interpretivism (continued)
Research question and hypothesis	<ul style="list-style-type: none"> • Explicitly defined at the start of the study 	<ul style="list-style-type: none"> • Broad research question that becomes refined during data analysis. • Does not identify hypotheses.
Research Instrument	<ul style="list-style-type: none"> • Often uses external instruments that ideally are valid and reliable. Researcher may also act as observer. Subjects 	<ul style="list-style-type: none"> • The researcher.
Respondents	<ul style="list-style-type: none"> • Subjects are passive. 	<ul style="list-style-type: none"> • Respondents actively involved in constructing the 'reality' with the researcher
Relationship between researcher and respondents	<ul style="list-style-type: none"> • Detached and impersonal. Researcher to remain objective. • Respondents are subjects to be studied 	<ul style="list-style-type: none"> • Involved, immersed in the respondent's world. Respondents are actively contributing.
Data	<ul style="list-style-type: none"> • Measure. Quantitative data (numbers) is derived from strict rules and procedures 	<ul style="list-style-type: none"> • Interpret words (spoken or written) and meanings to gain understanding of phenomena. • Use of thick description
Variables	<ul style="list-style-type: none"> • Controlled 	<ul style="list-style-type: none"> • Not controlled
Credibility	<ul style="list-style-type: none"> • Replication. 	<ul style="list-style-type: none"> • No attempt to replicate studies.

Table 4.13 – Comparison of Assumptions Underpinning Positivism and Interpretivism

Source: Modified from Petty et al., (2012a)

As shown in Table 4.13, in order to explore and comprehend the phenomena of competition within the Malaysian PPP in depth, the researcher believes that it is appropriate that the current PPP implementation in Malaysia is reviewed from the point of view of social actors who have lived the experience themselves. Key aspects will include enquiries from various individuals' perspectives on the subject matter. The social actors will comprise the main players who are responsible for developing, implementing and executing all available and relevant law, statutes, financial authorities, and regulations regarding PPP procurement.

The research focuses on the dynamics formed by the social actors involved. Diverse decisions are made by these insiders deliberately for different situations and consequences. Furthermore, different individuals involved may have different interpretations of the same relevant subject. Therefore, interpretivism is the philosophy best suited for this research. Interpretivism principles allow the research subject to be explored in detail in its own context to gain rich inside understanding (Saunders & Tosey, 2012; Yin, 2014) which is an advantage for the researcher in identifying key issues. The researcher seeks understanding of the motives by questioning, interpreting actions of the social actors assigned to the reality, and revising the meanings they put to it (Christie et al., 2000).

This may not be possible through positivism, since positivism seeks to settle on generalising the law and this does not fit well with the researcher's target. Positivism is unsuitable to

achieve the aim and objectives of this research since the philosophy has been criticised for its ability to enable in-depth understanding of human behaviour and involvement but does not consider these factors as objects' (Crossan, 2003). Positivism is frequently used by researchers to identify causes and test causal relationships. Interpretivism is therefore applied to this research, and the effects of this selection of the next level of the research onion are discussed below.

4.4 Research Approach

There are three research approaches as described by Saunders et al. (2015): (i) deductive, (ii) inductive and (iii) abductive. Deductive research leans towards positivism and the inductive approach towards interpretivism. Also known as a top-down process, the deductive approach is used by researchers to describe causal relationships by testing hypotheses or empirical observations. It begins the process from the broad area and moves into more specific research areas. Contrary to the deductive approach, the inductive or bottom-up process moves from a specific observation to the formulation of a theory. The abductive approach combines the process of deduction and induction.

This research adopted an abductive approach to investigate the PPP phenomena. It starts with the deductive approach through the literature review and advances towards induction by developing a framework. Although the abductive approach shares the mutual goal with induction approach in producing a theory, the distinction lies at the point of the final conclusion of the research. The ultimate goal of the abductive approach inclines towards discovering new results through understanding of a new or existing phenomena in a fresh way, while the inductive approach aims to establish generalisations of the final outcomes (Dubois & Gadde, 2002; Kovács & Spens, 2005). Considering the aim of this research, the abductive approach is most suitable.

4.5 Methodology Choice

Determining the choice of methodology is, according to Saunders and Tosey (2012), fundamental. There are two major choices, quantitative and qualitative, which determine the data collection techniques and corresponding analysis procedures. Some researchers prefer the quantitative methodology where data are represented numerically, or the qualitative

methodology where data are represented textually or illustratively. Table 4.14 summarises the main features of both methodologies.

Table 4.14 - Features of Qualitative and Quantitative Approaches

Quantitative	Qualitative
Inquiry from the outside	Inquiry from the inside
Underpinned by the completely different set of epistemological foundations from those in qualitative research	An attempt to take account of differences between people
Are simply different ways to the same end	Aimed at flexibility and lack of structure, in order to allow theory and concepts to proceed in tandem
Involves the following of various states of the scientific research	
The result is said to be "hard generalisable data"	The result is said to be, through theoretical generalisation "deep, rich and meaningful."
	Inductive – propositions may develop not only from practice or literature review, but also from ideas themselves
	An approach to the study of the social world, which seeks to describe and analyse the culture and behaviour of humans and their groups from the point of view of being studied

Sources- Amaratunga et al., (2002)

A qualitative approach was adopted to execute this research. Although a multi or mixed-method approach is available, this research focuses on the organisational process and public policy. The qualitative approach is more appropriate for exploring the actual UKAS practice in addressing the research objectives. The researcher's choice of methodology inherently stands on the foundation of the chosen philosophy and the issues addressed in this study. As mentioned earlier, this research seeks to understand the implementation of competition in PPP at different policy-making levels by personnel and practitioners involved in PPP implementation, thus making the qualitative method an obvious and appropriate choice. The selected approach allows the research to gain the best of the qualitative features. It is highlighted as so influential that it can be used to study in depth any process (Amaratunga et al., 2002).

On the contrary, the quantitative approach's weakness is the inability to provide data that reveals the deep underlying meanings of this research. Positivism requires generalisation of

the results gathered from large volumes of quantitative data which researchers will assume to represent reality (Myers, 2013; Saunders et al., 2015), and that is not the aim of this study. It is acknowledged that a mixed or multiple method may be used for built environment research with positive features, but the proposed research objective can be accomplished by using a qualitative method. Within the overall qualitative approach, it is still possible, when deemed necessary within the research, to utilise quantitative analysis for specific details of the research. Having defined and justified the analytical approach it is now necessary to select the most appropriate research strategy.

4.6 Research Strategies

This layer is described by Saunders and Tosey (2012) as the layer where the development of an answer to the research questions will take place. There are abundant strategies a researcher may use to provide acceptable answers to research questions. Notable and common strategies include: experiments; surveys; archival research; case studies; grounded theories; ethnography; action research; cross-sectional; and longitudinal studies as well as descriptive and exploratory studies (Easterby-Smith, 2003; Creswell, 2008; Myers, 2013). In order to select the most appropriate strategy, Yin (2014) suggested considering three conditions. The first condition is the type of research questions posed; the second is the extent of control an investigator has over behavioural events; and the third condition is the degree of the focus on contemporary events. The relevant situations for different research strategies are shown in Table 4.15.

Table 4.15 - Qualitative Research Strategies

Research strategy	Forms of research question	Requires control of behavioral events	Focuses on contemporary events
Experiment	How, Why?	Yes	Yes
Survey	Who, What, Where, How many, How much?	No	Yes
Archival analysis	Who, What, Where, How many, How much?	No	Yes/No
History	How, Why?	No	No
Case Study	How, Why?	No	Yes

Source –Yin (2014)

The methodological choice of this research is a qualitative study, and Myers (2013) suggested that the qualitative method focus on these strategies: ethnography, action research, case study and grounded theory. Each of the methods has its own strengths and weaknesses in addressing different types of research. For example, experiment as a research strategy allows the researcher to control the variables for repetitive experiments with the purpose of observing causation and consequences (Kumar, 2011; Yin, 2014). As this is most suitable for scientific research, it is not applicable to this research since the researcher has no control over the subject research. Meanwhile, ethnography requires the researcher to be part of the research subject in order to observe and engage with the research subjects in their natural surroundings (Myers, 2013). This too can be set aside since the researcher did not intend to immerse as part of the context and it is definitely outside the research subject. On the other hand, the action research goal is to identify and solve real-life problems of the organisation under consideration, but it is unsuitable here due to the constraints of time and the limitations of authority of the researcher. Grounded theory is inclined towards grounded issues of reality and theory building from first-hand data and is said to contain both deductive and inductive elements (Myers, 2013; Saunders et al., 2015). Furthermore, the aim and objectives of this research do not require pure grounded theory as a strategy.

Since the primary research is exploratory in nature, a case study approach is used. The research emphasises the practitioners' input on his/her views or experience. Therefore, in line with the characteristics described in the above table and the research context, a case study is deemed to be the best approach to the questions of the how and why of this research, and to gain a greater understanding of real-life instances (Yin, 2014). Furthermore, the researcher has no control over any aspect of the research subject, which is the UKAS procurement process and the competition policy engaged within the procurement process. In addition, research by Tang et al. (2010) suggested that case study is the preferable research strategy used to study PPP phenomena.

The case study designed for this research is based on the four choices suggested by Yin (2014): (i) single case study (holistic) designs; (ii) single case study (embedded) designs; (iii) multiple case (holistic) designs; and (iv) multiple case (embedded) designs. A case can be anything which Yin describes as a *contemporary phenomenon....in its real-world context*.

The decision to select a single case (holistic) was influenced by the context of this study. This research focuses on UKAS under the Prime Minister's Department, as it plays such an

important role in promoting and executing PPP in Malaysia. UKAS was set up by the Government of Malaysia as the core agency given the responsibility to plan, coordinate and monitor the implementation of the majority of the PPP projects in Malaysia. Particulars of UKAS were given in Chapter 2. As advocated by Yin (2014), a single case study is suitable for a *critical, unusual, common, revelatory or longitudinal case*. He added that the approach is suitable when the objectives of the research are to *capture the circumstances and conditions of everyday situation*. UKAS reflects the description of a case to be studied since it is the sole agency set up as a PPP unit in Malaysia and responsible for PPP implementation. As there are no comparable PPP units in Malaysia, multiple case studies within the Malaysian context are out of the question. Dubois & Gadde (2002) suggested that in employing a multiple case study rather than a single case means breadth is chosen over depth. Siggelkow (2007) and Farquhar (2012) suggested that a single case study is capable of covering greater depth in understanding a phenomenon. Although single case study is mentioned for its lack of law-like generalisation ability, the goal of this research is aimed to understand in depth rather generalising the findings.

The unit of analysis in this research is narrowed down to competition within the UKAS procurement process. The selection of UKAS as the holistic case enable exploration of how competition is applied within the UKAS procurement process. The selected unit of analysis is closely related to the research objectives and will assist in shaping the range of data collected in the later stage (Yin, 2014).

4.7 Time Horizon

This layer explains the time horizon over which the research is executed (Saunders & Tosey, 2012). Even though the tenure of a PPP project may be 25-30 years, this research does not take a longitudinal approach. Instead, it was designed for a cross-sectional time which focuses on the details and objectives of the subject at one point of time. The research focuses on the specific timeframe of the procurement process. As the advantages of cross-sectional study include less time consumption and cost (Mann, 2003), it is also more suitable for the status of this research as a doctoral study than longitudinal research.

4.8 Data Collection Procedures

There are multiple ways by which data can be obtained. One of the strengths of using the case study approach is that it permits the researcher to exploit a mixture of sources of evidence (Yin, 2014; Saunders et al., 2015). Saunders et al. (2015) and Kumar (2011) categorise data as primary and secondary. Both types can contain a wealth of information. Primary data is the data collected from a researcher's own study, and can be obtained through observation, interviews and questionnaires. Secondary data comes from someone else's study. In this research, secondary data came mostly but not exclusively from books, articles, legislation, past theses, magazines, newspapers and relevant websites, while primary data was collected through interviews.

Although claimed as the most common method of data collection in conducting a case study (Yin, 2012), observation is not suitable for this research as it will not help the researcher to understand what is happening in UKAS. It is also susceptible to the researcher's bias (Saunders et al., 2015). No physical artefacts were identified for use in this research. Another preferred data collection method is the questionnaire, a set of pro-forma questions distributed to individuals in order to gather information. It is usually administered through mail, e-mail, electronic surveys or phone. As this research intends to go deeper into UKAS practice based on the experience of the social actors, the lack of opportunity in a questionnaire to ask for clarification will defeat the purpose. The data acquired from questionnaire may also lack clarity. Interviews are recommended to achieve rich data for the Malaysian PPP research (Ismail, 2013a, 2013b, 2014, Ismail & Haris, 2014a, 2014b).

The researcher therefore selected a combination of interviews with a review of documentation and archival records. The benefits of combining these two sources of evidence is that the methods complement each other. For example, there are limitations in interpreting the text in the documents reviewed. However, combined with the interviews and actual experience and knowledge of the participants, the researcher is able to put value and context to the text of documents for more informative results. Flick (2014) suggested that combining two data collection methods may result in discrepancies of information. It is therefore important to validate and verify the information in documents against UKAS actual practice, whether it agrees with or contradicts with the policy set. In addition, selection of interviews over other primary data collection methods was its capability to probe UKAS actual practice, allowing the researcher to receive clarification of any unclear answers from respondents (Kumar,

2011), and obtain access to unpublished sensitive information. The selected sources of evidence were tailored carefully to address the research objectives and achieving the aim of the research. The synthesis of all gathered information is expected to form important elements for the framework for this research. The case study will be conducted in two stages: document review and interviews.

4.8.1 Document Review

Although interviews are the primary source of evidence for this research, archival records and documents kept by the relevant agencies and parties are equally necessary. Collection of archival and current documents as empirical field data is recognised as being significant (Yin, 2014). Data will be gathered on the PPP implementation adopted by the UKAS. These reviews of existing information are needed to enhance the reliability and triangulate the research interviews. This is complemented by a process of semi-structured interviews with individuals involved with the UKAS PPP procurement process.

4.8.1.1 Identification of Documents

In the context of this research, the archival records and documents to be analysed were identified from the literature review and interviews. The published archival records and documents were used to understand the established PPP practice and the competition policy adopted by UKAS. In line with the ambitious plan to access UKAS documents and files, the researcher applied for permission from the Economic Planning Unit to undertake the research into UKAS, and was granted permission.

The literature review led to the belief that the PPP implementation is based on the Malaysian public procurement regulations. Despite the permission granted by the Economic Planning Unit, UKAS has a very strict policy of documentation control which limits access to the agency files and internal material, hence limiting the ability of the researcher to access material to examine the procurement process for past concessions. The main document used and referred to by UKAS is its own PPP guidelines. Other sources reviewed includes the Privatisation Master Plan and UKAS website. Documents are available to the public via the UKAS website, and details are further discussed in Chapter 5.

4.8.2 Interviews

As one of the most common sources of evidence for case study, data will be collected through a series of interviews. In built environment research, interviews are considered to be the favoured method (Amaratunga et al., 2002) and are the most critical source of evidence in this research. According to Saunders et al. (2015), interviews can be conducted in three ways: structured, semi-structured or unstructured. Each type of interview has its own advantages and disadvantages. A structured interview limits the responses from the individual, leading to less rich data. At the other extreme, unstructured interview allow the respondents to express themselves freely without limitation, hence making the process of analysing the data more difficult since there are no consistencies (Myers, 2013). A semi-structured interview elicits valuable information of actual experiences, the respondent's interpretation, and recommendations on the research matter. Since this study involves an in-depth study of the government's procedures and policy, a semi-structured interview will allow the respondents to be more flexible in giving their feedback from different perspectives, with consistency coming from a similar set of questions. A few sets of pro-forma interview questions were prepared. Due to the uniqueness and different decisions made by human actors in the case study, follow-up questions were asked for further clarification and justification. This was to ensure that the objectives of the interview, to obtain facts and the meaning of events, are met.

4.8.2.1 Sampling of Respondents

Saunders et al. (2015) explained that sampling is necessary, given the limitation in obtaining information from the entire population. The selection of the sample depends on the research objectives. Factors such as accessibility to the resources, and financial and time limitations should not be ignored in deciding the sampling technique. There are two strategic sampling options: probability sampling/random sampling and non-probability/non-random sampling. Kumar (2011) drew the border between the use of sampling within a quantitative research and a qualitative research. In quantitative research, a sample represents the study population, while sampling in qualitative research is less significant, used to achieve a diverse yet comprehensive set of data (Sandelowski, 1995). Both approaches are valuable. Based on the nature of the research outlined in Chapter 1, the research requires quality in the sample rather than quantity. Thus purposive sampling was selected. This is a sub-set of non-probability sampling where a specific sample is selected in a non-random way to acquire rich and specialised information (Kumar, 2011; Saunders et al., 2015). Purposive sampling is

consistent with the research philosophy and the research strategy. If a probability/random sampling technique is deployed in identifying the interview respondents, it might not achieve the objectives of this research. The researcher had a clear idea of the research respondents, and those identified are presented in Table 4.16.

Table 4.16 - Respondent Sampling

Sampling type	Criteria	Respondent identifier	Objective	Numbers of Respondents
Purposive	UKAS Personnel	UKAS Tactical – Respondent 1 (R1)	To understand the PPP implementation and the competition policy adopted from the policy making perspective. Further to confirm the actual practice with the published guidelines and regulations	5 respondents
		UKAS Tactical – Respondent 2 (R2)		
		UKAS Technical – Respondent 3 (R3)		
		UKAS Operational – Respondent 4 (R4)		
		UKAS Operational – Respondent 5 (R5)		
Purposive	PPP Practitioner who experienced with UKAS procurement process	Client – Respondent 6 (R6)	To learn about the benefits, experience and perceptions of these first line of UKAS PPP	5 respondents
		Consultants to Financier – Respondent 7 (R7)		
		SPV - Respondent 8 (R8)		
		SPV - Respondent 9 (R9)		
		Project management company for SPV - Respondent 10 (R10)		
Purposive	PPP Expert	Academic Expert – Respondent 11 (R11)	To learn about the expert's view on PPP phenomena in Malaysia	3 respondents
		Academic Expert – Respondent 12 (R12)		
		Industry Expert – Respondent 13 (R13)		

Respondents were deliberately selected based on their knowledge, experience and involvement with the UKAS procurement process. Each identified respondent has his own role and experience with the UKAS procurement process, so the researcher opted for individual face-to-face interviews. The rationale of the criteria mentioned above is to have an in-depth exploration of the Malaysian context as prescribed by people with experience or

knowledge about the UKAS procurement process. The research segregates the sample into three groups with divergent backgrounds, according to their activity and contribution to the UKAS procurement process. Through this sampling selection and thorough identification of respondents, the researcher is able to maximise the amount of information expected on Malaysian PPP.

Table 4.17 – Minimum Non-Probability Sample Size

Nature of Study	Minimum Sample Size
Semi-structure/in-depth Interviews	5-25
Ethnographic	35-36
Grounded Theory	20-35
Considering a homogenous population	4-12
Considering a heterogeneous population	12-30

Source: Saunders et al. (2015)

Deciding on the sample size in qualitative research is difficult. Too small a sample might affect the quality of the data collected (Sandelowski, 1995). However, Kumar (2011) stressed that sample size in qualitative research is not as crucial as in statistical research. Instead of achieving a specific sample size, an adequate sample size for qualitative research is one that is sufficient to satisfy the research objectives and to build arguments for the study (Suter, 2011). An adequate size is achieved when the data collected reaches saturation point, that is when no new information is received or new themes discovered (Kumar, 2011; Saunders et al., 2015). Although the saturation point is subjective and dependent on the judgement of the researcher, Table 4.17 demonstrate the minimum non-probability sample size as recommended by Saunders.

During the interviews, there was a suggestion by one respondent of a snowball sampling exercise, by recommending another individual to be interviewed; however, when contacted this individual was not interested in contributing to this research. In fact, the sample already included an individual with the same role and experience.

4.8.2.2 Interview Questions

The interview questions were designed to ensure richness gained through the sources of evidence mentioned in the above procedures. The classic questions of who, what, when, where and why were used as a basis from which to develop the interview questions.

The choice of interview as the source of primary data made the process of designing the questions critical (Bloomberg & Volpe, 2008). They were based on the literature review, with different sets of interview questions designed for each category in order to achieve the same goal but seen from different perspectives: policy maker, practitioner and expert. The advantage of using pre-determined questions is in providing a consistent basis for the data analysis phase. All interview questions can be seen in Appendix C, D and E. The interview questions were divided into two major themes: PPP and competition. In the PPP section, the questions were drafted to seek:

- i. Understanding of the people involved in the PPP legal status of UKAS;
- ii. The actual procurement process practised;
- iii. The objective of the PPP programme under UKAS.

For the second research theme, competition, questions were designed to ascertain the importance of competition in the procurement process. The questions in each set focused on:

- i. The relevance of competition within the PPP procurement process;
- ii. Respondents' views on the current competition policy incorporated by UKAS in the procurement process;
- iii. Considerations in deciding the type of procurement;
- iv. Unsolicited proposal implementation;
- v. The implementation of the New Economy Policy within UKAS PPP.

Several follow-up questions were also asked during the interview sessions, to seek justification and clarification of unclear responses. As mentioned above, different sets of questions were put to each group, the UKAS personnel, PPP practitioners and PPP experts, as follows:

- The first set was designed for the UKAS personnel and aimed at gaining information about PPP, competition and its implementation. To gain this information, respondents were asked their views on the policy and implementation of PPP. Further questions were about the parameters used by

the unit to justify using this procurement process and the initiatives taken to uphold competition in PPP implementation.

- The second set was designed for the managers of selected companies involved in PPP by UKAS. The interview attempted to assess their involvement in PPP and to gain their views and perceptions of the current UKAS policy.
- The third set was designed for the identified experts in PPP from academic institutions or from industry. These interviews were intended to gain an understanding on the PPP phenomenon in Malaysia, especially through UKAS, and their views and opinions on the applicability of competition in the PPP procurement process.

4.8.4 Pilot Study

A pilot study is commonly conducted in social sciences research for two reasons: as a small-scale trial run in preparation for a larger study; and pre-testing the feasibility of a research instrument or methods and procedures (van Teijlingen & Hundley, 1998). Since this research adopted the single unit case study, the pilot study is vital to anticipate any potential concerns, allowing any improvement or enhancement to be made. Prior to the actual interviews with the respondents, a pilot study was therefore undertaken to test the precision of the research instrument in addressing the research question and hence to increase its validity and reliability. The pilot study was also intended to estimate the time required for actual interviews.

One respondent who matched the criteria as outlined was interviewed in November 2014. This respondent worked for UKAS and also had the privilege to be seconded to one of the concessionaires. The interview lasted approximately 30 minutes. Based on the feedback from the respondent, the research instrument was considered clear in terms of language and easy to comprehend the content. The respondent advised on the researcher's interview technique in extracting information from future respondents, since there are questions regarding their experience and personal opinions of government policy. The data collected from this respondent will not form part of the case study as the pilot was only a feasibility study. Since the interview was conducted in several languages, it was translated and transcribed. The same procedure was carried out for the actual interviews.

4.8.5 Conducting the Interviews

The interviews were carried out in February and March 2015. Personal arrangements were made through telephone and e-mail with each respondent. All interviews were held face to face and conducted at the most convenient time and location for respondents. Each respondent was given an interview guideline comprising research information, the management and security of the respondents' responses and the interview questions. Respondents were volunteers and no incentives were offered in the invitation to participate. Respondents could refuse to participate and were permitted to withdraw at any time without giving any specific reasons. Due to the sensitivity of the research subject, they were assured that no information or any clue would lead to their identification. All personal information was anonymous and would not be discussed with other parties without consent.

The interviews lasted from 40 minutes to 2 hours, averaging of 1 hour of talking. For some respondents, follow-up questions were asked for clarification and to give the respondents the opportunity to develop the point made. The interviews were audio recorded, with permission from the respondents. These recordings are important to make certain of the accuracy of the translation from the different languages used during the interviews into acceptable English. The translation is presented in the form of a paper transcription for analysis purposes. All interviews ran smoothly as planned.

4.8.6 Data Analysis

Qualitative data analysis emphasises understanding in depth the meaning of the collected data, focusing on the context (Schutt, 2012) The process of analysing the collected data is significant as it draws the answers from the textual data collected into something meaningful (Saunders et al., 2015). In qualitative research, data analysis needs to be executed in a non-routine, original, iterative, non-linear and complete manner (Suter, 2011; Petty et al., 2012b). Without the analysis, qualitative data would be just a mass of texts collected from the data collection process.

Although there are numerous methods of data analysis, there is no specific method for case study (Petty et al., 2012b; Yin, 2012). Case study allows the flexibility to use any method. For this research, content analysis is employed to uncover patterns, identify themes and categories in order to understand the research subject.

4.8.6.1 Content Analysis

Content analysis is widely used in qualitative research. It is a tool or method to extract significant desired raw information (implicit or explicit) from texts or images and organise it into systematic concepts before making valid inferences and interpretation (Krippendorff, 1989, 2004; Smith, 2000; Kulatunga et al., 2007; Colorado State University, 2014). Content analysis is also capable of quantifying qualitative data (Kulatunga et al., 2007; Vaismoradi et al., 2013). The advantage in using content analysis of data is its systematic ability to deal with raw and overwhelming amounts of data (Joffe & Yardley, 2004).

Kulatunga et al. (2007) discussed four approaches to content analysis. The first is word count, in which the frequency of identified words is counted, with the assumption the most frequent words used indicates the importance of these words. The second approach is conceptual content analysis, in which text or sets of text are examined for the presence and occurrence of identified concept and/or themes (Colorado State University, 2014). The concepts or themes can be predetermined from the literature review or may emerge from the data itself. The third approach is relational analysis, which analyses the relationship between the concepts inside the text (ibid). The fourth approach is referential content analysis, in which the text is examined for its underlying meaning and interpreted based on the judgement of the researcher.

Content analysis was selected for this research as it offers the possibility to examine the respondents' responses through multiple approaches in order to find statements which are significant to the research. As this study aims to explore UKAS, the published documents related to its practice and the experience of the respondents were investigated. Considering the irrelevant and limited functionality of word count and relational analysis here, this research utilises conceptual content analysis to provide insight into UKAS practice. Using conceptual content analysis allows the researcher to interpret the text and identify the presence of explicit information that is relevant and essential to build up the case. Dealing with a large amount of text, conceptual content analysis is appropriate since it is a systematic approach to limit the subjectivity in the interview transcriptions.

4.8.6.2 Coding of Data

During the analysis of the pilot study, the researcher experimented with analysing the transcript manually and by using the Nvivo 10 software, deciding on the latter since it proved

to be an appropriate tool in managing the interview transcription and aiding the execution of the content analysis. The amount of categories/nodes and coding created during the analysis process is enormous, hence the use of specialised software was appropriate. Nvivo 10 has no doubt assisted the coding process to be systematic and more precise. Despite limitations in the graphic presentation produced by the software, the researcher accepted this, with the intention of integrating it with other available software.

Coding is the process whereby the data collected is interpreted and defined by the researcher, an important step (Robson & McCartan, 2016). The analysis process began with familiarisation with the raw data. The audio recordings of the interviews were listened to repeatedly, until the researcher was accustomed with them. Documents were read and re-read to understand the context. The next step was to categorise the data through the process of coding, that is organising and sorting the raw data (Kohlbacher, 2006)

The categories used in the analysis are a combination of pre-determined and open categories. Pre-determined categories were identified during the familiarisation stage through the documents referring to UKAS, while open categories emerged from analysing the data itself. Both were created as nodes in Nvivo 10. These nodes were important in classifying the data into meaningful categories. Through the process of coding the text into relevant categories, sub-categories emerged as more refined categories were identified; these are sub-nodes in Nvivo 10.

The process of coding the raw data into nodes and sub-nodes depends on the interpretation of the researcher. The codes were identified for the potential and relevance of the raw data to existing or new categories. In Nvivo 10, the process involves the researcher examining each interview transcript for relevant text and patterns which fit any category, then assigning it under respective nodes and sub-nodes.

These processes were done repeatedly; similar relevant texts from other respondents was examined, coded and collated under existing or new categories until the subject crystallised to address the research objectives. The analysed data was then presented and arranged in a consistent order, as illustrated in Figure 4.9, for ease of understanding.

Name	Sources	References
Implementation	14	143
Issues	0	0
PPP Status	0	0
Public Procurement	7	10
Non-Public Procurement	7	16
Governance of UKAS P	0	0
Evaluation Criteria	12	44
Drivers	12	95

Example of sub-nodes

Example of nodes

Blue highlighted means nodes in discussion

Figure 4.9 – Example of Data Presentation Using Nvivo 10

The result of the analysis corresponds well to the purpose of examining PPP implementation in the Malaysian context through the experience of the actors involved. The results were then used to develop the frameworks aimed to enhance the procurement process for infrastructure delivery in Malaysian PPP by incorporating competition.

4.8.7 Validation of the Frameworks

A validation exercise was carried out on the frameworks developed, in order to acquire a broader view regarding:

- i. the clarity of the proposed frameworks;
- ii. the possibility of the frameworks being used in practice;
- iii. barriers in implementing the frameworks; and
- iv. recommendations to enhance the frameworks.

After the development of the frameworks, a second phase of semi-structured interviews was conducted in December 2015 with specific respondents, identified as representing different types of important stakeholder in UKAS PPP implementation. The stakeholders were the public (taxpayer), government (policy maker), the practitioner (industry) and the client (ministries/agencies). The implication from the frameworks will affect these stakeholders in different ways. Respondents participating in the validation exercise were the chairman of the Public Accounts Committee (representing the public), the Director of Policy Section for UKAS (representing government), the Deputy Director of the PFI unit for a higher education institution (representing clients) and a project director of the largest concession under UKAS PPP (representing practitioners). The framework validation process ensured the framework

developed is appropriate for the application of Malaysian PPP, with consideration of the many trade-offs from the view of the highest authority. The detail of the validation process is discussed further in Chapter 6.

4.9 Validity and Reliability

The importance of having accurate data and solid results in achieving quality is very much a concern in any research (Creswell & Miller, 2000; Golafshani, 2003; Suter, 2011; Yilmaz, 2013). Yilmaz (2013) describes validity as *accuracy of data* and, on the other hand, reliability as *consistency or the degree to which a research instrument measures a given variable consistently every time it is used under the same condition*. Yilmaz added that to achieve reliability and validity, the research needs to satisfy certain standards in measuring and collecting data. Golafshani (2003) pointed out that in qualitative research, validity and reliability are also about eliminating bias in the research. Validity and reliability are also important to accomplish rigour in case study research (Atkins & Sampson, 2002; Gibbert et al., 2008; Thomas & Magilvy, 2011). In more simple terms, Neuman (2014) pointed out that validity is all about how truthful is the research.

Yin (2014) suggested four tests commonly used in social research to maximise validity and reliability: (i) construct validity; (ii) internal validity; (iii) external validity; and (iv) reliability. Construct validity should be considered in the data collection phase. The aim is to establish the precise operational measures for the research context. It is vital for a researcher to identify the required data to be collected, appropriate and suitable methods of collecting the identified data and the best way to describe the data in the context of the research. Suggested tactics include the use of multiple sources of evidence, establishing a chain of evidence and having the draft reviewed by key stakeholders. The second test, internal validity, is applicable when there is need to find a relationship between events, mainly in causal studies and experiments (Gibbert et al., 2008). The third test, external validity, concerns whether the findings can be applied to other research. The reliability test is about the possibility of repeating the same case study and achieving a mirror result. Table 4.18 demonstrates the strategy adopted to achieve validity and reliability.

Table 4.18 – Research Validity and Reliability Strategies

Test	Case Study Tactic	Actions	Phase of research in which action taken
Validation	<ul style="list-style-type: none"> • Multiple sources of evidences were used. • Establish Chain of Evidence • Have key informants review draft case study report 	<ul style="list-style-type: none"> • Interview was conducted with three different groups. UKAS personnel, practitioner and expert • Use of interviews and authoritative documents. • Interviews were audio recorded and transcribe in real time • The develop framework will be validated by identified key stakeholders in a second interview process. 	Data Collection
			Data Collection
			Composition
Reliability	<ul style="list-style-type: none"> • Develop case study database • Multiple run of data analysis 	<ul style="list-style-type: none"> • Database for interview transcript, document reviews and other relevant sources was developing • Multiple run of data analysis for reliability check 	Data Collection
			Data analysis

In the test of construct validity, Yin (2014) suggested using multiple sources of evidence instead of a single source, in order to increase validity. Thus, during the data collection stage, interviews were conducted with three different identified groups, allowing the researcher to collect different information from different experience and viewpoints of UKAS practice, to be corroborated later. The approach is also strengthened by the use of interviews and documents identified as sources of evidence. Another approach applied in this research was establishing a chain of evidence. All the interviews recorded, documents reviewed and literature referred to were well documented and cited to permit interested parties to trace the process of data collection. The final techniques applied to the case study was to have key informants review the draft report to validate the framework before it was finalized.

For reliability, the researcher applied the technique suggested by Riege (2003), creating a case study database by systematically documenting the data collected. All material in the database is kept securely in electronic form and is accessible only by permission of the researcher. Data analysis was also performed several times to ensure reliability.

4.10 Reflexivity

Besides validity and reliability, reflexivity is essential to enhance the credibility of the research. Symon et al. (2004) use the term reflexivity in qualitative research to acknowledge the active role played by the researcher and how it might affect the research process and the knowledge produced. As it is established that the researcher is part of the instrument in qualitative research, he might be expected to bring personal and professional experience to its execution (Baillie, 2015). Nevertheless, there is a danger that the researcher might be influenced by his own preconceptions, values and norms, affecting the results (Bowen, 2009; Thomas & Magilvy, 2011; Wright et al., 2016). Malterud (2001) added that even the background and position of a researcher can profoundly affect the research design and should not be ignored.

Baillie (2015) suggests that reflexivity is one of the techniques used to promote rigour in qualitative research, where the “researcher consciously recognises and addresses their effect and influence of the research”. She added that this technique requires the researcher to be self-aware and critical of any potential bias and preconceptions. Through reflexivity, the researcher attempts to be honest, reporting his position on the subject matter (Creswell & Miller, 2000).

Although it could be argued that he is employed by the government of Malaysia and sponsored by them to pursue the Doctoral study, this researcher is not part of the agency studied and has never been involve with their activities. Even though the government of Malaysia has awarded him a scholarship, they never dictated the research subject or interfered with the research at any time. All interpretations and conclusions made were drawn from the findings and the researcher’s own work.

In adopting an interpretive approach to understand the practice of UKAS, it was established that a multiple reality exists, constructed by the respondents, in their own words. As discussed and justified in the methodology chapter, this is nevertheless the most appropriate approach to synthesise the actual practice of PPP in Malaysia. The respondents’ replies contains rich, in-depth data which is not available publicly, hence are appropriate to achieve the aim of this research. The use of semi-structured interview questions allows the respondents to talk without restriction within the study context (Saunders et al., 2015). The researcher did not interfere or exert any influence on the interviewees’ responses or views. Although the

interpretation of these responses during the analysis process is that of the researcher, a large number of the original replies are quoted verbatim in the analysis chapter.

4.11 Research Ethics

As part of the requirements for a doctoral thesis at the University of Salford, it is the duty of the researcher to maintain the ethical standards set by the University. An application was submitted to the College of Science and Technology Research Ethics Panel, and approval was granted to conduct this research. The approval letter is attached as Appendix A. Guided by the research ethics, at all times the researcher is expected to perform his duty to responsibly use and share the data collected, respecting the anonymity and confidentiality of the respondents and preserving the privacy of the data.

The research was also granted approval by the Malaysian Economic Planning Unit, as required by the Malaysian Prime Minister's Department General Circular 3/99 for conducting research in Malaysia.

4.12 Summary

This chapter discussed the research design and methodology. The discussion comprises several considerations made before selecting the most appropriate philosophy, approach, methodology, research strategy, time horizon and research techniques. In the next chapter, the findings of the case study are presented.

Chapter Five – Case Study: Document Review and Interview Analysis

5.1 Introduction

In Chapters 2 and 3, the researcher provided a glimpse of Malaysian PPP development, public procurement procedures and the competition policy adopted, based on the literature review. In contrast, this chapter is centred on the case study, examining the data collected from multiple sources of evidence. As this study aims to examine the practice of UKAS, relevant published documents were reviewed and the experience of respondents was investigated through interviews. The purpose of the document review is to examine the documents used by UKAS in governing its procurement process and competition policy incorporated. Although interviews are seen as the primary means of acquiring knowledge of the actual practice of UKAS procurement process and the incorporated competition policy, document reviews were salient to verify and supplement the findings from the interviews in order to develop a comprehensive understanding of the subject studied. Both sources of evidence are crucial in addressing the research objectives and for the development of the framework.

This chapter consists of three main sections. The first examines published material regarding the procurement process and competition policy incorporated by UKAS. The second section presents the analysis of the findings from interviews regarding the procurement process adopted by UKAS for its PPP programme. The last section presents the analysis of the findings on the competition policy practised by UKAS in its procurement process. The documents reviewed are presented individually in this chapter, with comparison of the published information and the practice on the ground in Chapter 6.

5.2 Selected Documents

Different documents serve different purposes and were carefully identified for the review exercise. The selection was based on the literature review and response received from the interview respondents. The researcher acknowledges that there are other documents used by UKAS which are not accessible to members of the public. Request for Proposal documents, for example, are classified as private and confidential by the government; bidders are required

to sign a confidentiality agreement. Nevertheless, the documents reviewed in this chapter are those most frequently mentioned by the respondents as the main reference for UKAS PPP. For the purpose of this research, only content identified as relevant to understanding and addressing the research objectives will be highlighted. The documents reviewed are as follows:

5.2.1 UKAS Guideline (2009)

The UKAS guideline was the document most talked about by the respondents as the main reference for UKAS operation, including the procurement process. The guideline was published in 2009 to elucidate the UKAS principles and the concept of PPP. In the absence of specific statutory regulations, UKAS guideline is one of the main references for UKAS day-to-day operation. It states that it is not a detailed document, yet it is to be referred to by any interested parties participating in the programme.

The guideline starts with an enlightening brief of the PPP programme as a continuation of the PFI programme, acknowledging that the previous PFI programme is a subset model of the current PPP programme. Any PFI programme by UKAS shall be known as PPP. The guideline then explains the UKAS conceptual framework of PPP. In general, UKAS PPP involves a shift of responsibilities from the public to the private sector to finance, manage, construct and maintain the public sector's asset for an extensive period of time. In return for the services delivered by the private sector, the public sector/user is responsible for paying for the service over the concession period. Notably, the guideline indicates that PPP is part of the public procurement model.

Furthermore, the guideline confirms four characteristics of the PPP proposal to be considered by UKAS. These are:

- i. Beneficial to socio-economic conditions;
- ii. Value for money and cost saving for the government;
- iii. Fast and efficient delivery;
- iv. Enhancement of accountability, efficiency and effectiveness.

Pointing out value for money as the UKAS PPP main driver, the guideline describes it as *the optimal combination of whole life cost and quality to meet the users' requirements* (Public-

Private Partnership Unit, 2009). The guideline lists the UKAS approaches to achieving value for money:

- i. Optimum risk transfer between public sector and private partner;
- ii. Comprehensive concession contract, including life cycle of asset;
- iii. Innovation of bidders through specifying output specifications;
- iv. Competitive prices for projects;
- v. Performance-based payments;
- vi. Maximisation of private sector expertise and skills.

The guideline then puts forward a section for proposal development for interested parties. A proposal should include:

- i. Proposal justifications;
- ii. Commercial plans which includes business and financial;
- iii. Proof of financial strength and capability;
- iv. Suggested payment mechanism;
- v. Risk management plan.

In detailing these requirements of the proposal, there is a disclaimer warning interested parties to refer to specific tender documents for additional information. Proposals are to be submitted to relevant ministries or agencies. The guideline then itemises the general criteria for proposal assessment:

- i. Clear output specification;
- ii. Minimum of 20 years' economic life of proposed infrastructure;
- iii. Fresh innovative technology
- iv. Financially solid; minimum 10 per cent paid up capital from the project value fixed for Special Purpose Vehicle.

Other than these general criteria, there is a lack of detail or explanation for interested parties to participate in the programme. The guideline then describes the structure of UKAS PPP and anticipates the roles for all parties. It presents a flow chart of the process flow for UKAS projects, as illustrated in Figure 5.10. The guideline does not provide further explanation for the flow chart as it is assumed that it is self-explanatory.

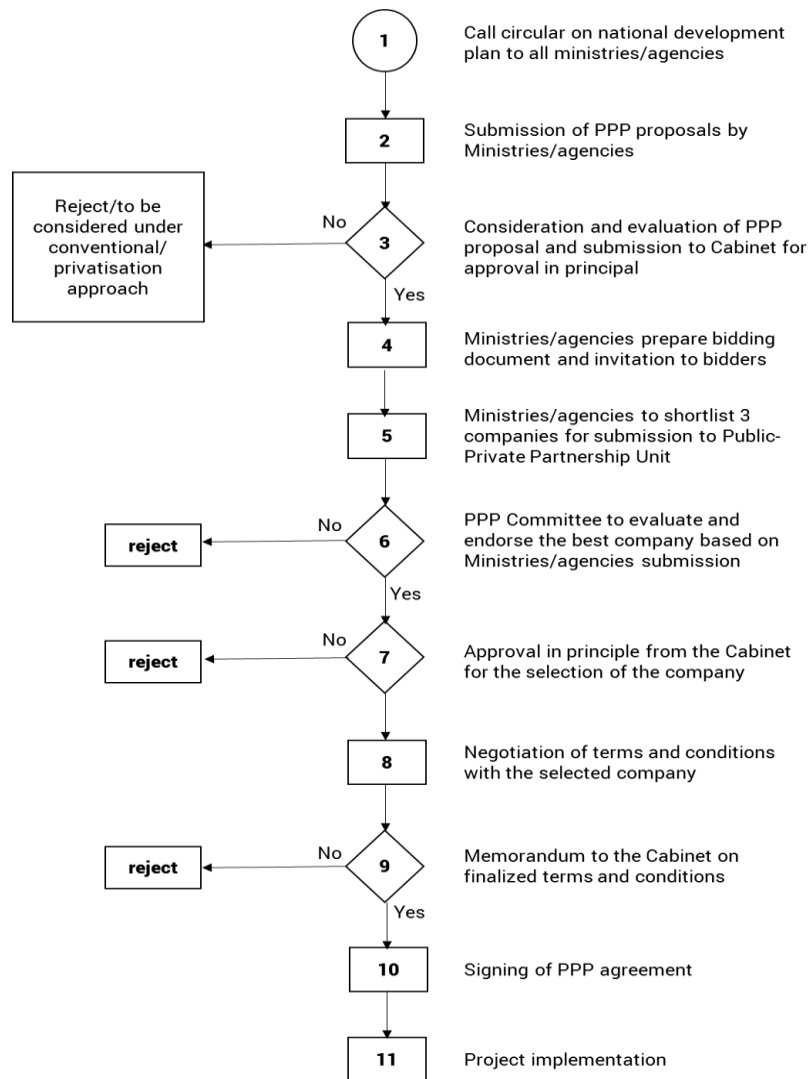


Figure 5.10– Process Flow in UKAS Guideline

Source: UKAS (2009)

The guideline does not specify whether the flow chart is meant for government-initiated or unsolicited proposals. It starts with submission of the PPP proposal from ministries or agencies to be brought to the cabinet to obtain approval in principle for the proposed project to proceed under the PPP programme. In the event of any proposal failing to obtain cabinet approval for PPP implementation, the submitting ministry or agency may continue with other government procurements, subject to approval from the relevant authority. Meanwhile, successful applications shall continue through the procurement process. There is a lack of detail in the flow chart explaining how UKAS decides on the suitable procurement process to be adopted. It only shows that, subsequent to approval of the principle by cabinet, ministries may proceed to prepare bidding documents and an invitation to bid. Through the procurement process, ministries and agencies are required to shortlist three names to be submitted to

UKAS. Subsequently, the guideline mentions an evaluation process to choose the best company, conducted by a committee. Nonetheless, there is an absence of detail of the committee in the flow chart or the guideline itself. Although endorsements are made by the committee, the decision still needs to be brought to a cabinet meeting for the final decision. Once the private partner has been selected, the process moves to the negotiation of terms and conditions with the private partner. As with the previous steps, the finalisation of the agreed terms and conditions will be decided by cabinet before any concessions can be signed. The flow chart ends with the stage of project implementation. After the flow chart, the guideline provides the contact details in the event of any enquiries from the reader.

5.2.2 UKAS Website

More organisations opt for digital media for public relations purposes, using a website as a medium to deliver announcements and convey updated facts (Verčič & Tkalac Verčič, 2015). UKAS maintains a website with various items of information for members of the public, the private sector and UKAS personnel. The content is available in two languages, Malay and English, although the latter sometimes incorporates Malay. The researcher has no problem in focusing on content regarding the UKAS procurement process and competition policy. The website covers UKAS history, vision, mission, objectives, organisation strategy, structures, role of UKAS and their customer charter.

Under the menu option MyPartnership is information regarding UKAS operation including the procurement process. The section briefly defines UKAS PPP and explains a model they adopted. It also compares conventional and PPP procurement. Two flow charts associated with the UKAS procurement process are presented, which may create confusion for industry newcomers and potential stakeholders. Their dissimilarity with the flow chart in the guideline may also lead to inconsistencies in practice by UKAS. The first flow chart is shown in Figure 5.11 below.

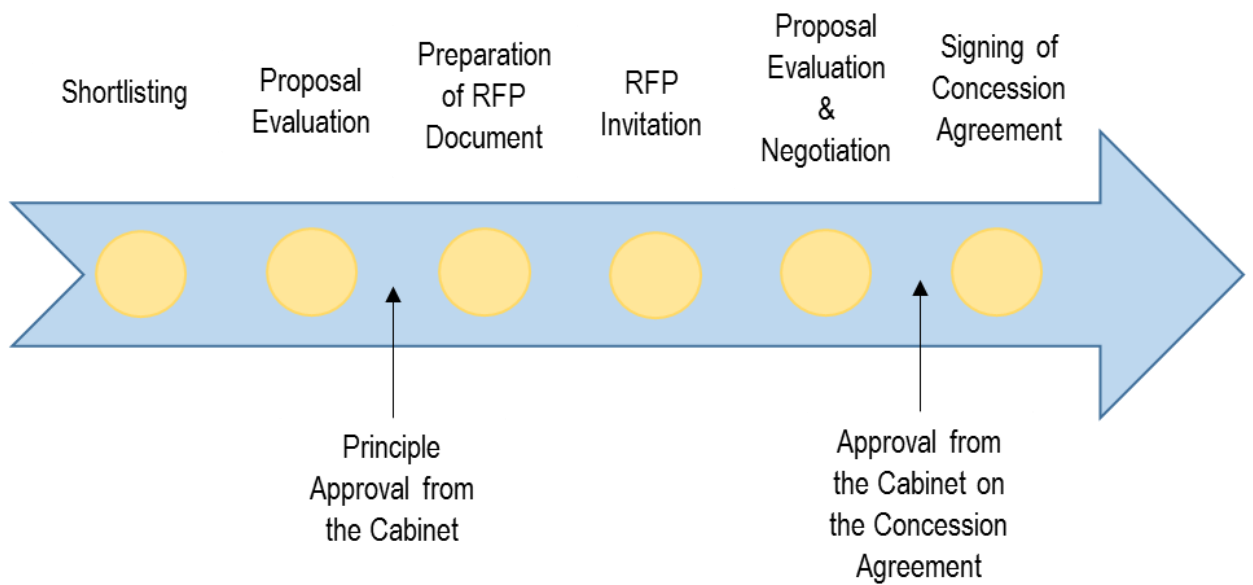


Figure 5.11 – Stages of UKAS Procurement Process.

Source: UKAS (2015a)

This flow chart is found under the heading *end to end process* under the MyPartnership menu. The website does not offer any description of the procedures involved in this flow chart. However, observation establishes that this chart is a simplified version of the flowchart in the guideline, discussed above, displaying the stages that a party will undergo with UKAS PPP.

Consequently, UKAS offers the reader another diagram under the heading *approval process flow chart*. Divided into two parts, this is illustrated in Figures 5.12 and 5.13. Part two describes the UKAS framework process in more detail than that in the official UKAS guideline. Figure 5.12 starts with receipt of PPP proposals from ministries or agencies and from the private sector, suggesting that this flow chart is meant for both government-initiated and unsolicited proposals.

After the receipt of a proposal, an assessment of completeness is conducted before the proposal is evaluated for feasibility and bankability under the UKAS PPP programme, although the website does not detail the evaluation mechanism conducted or adopted by UKAS for this assessment. In the event that the proposal is considered acceptable in meeting all of the government’s requirements, it will be tabled before an inter-agency committee comprising Jawatankuasa Awam Swasta (JKAS) and Jawatankuasa Tertinggi Awam Swasta (JTAS). At both levels, the inter-agency committee is only authorised to endorse and make

recommendations to cabinet and still requires the cabinet minister's decision. If approved by cabinet, the proposal will go through the phases illustrated in Figure 5.13.

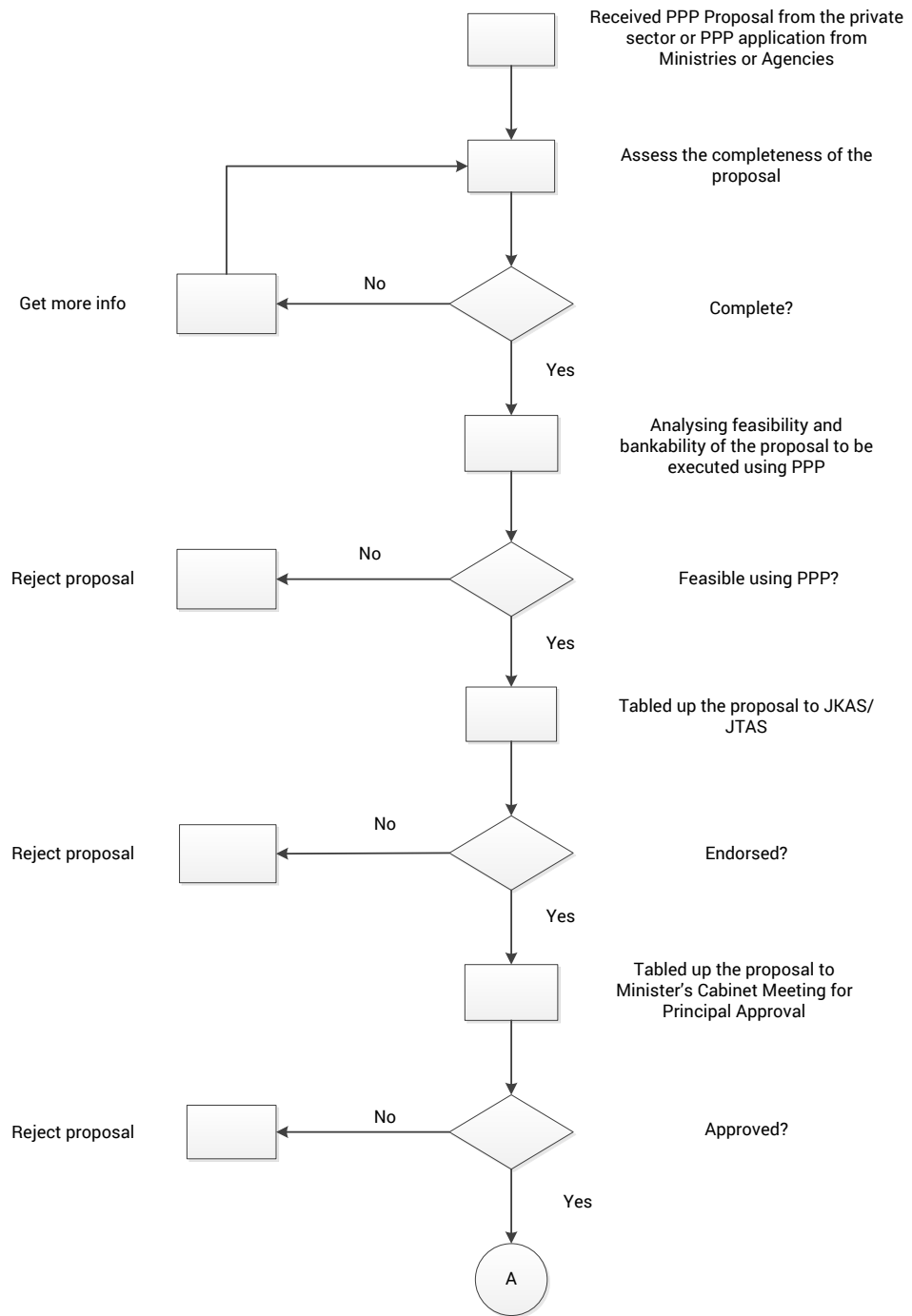


Figure 5.12 - Approval Process Flow Chart Part (i)

Source: UKAS (2015b)

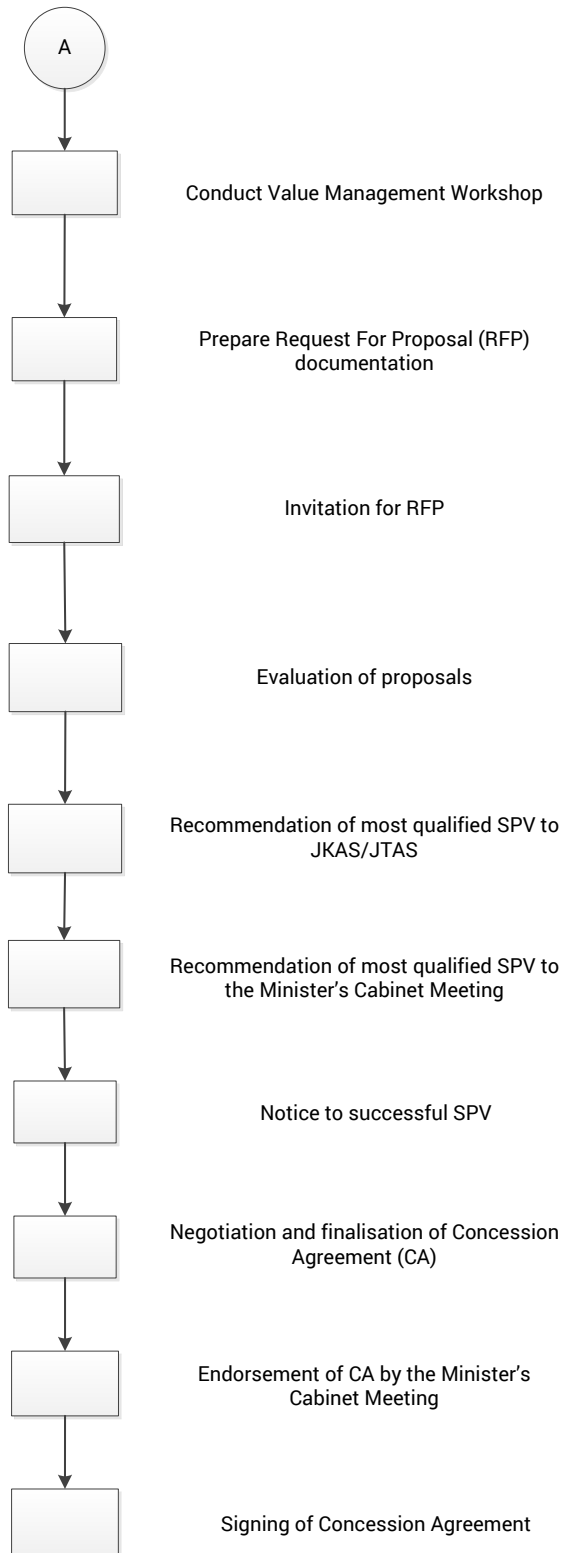


Figure 5.13 -Approval Process Flow Chart Part (ii)

Source: UKAS (2015b)

This second flow chart starts with a value management workshop, of which no particulars were given on the website. After the workshop, the diagram indicates the Request for Proposal document preparation and procurement process stages. Yet again, the diagram and other website content offer no explanation of the Request for Proposal invitation bid or the procurement process. Following the procurement process is the proposal evaluation stage, again without explicit rules as to how a proposal is evaluated. Proposals will be scrutinised and discussed in detail in the JKAS and later JTAS. Once more, the inter-agency committee can only recommend to the cabinet, which makes the decision. Once a decision has been reached on the most qualified private partner, the government and selected Special Purpose Vehicle will have multiple discussions and negotiations on the details of the terms and conditions of the whole concession agreement. Agreement between both parties is to be tabled for finalisation by the cabinet. Subject to the approval of the cabinet, the next step is signing the Concession Agreement.

The website has a section describing in detail the role of the inter-agency committee, JKAS and JTAS. JKAS was established to perform the decision-making role for policy matters regarding PPP proposals received, with weekly meetings. The website does not specify under which statutory act or any other regulation JKAS was formed. In describing the role of JKAS in detail, the website lists further responsibilities:

- a. Reviewing PPP proposals (including application for facilitation fund) by ministries/agencies and from the private sector;
- b. Endorsing PPP proposals for cabinet or the Prime Minister's final decision;
- c. Evaluating proposals for government's facilitation fund;
- d. Endorsing shortlisted/qualified companies for Special Purpose Vehicle consideration by the cabinet or Prime Minister;
- e. Validating concession agreement terms and conditions (and also for facilitation if applicable) for cabinet decision;
- f. Determining PPP project negotiation in detail;
- g. Acting as the parent committee for the Project Steering Committee (JPP), the Finance Sub-Committee (JKK) and the Technical Sub-Committee.

The guideline further lists the members of JKAS in detail (Table 5.19). As discussed above, after a matter has been endorsed at JKAS level, every discussion is brought to a higher-level committee called JTAS. The UKAS website lists the role of JTAS as:

- a. Obtaining the principal approval and any decision from the cabinet regarding PPP proposals, including the procurement process;
- b. Endorsing high-impact proposals for the award of facilitation funding for the consideration of the Prime Minister;
- c. Mediator for disputes regarding PPP proposals (including facilitation fund) between agencies or ministries during negotiations and project implementation.

	JKAS Members
Chairman	Director General of UKAS
Secretary	Director or Principal Assistant Director of Secretariat Subsection, Project Monitoring and Secretariat Section of UKAS
Permanent Members	Representative of Attorney General Representative of Economic Planning Unit, Prime Minister's Department Representative of Investment, MKD and Privatisation Division, Ministry of Finance Malaysia Deputy Director General (Policy), UKAS, JPM Deputy Director General (Development), UKAS, JPM
Invited Members (implementing ministry/agency)	Section Director (project negotiation supervisor), UKAS, or representative Specialist Officer, UKAS, Certain individuals to give their views and advice on Facilitation Fund projects (Facilitation Fund Meeting only)
Meetings involving Facilitation Fund	Representative of Loans Management, Financial Market and Actuary Division, Ministry of Finance Malaysia Representative of Economic and International Division, Ministry of Finance Malaysia Representative of Finance and Development Division, Prime Minister's Department Representative of Bank Negara Malaysia Senior Director of PPP Policy and Corridor Development Section Facilitation Fund Section Director
Meetings not Involvin Facilitation Fund	Representative of Budget Management Division, Ministry of Finance Malaysia Representative of Government Procurement Division, Ministry of Finance Malaysia Representative of Department of Lands & Minerals Director General Representative of Department of Valuation and Property Services Director of Technical Section, UKAS, or its representative

Table 5.19 – List of JKAS Members

Source: UKAS (2015c)

The website also lists the members of JTAS. Although JTAS has a similar composition to JKAS, JTAS includes the head of the organisations invited, as shown in Table 5.20. The remaining information under the MyPartnership menu consists of statistics on PPP achievements, major PPP projects undertaken, links to the available guidelines, current tender advertisement and information on the facilitation fund.

The researcher also discovered relevant information regarding the procurement process adopted by UKAS in the Frequently Asked Questions menu. One question was whether PPP proposals only come from the private sector, and the answer was that two routes are accepted by UKAS: proposals initiated by the government, which originate from the ministries or agencies and are known as solicited proposals, and unsolicited proposals initiated by the private sector.

JTAS Members	
Chairman	Chief Secretary to the Government of Malaysia
Secretary	UKAS
Permanent Members	Attorney General Secretary General of Treasury Director General Economic Planning Unit, Prime Minister's Department Director General of UKAS, Director General of Department of Lands & Minerals Director General Director General of Department of Valuation and Property Services Deputy Director of U
Invited Members	Relevant Secretary General of ministries and/or Director General of agencies

Table 5.20 - List of JTAS Members

Source: UKAS (2015d)

The website does not contain any timeline for the stages in the flowchart. Nevertheless, under the menu Client's Charter, UKAS promises to inform the proposer of the government's decision within three months of receiving a complete proposal. Within 12 months of the approval, UKAS promises to negotiate and finalise the concession agreement, although this is still subject to non-pending issues such as land matters and approval of the relevant authority.

5.2.3 Privatisation Master Plan

According to the respondents, the UKAS PPP programme is a continuation of a privatisation programme mooted by the Government of Malaysia in the 1980's. Although decades earlier, and the details of PPP implementation not necessarily being the same, respondents stressed that the Privatisation Master Plan is an important document and is still considered relevant to the current PPP programme. The Master Plan was authored by the Malaysian Economic Planning Unit, aiming to educate the public regarding the privatisation programme and to serve as a guideline for interested parties to participate and take hold of the opportunity offered by the programme (Economic Planning Unit, 1994).

The Privatisation Master Plan comprises a general privatisation framework, procedures, and other information on the privatisation programme such as the background, progress,

achievements and its future direction. The research focuses on information that is relevant in addressing the research objectives and understanding the link between conventional privatisation programmes and the current PPP programme. The Privatisation Master Plan defines the programme's drivers clearly. There were five drivers: to facilitate the nation's economic growth; to relieve financial and administrative pressure on the government; to enhance efficiency and production; to downsize the public sector in the economy; and as a tool to achieve the National Economic Policy objectives. 246 projects were identified as suitable for privatisation (infrastructure and non-infrastructure). They were all government-initiated proposals, subjected to competitive bidding, either from the public at large or specific target players. The plan also stressed that any private proposals attempting to hijack any of the 246 projects before the competitive bidding process would not be entertained. No regulatory framework was linked to implementation of any of the listed projects, although centralised planning for government-initiated projects was to be steered by the Economic Planning Unit. Identified potential privatisation exercises were executed by relevant ministries or agencies.

5.2.3.1 Private-Initiated Proposals

Besides the government-initiated proposals, the Privatisation Master Plan acknowledged proposals from the private sector, but only if the proposal was considered unique. According to paragraph 89 in the Privatisation Master Plan, *unique* is characterised as follows:

- a. A feasible proposal comprising a cost-effective solution to save cost for the government.
- b. A private proposer in an advantageous position if holding exclusive patent rights or sole technical capabilities; this is the key to a privatisation proposal;
- c. In the event that a proposer is reliant on another proficient party, the privatisation would be granted to the proficient party.

If the private proposal did not meet this definition of uniqueness, the proposal had to go through a competitive bidding process. Private-initiated proposals were considered on a *first-come-first-served-basis* to reward the private sector for innovation and ingenuity. If any proposal was deemed unique and viable for execution through privatisation, it was promoted and further scrutinised by the Malaysian Economic Planning Unit. If the proposal suited the government's requirements, negotiation was conducted with the original proposer. The government conducted an open bidding exercise for the proposal if the negotiation failed to be

finalised between both parties. Nevertheless, the original proposer was to be compensated by the successful bidder for the cost of the study incurred. The amount of this compensation was to be agreed between the government and the original proposer and specified in the bidding documents.

5.2.3.2 Evaluation of Bidders

Both private- and government-initiated proposals were scrutinised to ensure compliance with government policies and achieving positive implementation. Proposals from both routes were assessed for technical and financial capability. The Privatisation Master Plan did not describe how a proposal was to be assessed. Nonetheless, a form requesting important information regarding the proposer and the proposal was attached to the Plan, to be filled in by the proposer; it is assumed to be used as part of the evaluation. The information requested is shown in Table 5.21.

Table 5.21- Information Requested from Proposer as in Privatisation Master Plan

Information Requested	Detail
Proposer	Company profile (including paid up capital, authorised capital, particulars of shareholders, information on insolvencies, type of activity and business performance in past 3 years, information on new entity set for the privatisation, detail of employees)
Proposal	Particulars on the privatisation proposal, proposed model of privatisation, price offered, future investment plan,
Finance	Detail on source of finance, projected cash flow, profit projections for first 5 years

Source: Economic Planning Unit (1994)

The information required as per Table 5.21 suggest that the bidders might be assessed base on their company background, particulars on the proposal and the financial aspects.

5.2.3.3 New Economic Policy

Privatisation programme was one government vehicle to achieve the national agenda, including the New Economic Policy. The Privatisation Master Plan stated that a majority of the privatisation projects had to have 30 percent *Bumiputera* participation. Privatisation was anticipated to create more business opportunities for the *Bumiputera*, thus motivating *Bumiputera* entrepreneurs to be more innovative. According to the Economic Planning Unit

(1996), to safeguard this *Bumiputera* participation, a condition was imposed in the concession agreement for 30 percent of the work contracts to be reserved to *Bumiputera* companies. This was an attempt by the government to ensure the privatisation benefited society by balancing the socio-economy.

Foreign company participation was also accepted to assist implementation of the privatisation programme. However, foreign companies' participation was subjected to:

- i. non-availability of local experts;
- ii. foreign participation was needed to promote export industry;
- iii. the domestic market was insufficient to captivate shares offered and to distinguish international partnership.

Foreign companies' participation, however, was capped at 25 percent of its share capital in a privatised entity.

This ends the review of relevant documents used in the UKAS procurement process. Overall, the documents provided for members of the public and interested parties are too broad. The lack of information on the procurement process and other UKAS practices reflects a lack of transparency in UKAS practice. Nonetheless, the findings from the document review will in the chapters be compared and contrasted with actual UKAS practice, as obtained through the interviews. The next sections will present the analysis of the interview findings regarding the procurement process adopted by UKAS and the competition policy incorporated within the procurement process. Figure 5.14 illustrates the cognitive mapping of UKAS implementation in relation to understanding the UKAS procurement process.

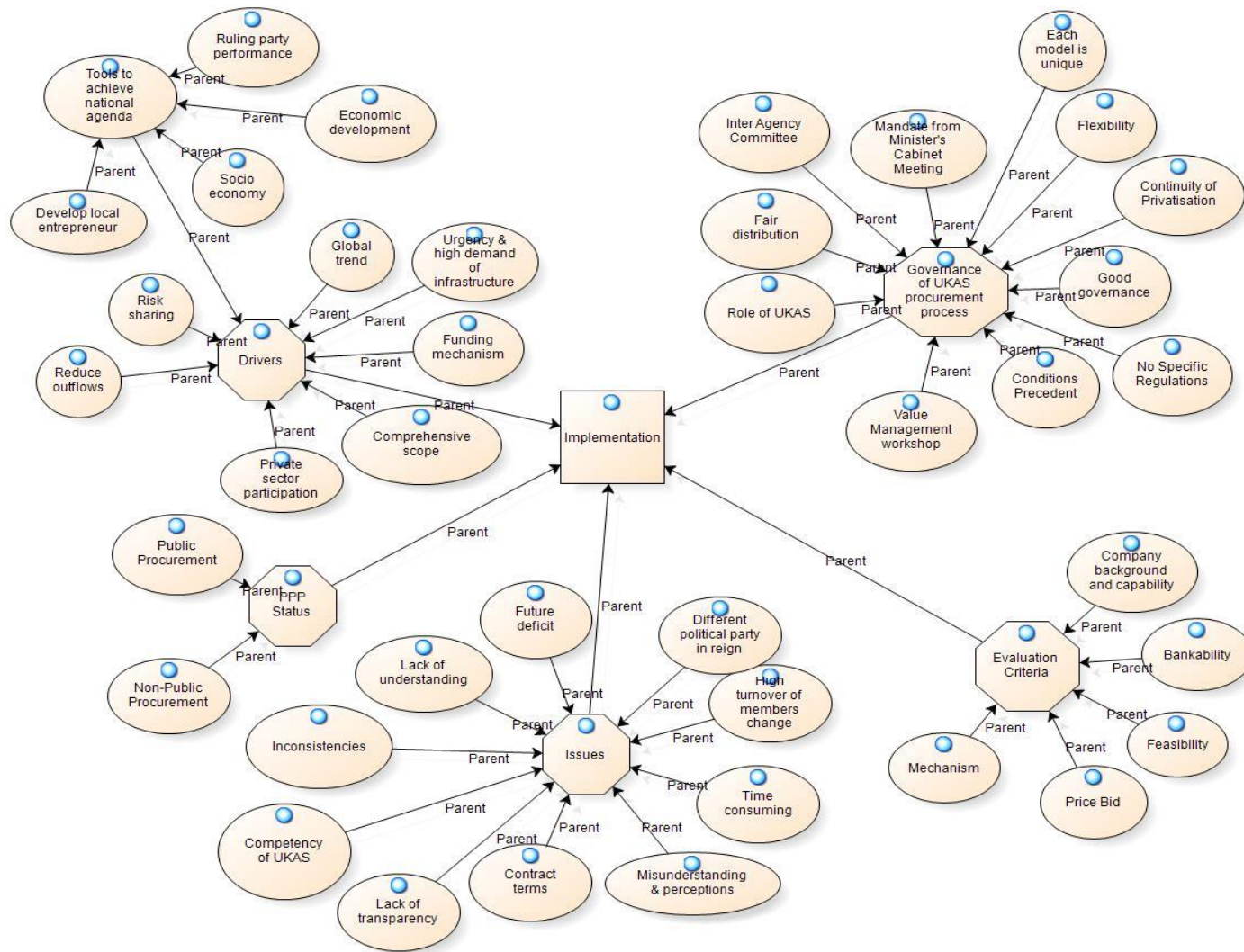


Figure 5.14 – Cognitive Mapping for UKAS PPP Implementation

5.3 UKAS PPP

Participants were asked about the status of PPP implementation by UKAS and its legitimate authorisation. The feedback received was interesting in that most of the respondents were themselves uncertain about this. In essence, none of the respondents was able to show legal evidence to support their view. Their opinions were explicitly divided into two; PPP under UKAS is part of public procurement, or is not part of public procurement. The status of PPP implementation is important as this should determine the governance of PPP by UKAS. The response to the status of PPP under UKAS is as illustrated in Figure 5.15.

Name	Sources	References
Implementation	14	143
Issues	0	0
PPP Status	0	0
Public Procurement	7	10
Non-Public Procurement	7	16
Governance of UKAS Procurement Process	0	0
Evaluation Criteria	12	44
Drivers	12	95

Figure 5.15– UKAS PPP Status

5.3.1 Non-Public Procurement

Respondent R4 said that the status of UKAS PPP as public procurement has been debated for quite some time, further acknowledging the non-existence of a statutory act defining the status of PPP in Malaysia, whether it is public procurement or otherwise. According to Respondents R1 and R2, PPP by UKAS is not considered part of Malaysian public procurement, justifying why UKAS use their own guideline and are not bound to the Malaysian public procurement regulations set out by the Ministry of Finance. Respondent R2 added that although UKAS did not follow the public procurement regulations, they always exercised good governance. Respondent R5 stressed that UKAS tried to adhere to the public procurement regulations available and pointed out that the UKAS guideline is in accordance with and does not

contradict any existing regulations. Respondent R4, however, admitted that the guideline is very brief compared to the public procurement regulations.

From a different perspective, Respondent R10 believed that PPP should not be treated in the same way as conventional procurement because of its complex nature. Respondent R12 shared this sentiment on the complex nature of PPP, demarcating it from public procurement. Respondent R12 said, *PPP is not typical public procurement like the government would do with annual development expenditure. If they do that, they would not need UKAS. Respondent R12 however added, nevertheless there are rules and regulations that they still need to observe like the Ministry of Finance rules. When it comes to project implementation, UKAS is quite complicated situation to a certain extent.* The same view was shared by Respondent R2, comparing it with a public procurement project, *It's quite challenging. If it is a public procurement project, we can just follow the available public procurement regulation.* Respondent R11 believed that PPP is a hybrid procurement, saying *By right it should be a public procurement. But there are some elements in PPP that can also be justified as not a public procurement.*

5.3.2 Public Procurement

Despite certain respondents considering UKAS PPP not to be part of public procurement, Respondent R13 stressed that it is no doubt for the public, even though no statute, circular or guideline states that the procurement is or should be part of public procurement.

Respondent R12 stated that if it is all down to the intent and purpose of the PPP, it can be considered as public procurement, adding, however that it is more complex than that. The status of PPP has been argued and manipulated even in advanced PPP practitioners' countries. Respondent R12 further explained that the one of the reasons why PPP is not executed strictly in accordance with the process and procedures of public procurement is that countries are trying to circumnavigate public procurement rules including transparency, advertisement, and strict participation under public procurement regulations. Even though it is acknowledged that the infrastructures built through PPP are public infrastructures, the source of funding technically does not make it fall under public procurement.

Respondents R4 and R5 suggested that government will still pay for the end product, so PPP by UKAS is part of public procurement. Respondent R4 added that the requirements and approval for infrastructure facilitated by UKAS still come from the government.

Name	Sources	References
Implementation	14	143
Drivers	12	95
Tools to achieve national agenda	9	36
Socio economy	4	9
Develop local entrepreneur	3	6
Economic development	2	3
Ruling party performance	1	2
Private sector participation	8	17
Funding mechanism	7	14
Urgency & high demand of infrastructure	6	12
Comprehensive scope	3	5
Risk sharing	3	4
Reduce outflows	2	2
Global trend	2	2

Figure 5.16 - UKAS PPP Drivers

5.4 Identifying the Drivers of UKAS PPP

Identifying the range of motivations for PPP is important as it shapes the overall implementation. Most governments adopt PPP for its funding mechanism and ability to achieve value for money. The researcher investigated the drivers of PPP by UKAS by questioning the respondents on the reason why Malaysia resorted to PPP. The interview outcomes led to the response illustrated in Figure 5.16. Similar to other nations, Malaysia resorted to use PPP due to:

- a. Private sector participation
- b. Funding mechanism
- c. Urgency and high demand of infrastructure
- d. Comprehensive scope
- e. Risk sharing
- f. Reduce outflows
- g. Global trend.

5.4.1 Private Sector Participation

In discussing the drivers of PPP, eight respondents mentioned that PPP benefited from private sector participation. Citing the Ninth Malaysia Plan, Respondent R11 said that there is a need for private sector participation in developing the country. Respondent R2 added that the economy of the country should be driven by the private sector instead of solely by the government.

Respondent R12 believed that the government benefited from an increase in efficiency resulting from the private sector's participation in building the nation since privatisation was introduced. Respondent R2 said *I see that the private sector has a better capacity to deliver more efficiently than compared to the public sector. They have the resources such as: money; experience; and the latest technology. The private sector is driven by profit; hence they usually come with innovative ideas on how to save on the cost of delivery. PPP is an instrument to tap those resources from their side.* Respondent R8 considered that selected infrastructures were pushed to the private sector since they are able to deliver and sustain the facilities better than the government.

Given the *modus operandi* of PPP, Respondent R10 said the private sector must be creative and proficient to ensure completion and delivery of the infrastructure on time and consequently collect their revenue. Respondent R4 agreed that private sector companies were always creative with their proposals, injecting new technology and innovation into the project.

Significantly, Respondents R9 and R10 claimed that under PPP, most participating private companies develop a sense of belonging and build passionately since under most PPP models the private sector is still responsible for the maintenance of the infrastructure. Respondent R9 stated this resulted in the private sector being more accountable in designing, constructing and maintaining everything they installed. In addition to specific financial return, Respondent R9 believed private companies are concerned about their reputation and need to ensure the whole concession is profitable.

5.4.2 Funding Mechanism

It is not surprising that most countries adopt PPP for its funding mechanism, Malaysia included. Respondent R4 stated that the government resorted to PPP for its tight budget in providing infrastructure. Respondent R9 explained that some of the projects were initially

listed under the development budget to be built using conventional procurement, but that the government was cash strapped and needed to find alternative funding. Respondent R13 believed, *Well actually the whole idea, in my personal opinion the government does not have the money at the point of time and yet wanted the private sector to come in so the government can get the projects going and pay later.* Sharing the same sentiment, Respondent R10 said, *The government will be stretched if the entire social needs projects are to be constructed. But we can't ignore the importance of these projects to society. The way I see it, the government can buy time on the funding since they will only start to pay upon the delivery of the infrastructure. Through PPP also, the government is assured of completion.*

Despite the respondents' belief that the government's use of PPP is comparable to the credit card mechanism, the government obtains a better infrastructure through private funding. Respondent R1 emphasised ... *if we rely solely on the government/public funding, we can't explore many mega-projects. By using the PPP approach, we can really expand and extend a lot of mega-projects, particularly infrastructure.*

5.4.3 Urgency and High Demand for Infrastructure

Another driver for Malaysian PPP is closely related to the funding mechanism. Due to the high demand and urgent nature of public infrastructure, the government resorted to alternative procurement. Six of the respondents agreed that given the high demand for public infrastructure such as schools, universities, hospitals and highways when the government budget is limited, PPP seems to be the key to achieving them all rapidly. Citing the UKAS website, Respondent R12 explained the reason that the government adopted PPP was *Among others, socio-economic engineering, high demand for modern socio-economic infrastructure for which the government could not afford to provide within such a short span of time.* Respondent R2 commented that Malaysia had previously managed to expedite most of the existing infrastructure through privatisation programmes. Such infrastructure might not exist if the government had decided to ignore the demand. This opinion was shared by Respondent R8, who commented ... *if we don't use that means to obtain the infrastructure, we might not get it. At that point of time, the government needed the infrastructure and the private sector was seen able to deliver them.*

Nevertheless, the desperation to obtain the infrastructure seems to cloud other important factors which should be considered. Respondent R6 claimed, *Once we decided to go for PPP,*

the rental/leasing rate will be much higher compared to the rental/leasing rate if development were to be built using conventional procurement. But we need the facilities as soon as possible. Respondent R6 added ... *since our objective was to get the facility, we were not too concerned on the selection of the procurement process.* The procurement might be able to facilitate stakeholders in obtaining the infrastructure the soonest, even though it may burden the government in the future due to the high cost of leasing the infrastructure later on.

5.4.4 Comprehensive Scope

Infrastructure projects built through PPP tend to have a comprehensive scope, from funding, operation and maintenance to collecting revenues, which government sees as an advantage. Respondent R9 repeated that asset maintenance for government projects is not given enough consideration by the government, although Respondents R5 and R10 added that the comprehensive scope contributes to higher costs for UKAS projects.

5.4.5 Risk Sharing

One of the motivations for adopting PPP is optimising risk transfer from the government to the private sector. When the government and the private sector enter into a PPP agreement, risk will be allocated to the party best able to manage and control it. Respondent R9 insisted that the risk allocation exercise gives a holistic impact to the partnership. Parties are more responsible and are seen to be working together rather than blaming each other. Once one party has been allocated with a risk, the other party will trust its partner; for example, Respondent R5 stated, *In general, we will leave the construction matters to the Special Purpose Vehicle, we do not interfere. However, when the infrastructure is complete, then we will assess the end product with the specifications agreed.*

5.4.6 Reduce Outflows

Benefiting from the funding mechanism of PPP, governments manage to reduce cash outflow in providing infrastructure. Based on the literature review, most countries see this as a main driver in adopting PPP. On the other hand, only two respondents brought up reducing expenditure as one of the UKAS drivers. R11 stated that easing the national financial burden could be a key reason for Malaysia adopting PPP, while another respondent commented that

through the programme, government indeed manages to save on capital and operational expenditure.

5.4.7 Global Trend

Two respondents were of the opinion that one of the reasons Malaysia adopted PPP was the global trend at that time. When Malaysia saw other nations flourish by adopting PPP, they followed suit. Respondent R11 stated ... *the spirit of having PPP in the year 2006, is due to following the global trend. That is why we don't really appreciate or fully maximise the benefit of PPP. When PPP was used by other countries, Malaysia didn't want to miss out. That's why we don't follow the fundamental concept of PPP. They don't really understand what PPP is. In the end, it will be a typical conventional public procurement.* Respondent R4 held the view, *At that point in time, our national economy was not so good, we had a quite tight budget especially for infrastructure development, therefore the government decided to find other alternatives to boost the economy. One of the alternatives at that time was the PPP UK model and concept. We were told to study and look into the possibilities of adapting the model here. After we did some research including PPP projects in the UK. We adapted the UK model and altered it to suit our environment.*

5.4.8 Additional Drivers for Malaysian PPP

In addition to the textbook drivers for PPP, the researcher identified the following: tools to achieve the national agenda; and problems with conventional procurement.

5.4.8.1 Tools to Achieve National Agenda

The respondents identified:

- a. **Socio-economy engineering** – As alluded to in the document review, the objective of the privatisation programme in Malaysia was to help the nation to achieve the New Economic Policy. This policy was introduced by the government to eradicate poverty and balance the socio-economic conditions of the people. It was confirmed by Respondent R2 that PPP is also one of the instruments for the government to achieve this goal. While not dismissing the government's effort, Respondent R11 pointed out one concern, that *UKAS does emphasise Bumiputera. It's good to achieve the national agenda, to empower the socio-economy of the Bumiputera, but there will be restrictive*

competition. Sharing this view, Respondent R12 said *One fundamental area that makes ourselves complicated, but it is a necessity, is the social engineering bit. That socio-economic engineering so far it has been useful in terms of having it achieved through PPP but it is so problematic.* Although it may be debateable, Respondent R9 was of the opinion that through PPP the government emphasised socio-economic engineering over monetary return, adding *The government also knows that the private sector needs to make a profit, but not supra-profit. It has to be in a partnership spirit. Win-win situation.*

- b. **Develop local entrepreneurship** – Among other drivers of PPP mentioned, Respondent R2 stated that PPP has been used to develop more local entrepreneurs. Respondent R9 claimed that, in many instances, less complicated projects such as university hostels and campuses were allocated to *Bumiputera* companies, adding *Nevertheless it worked for smaller scale projects and not complex and big projects such as hospitals.* Furthermore, Respondent R9 stated that even though a project is awarded to a Government Link Company (GLC), they will still hire technical consultants as part of their responsibilities to develop local entrepreneurship although they already have their technical expert. Describing a different experience, Respondent R6 claimed that for his project, *The concession was decided to be awarded to the original proposer due to the reason of reducing the domination by existing major players and to train new players.* While the decision could be debated, it has always been the government's objective to achieve the New Economic Policy and this is maintained in the current PPP programme.
- c. **Economic development** – Respondents R2 and R4 said that the government adopted PPP to facilitate and boost national economic growth at that point in time. The private sector was seen as a catalyst for economic growth and to lead the market.
- d. **Ruling party performance** - The government is expected to provide infrastructure or services to the public. It will be a benchmark or an indicator to measure the success of any political party in power. When asked whose interest was being promoted through PPP, Respondent R11's response was, *I would say number one is the government agenda, which also relates to politics. An example is one of the universities in Malaysia; they want to achieve a certain number of graduates by the year 2020, so they develop many new university branches through PPP. PPP is the in thing to achieve the*

government agenda. Indirectly it will benefit the public. Nevertheless, the government agenda is still beneficial for the public.

5.5 Governance of UKAS Procurement Process

The feedback from the respondents revealed unpublished practice of the UKAS procurement process. The analysis of the respondents' feedback is demonstrated in Figure 5.17.

Name	Sources	References
Implementation	14	143
Drivers	12	95
Evaluation Criteria	12	44
Issues	0	0
PPP Status	0	0
Governance of UKAS procurement process	0	0
Inter Agency Committee	8	23
Mandate from Minister's Cabinet Meeting	6	22
Role of UKAS	6	15
Each model is unique	5	13
No Specific Regulations	6	10
Flexibility	4	9
Value Management workshop	3	8
Conditions Precedent	3	7
Continuity of Privatisation	3	4
Good governance	2	4
Fair distribution	1	2

Figure 5.17 – Governance of UKAS Procurement Process

5.5.1 Role of UKAS

The day-to-day role of UKAS in the PPP programme is less well known. There is limited knowledge apart from that in the published official documents. An example of lesser known UKAS practice that might be expected from UKAS as the central agency assigned to manage PPP is as a party to the contract or involvement until the lease of the asset. As Respondent R1 explained, the concept of UKAS PPP is centralised planning and decentralised implementation. Respondents R5, R7 and R8 further explained that UKAS' involvement is only until the signing of the concession agreement. As shown in the document analysis, initiation of development comes from the ministries, agencies or from the private sector. Respondent R4 said UKAS did not dictate the needs of a project. When they receive a proposal, they facilitate it and bring it to the Minister's Cabinet Meeting for a decision.

Respondent R5 said projects are returned to the relevant ministries or agencies for the post-contract phase once the concession agreement is agreed, since UKAS is not a party to the contract. Respondent R8 described UKAS as a coordinating agency.

5.5.2 Continuity of Privatisation

As discussed in an earlier chapter, the privatisation programme in Malaysia was identified as the beginning of the PPP era in Malaysia. Responses below are feedback from respondents on this matter.

- a. *The PPP in Malaysia is a continuity of the earlier Privatisation Master Plan.* (Respondent R8)
- b. *The only thing that UKAS had was a continuity from privatisation implementation. There are similarities in PPP and privatisation such as BLMT, BOT.* (Respondent R9)
- c. *The government has been using privatisation to accomplish its own agenda. Details can be found in the Malaysia Privatisation Master Plan. PPP is a continuity of the Privatisation Master Plan.* (Respondent R2)
- d. *From the initiation of privatisation in the 1980's, we wanted the private sector driven type of economy. PPP is still in line with that vision.* (Respondent R2).

5.5.3 Each Model is Unique

Respondents R1, R2 and R3 stressed that each PPP model is treated differently by UKAS. Any proposal, whether initiated by the ministries and government agencies or as unsolicited proposals, will be considered thoroughly. Respondent R1 said *Each model is difference. We really need to have a thorough understanding; comprehensive knowledge of what are the elements that will lead to a better outcome of the thing, then and from macro to micro, from micro to macro.* Respondent R1 added, *The context of each project is important. You can't generalise every project. However, a project may be generalised and characterise in the same sector. Then only you can say that, "This is a good PPP project for infrastructure of a*

highway project". Even so, there are still differences between highway projects, urban highway and interstate highway. Isn't it?

Since UKAS treat each proposal according to its suitability, Respondent R3 believed that, regardless of the procurement process adopted, they are still capable of achieving value for money through current protocols. Although Respondent R4 said that UKAS have to consider multifaceted factors to decide on the procurement process, Respondent R3 believed that conducting competitive bidding for a simple project such as a university hostel is benefiting the government in terms of competitive prices and proposals.

Nevertheless, Respondent R5 said that, due to the customised treatment for each proposal, there are inconsistencies in UKAS practice, commenting, *People (private companies) who have been dealing with other sections sometimes dispute inconsistencies between the section practices in UKAS. We do get queries from the banks about differences of Concession Agreement terms used by different sections. We do explain to them that each project is treated differently and there were sometimes refinements for certain projects.*

5.5.4 No Specific Regulations

Six of the respondents acknowledged that there is no specific statutory act or regulation for PPP in Malaysia. Most of the six believed that there is no need for a specific PPP act. Respondent R2 explained that current UKAS practice is based on UKAS' own guideline, the Privatisation Masterplan, cabinet meetings, and enabling statutory acts and provisions. A specific act will only restrict implementation. Respondent R12 said, *There are some countries that have PPP specific rules, like Japan, and things do get some constraints due to that inflexibility. For here now, the government can decide if it is better for a project to be public procurement per se, following strictly the government rules; they will use the development expenditure and give it to the Public Works Department".* Respondent R12 added that Malaysia is not unique in this matter; advanced PPP practitioners like the UK also do not tie themselves with a specific PPP act. Respondent R2 did not reject the possibility of having a specific statute for PPP in Malaysia, nevertheless pointing out that, *if we were to propose and push a specific act, we need a flexible one.*

5.5.5 Flexibility

Not being tied to any specific statutory act or regulation, UKAS is very flexible in its procurement process. Even the UKAS guideline is generic in nature. Respondent R4 stated there is a reason for the broad guideline: *We have quite broad guidelines for our procurement process. It is because PPP is different from conventional public procurement. So in order to address the complexity in PPP, the guidelines need to be flexible.* Respondent R2 seconded this: *The leniency of the guidelines is intended to give room for innovation.* Respondent R1 considered that flexibility in UKAS practice leads to dynamism.

In detail, Respondent R2 explained, *We try to facilitate proposals that come in. Whether it's beneficial or there is a need to do it as PPP or otherwise. We are quite flexible in terms of the procurement process. We have to be creative and innovative. In PPP, it's not the case of the Government knows best".* Relating the flexibility strategy of UKAS to its practice of direct negotiation with a single company, Respondent R1 claimed that flexibility in the practice itself is an advantage in achieving what the government needs. Although some responses seem optimistic regarding the flexibility strategy adopted by UKAS, from Respondent R6's observation, UKAS has been too flexible and does not abide by its own guidelines, as changes are made to suit the *status quo*.

5.5.6 Inter-Agency Committee

Even though UKAS is the centralised agency for PPP implementation in Malaysia, it has set up several inter-agency committees with different roles. As Respondent R5 pointed out, UKAS do not make any decisions; endorsements are made by these inter-agency committees, later to be brought to the Minister's Cabinet Meeting. Respondent R4 described how the inter-agency committee is referred to once a proposal is complete: *Before JKAS, we have the JPP meeting. Basically JPP is where we discuss and get all the necessary information. We will also call them for a presentation of their proposal. At the JKAS level they will further deliberate the proposal. JKAS have the authority to decide within their stipulated power. JKAS will recommend to JTAS and highlight issues or matters that are beyond their authority.* Respondent R4 pointed out that the some of the inter-agency committee members are representatives from the Ministry of Finance and the Attorney General's Chambers. They are important to highlight any inappropriate practice in the meetings.

5.5.7 Mandate from Minister's Cabinet Meeting

Six of the respondents mentioned that UKAS refers everything to the cabinet. Respondents R1, R4 and R5 boasted that UKAS obtains its authority and mandate directly from the cabinet. Nonetheless, the respondents did not specifically justify the mandate given by the cabinet when PPP falls under a particular act or statute. Considering it as an advantage, Respondent R1 observed, *Supported by political will, we can expedite the project. It's the highest authority.* Although a proposal is discussed in detail by various tiers of inter-agency committee in UKAS, they only make recommendations to be endorsed by the cabinet. Respondent R1 added, *The Minister's Cabinet Meeting may not 100% agree, they have their own view.* The same experience was shared by Respondent R3 that the cabinet may decide otherwise than recommended.

5.5.8 Value Management Workshop

In an effort to achieve value for money from different procurement process, UKAS organises a Value Management workshop for all accepted proposals. Respondent R6 described this as an exercise to refine the scope proposed either by the government agencies or private sector. Respondent R5 explained that the process starts after the proposal is given approval by the cabinet: *If it is approved, then we will conduct a Value Management (VM) workshop to set the optimum scope. The optimum scope will be the scope set in the RFP documents. The VM will be conducted with the relevant ministries and agencies, minus the private companies.* Respondent R5 added, *After the Value Management workshop, the proposed project may go through scaling down of scope to an optimum required scope, and then the company will have to make necessary adjustments and come up with a new price. We will bring the adjusted proposal and the new price to the JKAS.*

Respondent R5 believed that UKAS managed to achieve value for money through the Value Management workshop. Justifying the UKAS strategy, Respondent R5 clarified, *Sometimes the requirements by the ministry or agency are over what is needed. They need to understand that the more area built, the more money is needed for the maintenance later.* In addition, Respondent R5 said, *Under PPP planning, each area built should be fully utilised. We don't want a white elephant project. That is why we conduct the Value Management workshop.*

5.5.9 Conditional Precedents

UKAS imposes some conditional precedents with which the Special Purpose Vehicle is to comply in order for the concession agreement to become effective. All of the respondents who raised this connected it to the financial closure. Respondent R4 explained, *Even when we have awarded, we have a six-month financial closure process where the Special Purpose Vehicle needs to submit some further financial documents required by the government. After the financial closure procedure only then does the concession agreement become effective. Failure to produce the required document within six months, results in the concession being cancelled.* Highlighting the importance of the financial closure, Respondent R9 stated that there were contracts being cancelled and awarded to different Special Purpose Vehicles due to the failure to meet the requirements of the financial closure. Nevertheless, Respondent R5 mentioned there were cases where the six-month period was extended.

5.5.10 Good Governance

Only two of the respondents claimed UKAS are upholding good governance even though they do not adhere to the available public procurement regulations. When asked whether the inter-agency committee is bounded by any public procurement regulations, the response given was *No; but the principle upheld is more or less the same* (Respondent R5).

5.5.11 Fair Distribution

In awarding the concession contract, Respondent R4 pointed out that UKAS practises a fair distribution and tries to avoid any monopoly practice.

5.6 Evaluation Criteria

Under the Malaysian public procurement regulations, a detailed evaluation methods and criteria are published in Treasury circulars and the tender documents. In contrast, little is known of the award criteria of UKAS, and there are no published details on evaluation criteria for the UKAS procurement process. Although Respondent R5 claimed UKAS published its evaluation criteria inside its Request for Proposal, when checked the criteria mentioned were only for joining the bidding exercise and not for evaluation. Nevertheless, in a case of competitive bidding, Respondent R2 stated, *The lowest price does not necessarily get the contract. The decision made is based on a comprehensive evaluation; the feasibility and*

viability of the proposal, technical ability, financial capacity, concession terms and other considerations. Respondent R3 stated that UKAS carried out several process to filter a proposal. Respondent R5 said each proposal is evaluated on its compliance to the requirements set out in the Request for Proposal documents before other factors.

Based on the respondents' responses, below are other points raised on what UKAS looks for in evaluating a proposal.

- a. **Feasibility** – Respondent R9 said it is important for a PPP proposal to be feasible. Respondent R4 more or less confirmed this statement by commenting that a proposal will be discussed in JPP on its feasibility. For an infrastructure development proposal and requirements, Respondent R4 said, *Basically, if an infrastructure of a facility is really needed, the end user needs to come out with a needs statement. Based on that needs statement, we will start to discuss the project, we will start asking questions. Whether the government has the ability to pay the lease? Do they really need the infrastructure? Is the projection of capacity need appropriate?* The same process was also explained by Respondent R3.

For the feasibility study of an unsolicited proposal, Respondents R4, R5 and R9 mentioned that UKAS corresponded with the relevant ministries or agencies to cross check with their development planning. Respondent R10 however said, *The requirements and expectations by the end user and UKAS as facilitator were different to a certain level of contradiction. The end user expectation was very high. However UKAS needed to scale down based on what they felt right. The disparity of these expectations can be great if it's not well managed.* UKAS have their own reason for interfering in ministries' or agencies' requirements: they are concerned with the feasibility of the end-user requirements. Respondent R5 pointed out, *As an example, the Ministry of Health (MOH) requested a 400 bed hospital; we will ask whether they can be fully utilized from day one. What are the bed occupancy rates? Is the number of doctors sufficient for 400 beds? We don't have any problems if they can justify and prove these demands; the population catchment in the proposed area has increased or is over-populated, the bed occupancy rate in nearer hospitals is also over populated.*

- b. **Company background and capability** – As mentioned earlier, UKAS assessment takes into consideration multiple factors, not necessarily the lowest price. The criteria to join the bid are clearly presented in the Request for Proposal document, and Respondent R4 said, *So to participate and venture into this PPP, the company has to know their own capability and ability to deliver. When they know they are not capable, they or we will know and they will be rejected.* Respondent R5 said the evaluations made by UKAS were assisted by relevant agencies with different expertise. Respondent R9 added ... *the proposal went to two committees, which evaluated the financial aspects and the technical aspects of the proposal. After the technical committee has evaluated the technical aspects, then the other committee will look into the financial.* Respondent R4 listed some of the factors UKAS looks: paid up capital; expertise; previous experience; consultant's hired, technical and financial capability.
- c. **Bankability** – Another important factor in the evaluation process is the commercial bankability of the proposed project. This was pointed out by Respondents R1, R2 and R9. Due to the funding mechanism of PPP, it is important for a proposal to be seen as bankable for the financier. Respondent R9 added that there were some initiatives by the private sector who proposed to generate income from the land lease as part of the PPP package.
- d. **Mechanism** – Selecting the right proposal and Special Purpose Vehicle for PPP is critical. Explaining further the methods UKAS adopted to evaluate proposals, Respondent R1 said they use a scoring system. Each criterion is given a different weighting, and scores are compared and contrasted at various selection stages. When asked about the weighting for each criterion, the respondents replied that it depends on the type of project and the industry involved. The scores are not published anywhere since they are intended for internal used only. Besides the scoring system, UKAS has used other evaluation methods; Respondent R1 said, *Our internal evaluation is based on certain parameters. We have used a five-point Likert scale based evaluation. For a one-off project, we even have a seven-point Likert scale evaluation if it is required.*

- e. **Price Bid** – Although UKAS conducts a comprehensive assessment in evaluating a company and its proposals, the price offered by the bidders still needs to be considered. Respondent R5 commented, *Financially, we are interested in the price that the government needs to pay. It should be within our budget, not burdensome in the future, and comparable to existing projects.*

5.7 Issues

Figure 5.18 illustrates some of the issues experienced by UKAS personnel, industry practitioners and experts. Ten issues were highlighted by respondents, presented below.

5.7.1 Inconsistencies

The majority of respondents gave inconsistency as their main concern about UKAS in practice, for instance the absence of a specific law for implementation. This was voiced by Respondent R12: *So that's why I said in the absence of a clear law, the government can adopt what they want.* Regardless of having their own guideline, Respondent R4 pointed out inconsistencies in practice between different sections of UKAS, which may be due to the vagueness of the guideline. Respondent R5 said UKAS has been queried: *People (private companies) who have been dealing with other sections sometimes dispute inconsistencies between the section practices in UKAS. We do get queries from the banks about differences of Concession Agreement terms used by different sections. We do explain to them that each project is treated differently and there were sometimes refinements for certain projects.* It was no surprise when Respondent R4 recalled that the National Audit Department had queried the UKAS guideline.

Name	Sources	References
Implementation	14	143
Issues	0	0
Different political party in reign	1	1
Competency of UKAS	2	2
Contract terms	1	3
High turnover of members change	3	3
Time consuming	3	5
Lack of understanding	3	7
Misunderstanding & perceptions	2	9
Future deficit	6	11
Lack of transparency	6	13
Inconsistencies	8	22
PPP Status	0	0
Governance of UKAS procurement process	0	0
Evaluation Criteria	12	44
Drivers	12	95

Figure 5.18 - Issues within UKAS Procurement Process

Other respondents have different experiences with UKAS inconsistency. Respondents R6, R7, R10 and R11 experienced UKAS inconsistency in abandoning their own guideline. Respondent R7 said UKAS did not stand by their nationwide advertisement guideline, adding, *There was no competition exercise as stated in their guidelines*. Respondent R6 brought up the same point, explaining further, *Literally, based on the UKAS guidelines, they insist on calling for RFP from at least three companies. However, they did not follow their own guidelines. I don't have the numbers, but from what I have been told, most of the PPP projects for other education institutions also have not practised a competition format of the procurement process*. Respondent R10 pointed out that everything is decided by the cabinet despite UKAS not complying with their own guideline. Without specifically stating the details, Respondent R11 explained that inconsistencies might result from the instructions received by UKAS from higher authority questioning the work of UKAS. Based on the response already presented, UKAS practice on the evaluation methods is also inconsistent.

Meanwhile, Respondent R10 highlighted the inconsistencies between the stakeholders' requirements, commenting, *I would say the tricky part was dealing with UKAS personnel and the end user. The requirements and expectations by the end user and UKAS as facilitator were different to a certain level of contradiction. The end user expectation was very high*.

However, UKAS needed to scale down based on what they felt right. The disparity of these expectations can be great if it's not well managed.

5.7.2 Future Deficit

Even though desperation to obtain the infrastructure leaves stakeholders with little option, Respondents R4, R5, R6, R11, R13 were well aware of concern about the high cost of using PPP. Respondent R6 compared overall PPP project funding to credit card usage: *I see it as a credit card where we spend money that we don't have and pay later with a very much higher interest and longer payment period.* Respondent R13 described PPP as, *In other words, just deferring the government liabilities to a later time.* Respondent R6 gave this impression: *I would say the future cost of the infrastructure development using PPP is quite worrying. The rental/lease rate that the government has to pay is roughly four times higher than the same facility built using a conventional public procurement.*

Respondent R11 felt that UKAS was starting to feel the heat of poor planning from previous projects, adding that UKAS had already stopped some projects in some of the sectors in an effort to find a new sustainable model. According to Respondent R4, currently *We try to limit to only crucial facilities to be done by PPP. We don't want them to be burdened by the lease payments in the future.* Respondent R9 confirmed this statement, pointing out *Late last year, I was told that the Ministry of Health is planning to build another five hospitals using PPP but when they proposed this to the minister in the Prime Minister's Office, it was kept on hold. The minister said that the government needed to look into other options, as he didn't want it to be a burden of deficit for the future generation.*

Respondents R5 and R9 pointed out that it was the Ministry of Finance who were really concerned about the PPP future deficit for ministries and agencies. Respondent R9 said *I was told that the MOF was not really in favour of PPP because of the higher cost for leasing the assets under PPP. There was a debate on this issue; the MOF did not want this debt to be a burden to the ministries and the government later.* Nonetheless, Respondent R9 stated it is important to educate and create awareness among all stakeholders of the cost of maintenance of the built asset. Respondent R5 agreed: *They need to understand that the more area built, the more money is needed for maintenance later.* Respondent R5 added that the leasing cost should not really be a concern since UKAS will make sure the price agreed is within the budget and should not burden future generations.

5.7.3 Lack of Transparency

The practice of UKAS is little known to the public. Respondent R8 believed that as a government agency, transparency is important as UKAS is accountable to the public. Touching on the subject of the award of concession, Respondent R13 pointed out, *Quite mysterious; not transparent; nobody knows how the Special Purpose Vehicle is being selected; wondering as to whether they are technically viable and financially viable, to spend the capital outlet upfront, and complete the job as it is.* Sharing this view, Respondent R8 said *People are demanding transparency. Whatever they do, they should address these issues. The important thing they need to look at is the public's interest. As part of the government, they are answerable to the public. People will question why company A is awarded a concession, who were the people behind them? Yes, there are certain PPP projects being awarded to certain people, but I believe that UKAS has their own justification.* Respondent R8 also called for UKAS to be more transparent. Respondent R11 thought the assessment consideration should be made transparent; otherwise people might suspect abuse of power by the government. Respondent R13 considered advertisement as an important medium for transparency, so that every qualified organisation is given the opportunity to join a bidding exercise.

Respondent R12 believed that UKAS has been transparent to a certain extent. UKAS published their guideline and made it available on their website, despite having other guidelines in use for internal purposes only. This was also supported by Respondent R4, who felt that UKAS had not been making all the important information accessible to relevant people. When asked about the availability of Special Purpose Vehicle requirements on the UKAS website, Respondent R4 replied, *Yes, we don't publish it. If it is for a RFP exercise, we will put the criteria that have to be met in the RFP document. Paid up capital; expertise; previous experiences; consultants hired, etc. Normally the requirement of a Special Purpose Vehicle in a competitive exercise is stricter than a direct negotiation requirement. Usually we will call for a pre-qualification exercise before an invitation for Request for Proposal is given to the shortlisted company.*

5.7.4 Lack of Understanding

From Respondent R9's observation, the early years of UKAS PPP saw much confusion and many misunderstandings of the programme from both sides: public and private sectors.

Respondent R9 explained that ministries and agencies had limited knowledge on the whole concept of PPP/PFI, failing to differentiate between PPP and conventional procurement used by the government. Respondent R9 added, *To them, it's just a design and build or privatisation or negotiated tender.* Meanwhile, for the private sector, the same respondent observed that most of the proposals submitted were not suitable or feasible, stating, *They failed to understand the concept of PPP/PFI and they failed to understand the context.* Nevertheless, Respondent R9 admitted that the misunderstanding may have resulted from the lack of proper guidelines, and acknowledged that more time was needed to ensure everyone understood PPP.

On a different note, the practice of unsolicited proposals to UKAS is different from any other practised in other countries. An unsolicited proposal implemented by UKAS is a development proposal from the private sector. When asked about this, Respondent R12 replied, *To me, in the absence of a clear definition, I would still consider the need. Where does the need come from, from the institution themselves, isn't it? They recognise the need, and they want it.* This response is parallel with the global unsolicited practice. Respondent R12 further explained, *My definition is simple: who initiated it? Who realised and can see the potential and who takes risk? Like these individuals, they are not taking risks because they know, there is already demand. The risk is in the implementation, not demand risk. The risk for demand is already there, but then like the ones who come to me for example they look at it and say how many students, how much accommodation do you need, what do you think of the university policy? Would the university allow students to live outside campus? That is how they establish it. So that to me is privately initiated.* In contrast, Respondent R4 justified the practice of UKAS: *I would say private initiated since the private sector comes up with the proposal.* The drawback of this is discussed in detail in Chapter 6. Nevertheless, as pointed out by Respondent R9, *I understand it will take some time before everyone can understand the concept of PPP*".

5.7.5 High Turnover of Membership

The UKAS procurement process involves several agencies and ministries. Although the composition of the teams involved in a project might be the same, the representatives sent by respective invited agencies might change for many reasons. There were many occurrences where the different representatives sent affected continuity. This issue was highlighted by Respondents R1, R8 and R10. In a tone of dissatisfaction, Respondent R8 stated, *There were*

issues on items agreed due to changes of officers. When this thing occurs, we need to explain again and again. Luckily everything has been sealed in the contract. Respondent R10 had a similar experience: *However, the problem arises when the person who came to the meetings keeps on changing. Some of them were even from a different department in the organisation.* Nevertheless, not to make the issue bigger, Respondent R1 stated, *Sometimes the committee members come and go but then again, if we want to formulate a good policy, we need to prepare, and be well structured. So that, you can really comprehend the subject matter and come up with a better solution.*

5.7.6 Time Consuming

One may have thought that resorting to PPP may save the government time, compared to traditional procurement. Comparing them, Respondent R3 stated, *When some said that PPP could speed up a process, there are some projects that were still time consuming. If the same problems occurred, I would say using conventional procurement would be better.* This respondent pointed out that the standard construction period for an infrastructure development in a UKAS BLMT agreement is three years, whereas it could be completed using conventional procurement in a much shorter time. In addition to the construction period, Respondent R6 mentioned that the process of UKAS was also time consuming since it involves multiple internal and external parties. Voicing his frustration, Respondent R6 also stated, *We are having a major delay due to land matters, which I think that the company should have tackled earlier. Until now the Concession Agreement has not been able to be complete due to this.* Another unpleasant experience voiced was, *Compared to the conventional procurement, based on my experience, it took a longer time to seal the deal for a straightforward case. If there is an issue on land matter like ours, it will take much longer. We have another PFI/PPP project that has been on the shelf for almost 2-3 years due to issues of land title* (Respondent R7).

5.7.7 Competence of UKAS

As the responsible authority for the national PPP programme, one would expect that UKAS is very capable. Nevertheless, Respondents R6 and R9 were uncertain as to UKAS' competence. When asked to share the experience, Respondent R6 replied, *I think even UKAS is not really ready for PPP yet. The knowledge of their own staff on PPP is only based on experience, which I feel they are lacking. At that time, they very much depend on cross culture staff*

brought from the private sector. They should increase the level of knowledge and competence of their staff in handling PPP projects. They should also develop technical specialists in evaluating proposals in terms of the business model to be used, cash flows and forecasts of future prices. For our project, I can see that they were also relying on the so-called expert hired by the private company who proposed the development. They should have their own specialist or expert to verify and check their proposal. Although they invited other related government agencies to evaluate and put their comments based on previous databases, I was not so convinced. In my opinion, UKAS should have their own experts. When the proposals were distributed to the external agencies, it was time consuming. Meanwhile, Respondent R9 admitted the weaknesses on early implementation of PPP by UKAS: One thing about UKAS personnel at that time, they were not trained and exposed to the financial background of PPP. That was why they needed the private sector to assist.

5.7.8 Misunderstanding and Perception

PPP implementation by UKAS is not without controversies. Respondent R12 observed that the perceptions of the public regarding UKAS PPP are mainly adverse. The first perception is regarding the award of concessions, and Respondent R12 pointed out, *It has been commented on by many during the early days, the way in which projects are being distributed; without transparency, people claim cronyism and nepotism.* Respondent R10, however, questioned the invitation to bid for a concession: *“Normally if the time given is very short, we assume that the exercise is not a genuine competition exercise.*

Another typical misunderstanding regarding PPP UKAS is the funding of concessions is still by the Government. Respondent R12 stressed *People need to get the concept right. Most people misunderstood the PPP/PFI by UKAS. Articles have been written by academicians and journalists about the funding of PFI/PPP projects here. The government did not fund any of the projects, instead providing a Facilitation Fund for a project to take off. Secondly, what people misunderstood is the fact that the government allows the Employees Provident Fund (EPF), for example, to fund. People say that this is funded by the government, but it is not. So please get it right!* Explaining further the reason for this perception of government funding, Respondent R12 explained, *So the fact that I think, if you check a paper by I can't remember which university, they did a study about funding by EPF, and therefore they said it is very risky to the government. On the one hand, yes it is risky to the government, but it is more so to the private sector; it is also a risk, except the risk is to the private sector. When EPF is treated*

like a private agency, the risk is therefore passed on to the private sector. It's just that people get confused, because EPF take care of pensioners. Pensioners are generally civil servants. So if anything goes wrong, they are worried about the funding made by EPF. On the other hand we have to understand, if we look at the funding agreement, the government chose to guarantee a net income of so much for the EPF. So actually it is a solid investment by EPF.

Respondent R12 gave another example, *But there are occasions of Joint Ventures, for example like the Banting-Taiping highway. For that project, there are four different models used. There was one stretch, the government fully funded it like conventional finance, there were stretches where the government provided a certain percentage in order to facilitate, and there was another stretch, entirely PFI model, but when people look at it, because people say that it is supposed to be by the private sector, why is the government involved? Therefore, they said the government is funding the project. So that is not correct. It needs to be corrected.* Defending the effort by the government in advertising government initiated proposal and experimenting with Swiss Challenge, Respondent R12 urged the public to change their thinking to be more positive.

5.7.9 Contract Terms

Respondent R13 highlighted an issue regarding the concession terms used by UKAS. Respondent R13 was dissatisfied with the Certificate of Practical Completion (CPC) to be issued by the consultants hired. Respondents R13 explained, *The government may enter the site, see what is happening, but only they can issue the CPC. The next stage after that is to issue the Certificate of Acceptance. By that time, I believe it is too late in the day to actually argue whether full compliance has been undertaken by the contractor pursuant to the terms, since it's already completed. Whether you like it or not I can't terminate. All I can make is certain noises to make good.* Respondent R13 believed it is significant for the government to have some authority in micro-managing the construction of the infrastructure: *I would always argue in my opinion that the CPC must be issued by us, rather than the contractor's consultant, given the fact that I'm going to pay later on. I would also argue that we have a right to actually comment on the progress on site and proper intervention is needed from time to time. That is my biggest worry. In addition, after that the price in term of quantification. Of course they need to maintain the collection of money and all that, again it is not transparent. That is my biggest answer.*

5.7.10 Different Political Party in Government

As described earlier in the literature review, the Federal Constitution of Malaysia recognises the sovereignty of the states in Malaysia, hence certain authority is retained by the state governments. In the case of the same ruling party governing both federal and state government, the concept of power sharing makes administration between these two governments less difficult. However, there are issues when different political parties control the federal and the state government. Respondent R1 pointed out, *A current barrier is differences in political thought, between the federal government and the state governments. Different political thoughts have different approaches. For example, Selangor and Penang.*

The following sections examine the current competition policy within UKAS PPP. Figure 5.19 illustrates the cognitive mapping of the interview findings in relation to the competition policy incorporated by UKAS. This is to assist in understanding the key aspects and the issues in the competition policy implemented by UKAS in the procurement process.

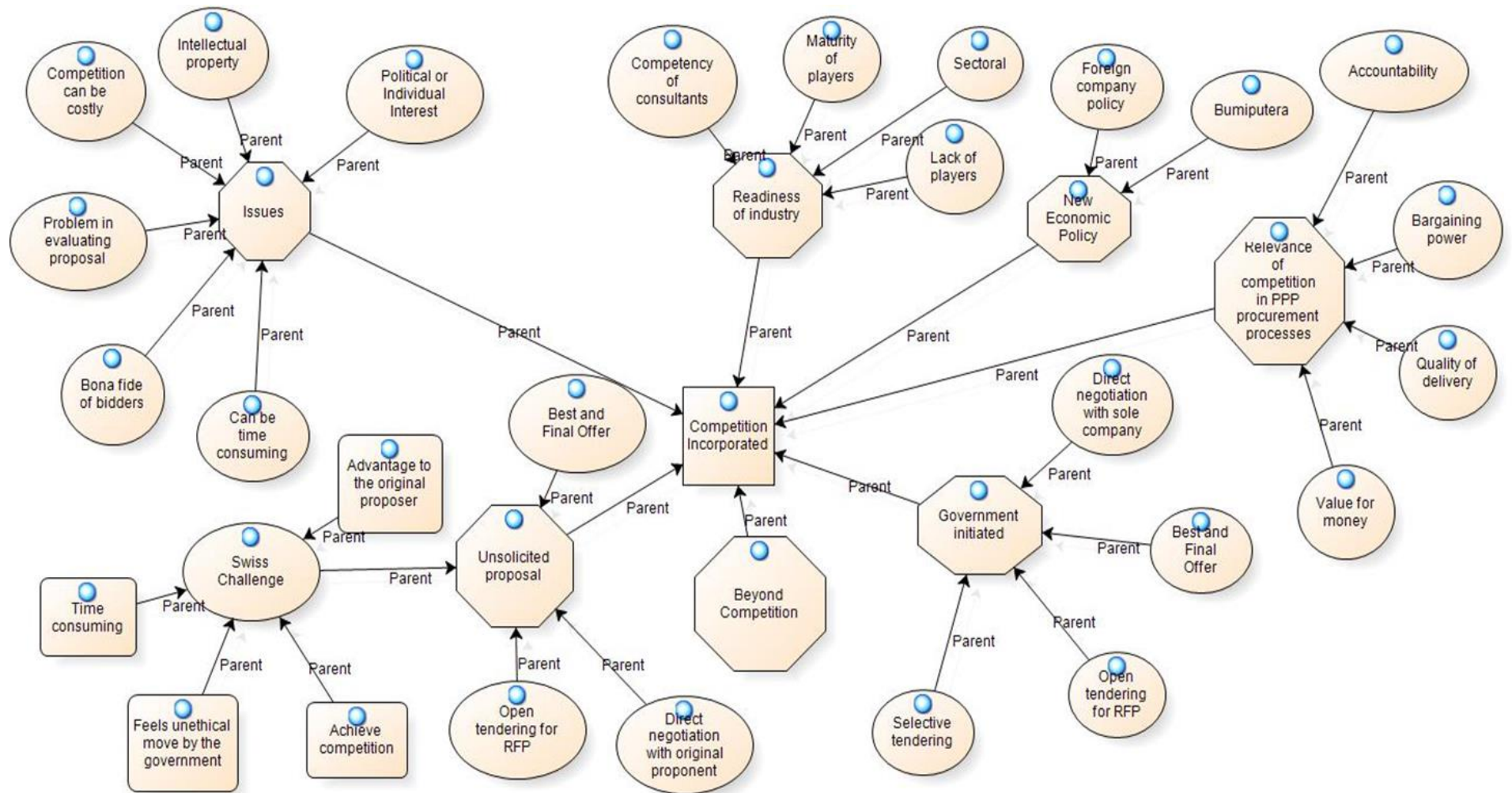


Figure 5.19 - Cognitive Mapping for Competition

5.8 Ascertain the Relevance of Competition

The participants were asked about the relevance of competition in the PPP procurement process. 12 out of 13 respondents acknowledged and agreed that such competition is important or very important (Figure 5.20). Collectively, and without hesitation, the respondents from the different groups interviewed agreed that competition is needed in the PPP procurement process for the following reasons:

- i. To achieve value for money;
- ii. To obtain quality of concession delivery;
- iii. To possess the bargaining power; and
- iv. To honour accountability.

Name	Sources	References
Competition Incorporated	13	214
Beyond Competition	3	4
New Economic Policy	8	21
Readiness of industry	8	22
Current level of competition	9	37
Procurement procedures for government initiated proposal	10	18
Procurement procedures for unsolicited proposal	11	48
Challenges in advocating competition within procurement process	12	25
Relevance of competition in PPP procurement processes	12	34
Accountability	1	1
Quality of delivery	2	2
Bargaining power	3	3
Value for money	9	12

Figure 5.20 - Relevance of Competition in PPP Procurement Process

Although it is apparent that the majority of the respondents acknowledged the benefits of having a competition exercise for the PPP procurement process, there was some concern about the success of the actual exercise in the procurement process by UKAS. Respondent R2 created a doubt by mentioning that, *Theoretically I would say competition is important*, and Respondent R12 pointed out that ... *the manner of the competition must not be such that it defeats the intention of having the competition*. These doubts were raised due to concerns about the effectiveness of the actual competition exercise. On the other hand, Respondents R6 and R9 highlighted the importance of having a fair competition.

5.8.1 Value for Money

Most respondents relate the competition element to obtaining value for money. As highlighted by Respondent R11, based on own academic survey conducted on PPP implementation, competitive tendering was identified as the most important measure to achieve value for money in PPP: *Yes, I can't remember which in paper, value for money or critical success factor, I asked respondents what are the key major elements in value for money in PPP: competition was among the top five. It shows that competition is very important, as perceived by the government and the private sector players. In fact, based on competition theory, we must have a competition.* Reflecting on the outcome of Respondent R11's own research and experience with UKAS projects, Respondent R11 recognised lack of competition as a contribution to the failure of a project: *... In fact, they [the client] admitted that based on the first phase of XXXX projects, the quality of the end product is much lower, which may have been contributed to by the non-existence of competition in the procurement process. It's proven when the project is completed; there were a lot of defects. At the end, the client is desperate and signs the acceptance of the infrastructure due to the student intake and can't afford any more delays.*

Nonetheless, Respondent R3 believed that value for money can be achieved by other means, and was more concerned about the success of the project in general: *... conducting a competition exercise in the PPP procurement process does not necessarily guarantee us value for money.* This is supported by Respondent R5, who explained that the current practice of UKAS of organising Value Management workshops is intended to achieve value for money. Respondent R5 confided that *... from these Value Management workshops held by UKAS, we obtained the value for money in each project.*

5.8.2 Quality of Delivery

Meanwhile, three references were made by to the importance of competition in obtaining quality of service. These respondents believed that conducting a competition exercise in the procurement process allows the best Special Purpose Vehicle to be chosen, resulting in quality of delivery. Respondent R4 stated *... if we want to have a quality end product, we want to be a partner with the best company available to deliver.* Similarly, Respondent R13 was of the opinion that competition is very important in achieving a high standard of delivery through to the end of the concession.

5.8.3 Bargaining Power

In contrast to a competitive exercise, a non-competitive exercise in the procurement process reduces the government's bargaining power. PPP is the best option when the government possesses maximum bargaining power (Zeisel, 2009). Respondent R7 shared this view, admitting that ... *the problem is when you start to negotiate with only one party, and then the government will lose their bargaining power.* Respondent R6 stated the same thing: ... *if direct negotiation or direct award to a single company has been chosen, we don't really have the bargaining power since we only deal with one party.* Respondent R11 gave an insight into the implications of non-competitive exercise in the procurement process, pointing out that *There are implications of direct negotiations in the future, including higher price of maintenance.* Based on respondent R6's project, which uses a non-competitive format for the procurement process, the cost of maintenance is four times higher than in a project using conventional public procurement.

5.8.4 Accountability

Despite some respondents being uncertain of the status of PPP as public procurement, UKAS is the government agency responsible for facilitating the procuring of infrastructure to the public through PPP. In a later phase, the lease of such infrastructure is most likely to be paid from the government's reserve, which is contributed by the taxpayers, so there is no doubt that UKAS is significantly accountable to the public at large. Respondent R8 strongly believed that, *The government is accountable to the public.* Respondent R8 added ... *competition and transparency is the key.*

5.9 Beyond Competition

Despite that respondents believe that competition is an important element to incorporate in the PPP procurement process, there appear to be some reservations by a few of the respondents, who are of the opinion that a holistic approach needs to be taken of the procurement process, rather than focusing on competition (see Figure 5.21).

Name	Sources	References
Competition Incorporated	13	214
Beyond Competition	3	4
New Economic Policy	8	21
Readiness of industry	8	22
Current level of competition	9	37
Procurement procedures for government initiated proposal	10	18
Procurement procedures for unsolicited proposal	11	48
Challenges in incorporating competition within procurement process	12	25
Relevance of competition in PPP procurement processes	12	34

Figure 5.21 - Beyond Competition

From the policy maker's perspective, Respondent R2 pointed out that ... *We might get value for money at the point of the procurement process; however, competition will not guarantee the success of the infrastructure development. There are many other factors that still need to be considered.* Respondent R8 added that the objectives and the drivers of the PPP itself are more important to be accomplished.

This view was also supported by Respondent R3 which sees this from the operative point of view. Respondent R3 stated ... *competition exercise in the PPP procurement process, does not necessarily guarantee us value for money.* In addition, Respondent R5 opined that if the objective of the government is to achieve value for money from the PPP exercise, it could be achieved by other means. To support his argument, Respondent R5 proposed that the current Value Management workshop conducted by UKAS is intended and able to achieve value for money even when a non-competitive exercise is being used for the procurement process.

Generally speaking, this insight suggests that the respondents are aware of the importance of competition in the procurement process and the benefits of incorporating the competitive element; however, implementation of competition might not be a priority for the government.

5.10 Exploration of Competition in UKAS Procurement Process

Although the step-by-step procedure was discussed above, feedback from the interviews is vital in providing insight into the actual practice of UKAS on the ground. Figure 5.22 illustrates the respondents' remarks on the practice of competition in the procurement process for government-initiated projects, and Figure 5.23 for unsolicited proposals. It is important to note that the feedback is derived from the respondents' own experience with the UKAS procurement process.

Name	Sources	References
Competition Incorporated	13	214
Beyond Competition	3	4
New Economic Policy	8	21
Readiness of industry	8	22
Current level of competition	9	37
Procurement procedures for government initiated proposal	10	18
Selective tendering for Request for Proposal	3	4
Direct negotiation with a sole company	4	7
Open tendering for Request for Proposal	5	5
Procurement procedures for unsolicited proposal	11	48
Challenges in advocating competition within procurement process	12	25
Relevance of competition in PPP procurement processes	12	34

Figure 5.22 - Procurement Procedures for Government-Initiated Proposal

5.10.1 Procurement Procedures for Government-Initiated Proposal

For Respondents R6, R7 and R10, their projects were deliberately awarded to a sole company without a competition exercise, while Respondents R8 and R9 experienced a competitive or partly competitive procurement procedures by UKAS. The research defines *partly competitive* as selective tendering.

Some respondents emphasised that the decisions from the procurement procedures need to be determined according to the nature of the project. Respondent R5 explained that *... not every project is suitable to be in a competitive format. As an example, a military camp, power plant, we don't do it in an open competition format due to security reason.* For Respondent R12, the government put effort into fostering competition by advertising the Request for Proposal for government-initiated projects. According to Respondent R12, *So I would say to a certain extent the movement towards competition, now appears to be more obvious. If you open up the UKAS website, most of the government-initiated projects are being advertised.*

5.10.1.1 Open Tendering for Request for Proposal

While the endeavour of the government to foster competition is focusing on the UKAS guideline, it is not being followed. This was expressed in the following remark by Respondent R6, *Literally, based on the UKAS guidelines, they insist on calling for Request for Proposal from at least three companies. However, sometimes they did not follow their own guidelines. I don't have the numbers, but from what I have been told, most of the PPP projects for other*

education institutions also have not practised a competition format of the procurement process. Respondent R7 and R10 had the same experience with different projects.

As suggested in the previous section, the procurement procedures for each project needs to be tailored and may not be suitable to be conducted in an open format. Despite this, Respondent R12 believes that the government has moved on from awarding directly to sole companies for government-initiated projects, and based on the fieldwork the practice is very much alive. This was experienced by Respondents R6, R7 and R10. The projects awarded directly were not regarded as complex buildings and were conducted in an open format to obtain competitive pricing. Nevertheless, this is what the respondents may be referring to with regards to developing local or *Bumiputera* entrepreneurs, where simple types of project are used rather than awarding complex types of project.

5.10.1.2 Selective Tendering for Request for Proposal

Respondents R9 and R10 briefly highlighted their experience with UKAS selective tendering. Although there was nothing of significance in their feedback, Respondent R9 experienced a lengthy process. After the invitation for a selective Request for Proposal process, UKAS were not able to decide on the best proposal. They proceeded with another round of the Best and Final Offer exercise.

Best and Final Offer was not mentioned in either the UKAS guideline or its website, thus making its implementation unclear. However, it was made clear that the substance of Best and Final Offer is commonly being used inside the UKAS procurement procedures. Respondent R3 revealed, *For Best and Final Offer we call for a multiple round of tendering. The original proponent is also invited to join the tender exercise.* Respondent R9 explained in detail the experience with UKAS Best and Final Offer. A multiple round of tendering is conducted until the government gets what it wants. When asked about the procurement process, the response received was that the guideline for Best and Final Offer is for internal use only and it is in the process of enhancement.

5.10.1.3 Direct Negotiation with a Sole Company

There are clearly inconsistencies in the procurement procedures practised by UKAS. Although it is stated in the UKAS guideline that a minimum of three companies should be shortlisted and forwarded to UKAS for consideration, Respondent R1 freely admitted that it is

the norm to award and negotiate with a single company for certain types of infrastructure. *For a highway project, normally it will be a direct negotiation with a sole company.* In the spirit of good governance, this may be acceptable if the project was initiated by a private company who had spent resources on conducting studies and presenting the proposal to the government; however, if the request originates from the government and there are minimum risks to be borne, the government might want to conduct some competitive element in the procurement procedures rather than awarding and negotiating with a single company. Although this may seem to result in a loss for the government, Respondent R1 pointed out that the advantage of using this route is its flexibility. If the concern was about value for money, Respondent R1 confided that *We can really go for value for money even though with one company. Then again it depends on how we negotiate and prepare the value management process, hence reflecting the value for money to the public.*

As already discussed, in relation to achieving the terms of the national agenda, Respondent R6 shared his experience of a direct negotiation where *“The concession was decided to be awarded to the proposer due to the reason of reducing the domination by existing major players and to train new players.* They were consulted regarding this issue and were told that if they had different views, an invitation for Request for Proposal would be advertised. It is also interesting to note that the instruction to award and negotiate with a single company comes from a different party. Quoting Respondent R5, *Nowadays, there is no one-to-one direct negotiation unless there is an instruction.* Respondent R5, however, did not specify where the instruction was to come from.

5.10.2 Procurement Procedures for Unsolicited Proposal

Although the term unsolicited proposal is used globally, the respondents were more familiar with the term *private-initiated project*. Either they are not familiar with the term and the concept or they are not comfortable with the term unsolicited. When asked the numbers received as unsolicited proposals, Respondent R2, R3, R4, R5 and R6 stated that UKAS and clients did receive many of them. This is not surprising, since UKAS welcomes unsolicited proposals in their guideline. However, due to the confidentiality of the documents and information, the statistics on numbers of unsolicited proposals received by UKAS were unavailable. The impression given by the respondents were alike: *Our project is mostly private initiated* (Respondent R1); *We receive quite a lot of privately initiated proposals* (Respondent R3); *Yes; we receive many”* (Respondent R2); *Of course. We received many. I*

believe every work section received many unsolicited proposals. Either they were sent directly to us or to the ministry and other stakeholders (Respondent R4); and Lately it is more private driven (Respondent R5). Respondent R5 however emphasised *back again to the numbers of unsolicited proposals received. Yes, we received many unsolicited proposals, but not every project will be realised especially if it is not in the ministry's or agency's planning.* According to Respondent R9, most of the proposals received were not feasible or were lopsided. Despite the benefits that can be brought by the private sector, there were attempts to squeeze the government for a supra-profit contract. Due to the vast numbers of unsolicited proposals received, the policy maker in UKAS admits *there is a need for a proper method to manage it.* Figure 5.23 demonstrates the nodes for the overall picture of the respondents' feedback on the practice of unsolicited proposals by UKAS.

Name	Sources	References
Competition Incorporated	13	214
Beyond Competition	3	4
New Economic Policy	8	21
Readiness of industry	8	22
Current level of competition	9	37
Procurement procedures for government initiated proposal	10	18
Procurement procedures for unsolicited proposal	11	48
Open tendering for Request for Proposal	2	2
Direct negotiation with original proposer	3	3
Swiss Challenge	7	28
Time consuming	1	4
Achieve competition	1	1
Feels unethical move by the government	3	5
Advantage to the original proposer	4	8
Challenges in advocating competition within procurement process	12	25
Relevance of competition in PPP procurement processes	12	34

Figure 5.23 - Procurement Procedures for Unsolicited Proposals

5.10.2.1 Open Tendering for Request for Proposal

Despite the perception of a link between unsolicited proposals and direct negotiations, UKAS did try to inculcate some element of competition for unsolicited proposals. Respondent R3 stressed that *If there were more than one proposal for the same infrastructure, UKAS might suggest an open competition for Request for Proposal.* In contrast, private practitioners may

take the opposite view. Respondent R10 stated that it was unfair not to award a concession to the original proposer: *But I don't think it's fair for an unsolicited proposal to be called for another round of tendering. The original proposer has the advantage of having extra info and extra time for preparing the proposal. Sometimes I see this exercise as just a formality when in the end; they will still award it to the original proposer.* Overall, the differences in these views are not surprising since the aims and objectives of the government and the private sector will not be the same. The government should always advocate good governance while the private sector aims for maximum profit.

5.10.2.2 Direct Negotiation with Original Proposer

From an expert's point of view, Respondent R12 asserted that a pure private-initiated proposal typically comprised the private company's own initiative and effort to conduct research, studies and the proposal of risk in implementation. There was also a hefty price absorbed by the private companies in order to produce the proposal. This explains why the private sector would prefer direct negotiation when submitting an unsolicited proposal. It is important to distinguish between the direct negotiation procurement procedures of a government-initiated project and a purely private-initiated unsolicited proposal. Unlike the government, the private company sees the potential and takes the risks, especially in implementation.

Respondent R4, however, suggested that, based on experience, *Most of my projects are direct negotiation projects. It's either because the project is complicated or they were the only one interested in initiating and sending us a proposal.*

5.10.2.3 Swiss Challenge

Although the Swiss Challenge is nowhere mentioned in the UKAS guideline or on the UKAS website, UKAS have been experimenting with it but with no success. When asked to define *no success*, Respondent R2 replied *In the end, the original proposer's offer is still the best.* As shown in the nodes in Figure 5.23, the responses to implementation of the Swiss Challenge by UKAS are expressed in four nodes;

- **Achieves competition** – Respondent R3 was satisfied with the mechanism in dealing with unsolicited proposals: *“Nevertheless the experience was ok and*

we know that by doing that we have alternatives. The prices submitted by other interested participants were quite competitive.

- **Time consuming** - Respondent R1 believed that the whole process of the Swiss Challenge was time consuming, stating *Swiss Challenges can even take up to two years. It's too long. ... If six months, it's ok. But can it be done in six months? If we can accomplish the Swiss Challenge process within one year, it is considered as an achievement.* This may be caused by the unavailability of guidelines on dealing with unsolicited proposals.
- **Feels an unethical move by the government** – The respondents were also of the opinion that the Swiss Challenge is unfair and unethical. This can be seen by these responses: *... I don't think it's fair for an unsolicited proposal to be called for another round of tendering (Respondent R10); I'm not sure at that time whether it's the right thing to do, in the sense that the proposal was initiated by the private sector but yet we invited others to bid. We also added some requirements to the need statement for other companies (Respondent R3); On the other hand to call a competition exercise for an unsolicited proposal is not ethically right. PPP is not as simple as conventional procurement (Respondent R9).* Another bold statement made by Respondent R9 was *UKAS tried to avoid the Swiss Challenge if possible; to them it's not fair to the original proposer.* The researcher observed that the views under this node were however based on sentiment by the respondents. The only problem legally related to unethical and unfair behaviour in the Swiss Challenge is the issue of the intellectual property, which can be managed in an appropriate way.
- **Advantage to the original proposer** –The researcher looked deeper into why the Swiss Challenge is undesirable. A clear indication given by an expert was that the process was merely a waste of time and money, for both government and the private sector. The reason given by Respondent R13 was, *It's a bit of nonsense. To me I'm not keen simply because, the original proposer will have the edge against others. He knows what he is proposing. In this situation, the original proposer owns a Tunnel Boring Machine.* He pointed out that, in whatever situation, the original proposer will always hold an upper edge in a

Swiss Challenge. The reason for this advantage was spelled out by Respondent R10: *The original proposer has the advantage of having extra info and extra time for preparing the proposal. Sometimes I see this exercise as just a formality when in the end they will still award it to the original proposer. This view is supported by Respondent R9: We can see that whoever proposes a project will have the upper hand in terms of knowing what they want; how to do it; what business model they are going to propose and present to the government.*

Notwithstanding the good intention of organising competition through Swiss Challenge, Respondent R2 believed that it could not achieve competition since it would not attract other bidders. He stated that *Normally since a private company initiated a proposal, they will be the only one interested with that project.* Failure to attract bidders defeats the purpose of having a Swiss Challenge.

5.11 New Economic Policy

The government created the New Economic Policy much earlier than the PPP programme, and even earlier than privatisation. Since then, it has been used to in an attempt to balance the socio-economic equality of the multi-racial citizens of Malaysia, consequently aiming for national unity. As tools to achieve the national agenda, privatisation and PPP have been used.

Little is known about the implementation of the New Economic Policy incorporated in the PPP procurement process by UKAS. In public procurement regulations set by the Malaysian Treasury, there are clear guidelines on the implementation of the New Economic Policy, although there are none for the PPP procurement process. As discussed in an earlier section, UKAS did not follow the public procurement regulations. Figure 5.24 shows the findings derived for the New Economic Policy incorporated within PPP in nodes.

Name	Sources	References
Competition Incorporated	13	214
Beyond Competition	3	4
New Economic Policy	8	21
Foreign company policy	1	3
Bumiputera	8	16
Readiness of industry	8	22
Current level of competition	9	37
Procurement procedures for government initiated proposal	10	18
Procurement procedures for unsolicited proposal	11	48
Challenges in advocating competition within procurement process	12	25
Relevance of competition in PPP procurement processes	12	34

Figure 5.24 - New Economic Policy

5.11.1 *Bumiputera*

In an attempt to discover the status of the New Economic Policy in PPP, the respondents were asked whether *Bumiputera* is applied to the PPP procurement process. The response in general suggests that the national policy is also applied in the PPP procurement process. This was confirmed by eight of the respondents. Respondent R2 asserted *Yes, the policy is very much applied to the PPP too. The New Economic Policy is a National Policy. PPP is one of the instruments for the government to achieve the target of New Economic Policy to restructure the socio-economics of the people. We still have to follow the related overarching national policy.* Respondents R4 and R11 also stressed that there is no exclusion since the New Economic Policy is a national agenda. Allied to the earlier question, the respondents were then asked about the details of the implementation, and the responses were more or less similar. Respondent R4 stated, *We also put the requirements into our concession agreement. In the Special Purpose Vehicle we're required to award some percentage to the Bumiputera work contractors and maintenance contractors. Even banks also played their part by putting some requirements for the Bumiputera policy.* In line with this response, Respondent R5 stated the same rule: *Nevertheless, we emphasise in the Special Purpose Vehicle company structure to follow the 30% requirement of the Bumiputera circular.* Besides the minimum percentage of equity ownership fixed for a Special Purpose Vehicle, Respondent R3 pointed out that a minimum percentage is also fixed for the work contractor and the consultants hired.

Furthermore, some respondents were asked whether the government would benefit from PPP with the restriction imposed. Respondent R12 said that the government has always used

government procurement to achieve its aim in the New Economic Policy, and PPP is not spared. Hence if the *Bumiputera* benefit from PPP, the government has accomplished its mission, even if it outweighs other elements such as the competitive procurement process. Quoting Respondent R12, *Without PPP/PFI, we might not have achieved the elements for nation building. Bumiputera certainly benefits from this.* Respondent R13 praised the national policy and is of the opinion that the New Economic Policy should also promote competition between the *Bumiputera*: *The New Economic Policy is good. In fact, the purpose of the policy is to promote a healthy competition and to actually inculcate or to help the Bumiputera to grow. On the other hand, at this stage not only to grow, but to compete between the Bumiputera. I believe we have good Bumiputera companies who can actually compete.* Despite praise for and defence of the policy, Respondent R13 was concerned about the implementation on the ground: *In this stage, the New Economic Policy can't be blamed in that sense. If we want to conduct a healthy competition between the Bumiputera, we need to be transparent; when they submit the tender; how was it proposed; what are the guidelines for evaluation; how the tender is being evaluated; the financial capacity, then and there it's ok. I am for New Economic Policy. But then again how to implement, I wonder.*

5.11.2 Foreign Company Policy

Besides priority given to *Bumiputera* companies, there is another restriction to the involvement of foreign company or foreign ownership for PPP by UKAS. Respondent R5 explained ... *under the annual development expenditure, the rule is not more than 49 percent equity; in PPP the percentage of equity is not more than 35%*". PPP goes a great way to tap resources and transfer technology from the private sector. Limiting competition from foreign companies in participating in the procurement process will relinquish some of the benefit of PPP. Respondent R5 raised the conflict of interest faced by UKAS: ... *in terms of the involvement of foreign companies, we have a restrictive policy for foreign involvement in the Special Purpose Vehicle. Yet, we want their innovation in high technology.*

5.12 Readiness of Industry

In order to gain maximum benefit from a competitive procurement procedure, an environment of healthy competition should be introduced. Healthy competition will drive a company to strive for the best, hence benefiting the government through PPP. Consistent with the objective of enhancing the practice of competition in the UKAS procurement process, the

researcher examined the data for readiness of the Malaysian PPP industry. Table 5.22 outlines the feedback received on the readiness of the industry. The analysis in Table 5.22 demonstrates the current situation of the PPP industry in Malaysia. A number of respondents talked about what they believe will hinder a healthy competitive exercise.

Table 5.22 - Readiness of Industry

Readiness of Industry	
Lack of players	<ul style="list-style-type: none"> • Criteria in the Request for Proposal documents are intended to filter capable companies from the non-capable. But the few left are mainly the same companies who participate in most of the UKAS Request for Proposal exercises. (Respondent R4) • We discovered that the same companies participate in our tender exercises for different sectors. (Respondent R4) • Some may even be a sister company. Higher criteria in the Request for Proposal may even result in same players. (Respondent R4) • However, we might have a problem to get participation for complex projects due to the minimum number of players. (Respondent R4) • Participation from the private sector has also increased, different companies rather than the same players. (Respondent R5)
Maturity of players	<ul style="list-style-type: none"> • When a company wants to propose an infrastructure project, they should have done a comprehensive study on everything including value for money, not purposely for profit. The private sector should be more efficient in giving the services. But it does not happen that way; we still have to guide them. The maturity of the players is still not as I expected. (Respondent R3) • Yes, we only have a few PPP players because of the financial thing. An organisation must be strong in financials to join a PPP bid. The fact that the government needs a company which will stand for another 27-30 years. Not a one-night company. (Respondent R9)
Sectoral	<ul style="list-style-type: none"> • Depends on the sector. (Respondent referring to the readiness for healthy competition) (Respondent R1)
Competency of consultants	<ul style="list-style-type: none"> • For our project, I can see that they were also relying on the so-called expert hired by the private company who proposed the development. They should have their own specialist or expert to verify and check their proposal. Although they invited other related government agencies to evaluate and put their comments based on previous databases, I was not so convinced. In my opinion, UKAS should have their own experts. (Respondent R6) • A study among Qs, in MICRA 2014, you look at the paper, even the Qs are not sure how to deal with, in terms of provision of services when they deal with PFI. Many start thinking it is the same as traditional procurement. In a way, yes, it is the same. But in a way it is not the same. Because you are trying to price what is needed to be considered and factors for 30 years. (Respondent R12) • So what do they do? They think conventionally. They load it. If all the mentality of our suppliers is like that, competition or negotiation will remain the same. It is only a belief, through competition you might get value for money. (Respondent R12)

5.13 Current Level of Competition

Overall, it can be seen that UKAS has not set aside the competition element within its procurement process. Respondent R10 observed that there are some competition elements in the UKAS guideline, although Respondent 10 did not give examples. UKAS current practice is said to be improved over their previous practice. Respondent R2 commented, “*Comparing then and now, we are moving towards more competitive exercise.*” Although it is said that PPP is complex and should not be treated in the same manner as public procurement, Respondent R12 commented, *Why do we put to competition? If we want value for money, whether PPP is a complex procurement or not, we allow open tendering.*

There were five approaches mentioned by the respondents on the efforts taken by UKAS to foster competition within its procurement process:

- **Advertisement** – According to Respondent R2, the calls for an open competition of Request for Proposal were intended to achieve value for money: *We tried to achieve value for money through competitive bidding.* Compared to previous years, Respondent R2 emphasised that UKAS is moving towards more open bidding, and provided in-depth reasons for UKAS’ previous practice of lack of competition: *Back then there were only few players and so much political pressure.* Respondent R2 added that the private sector was not very supportive of the PPP back then.

According to Respondent R12, UKAS can be seen advertising their Requests for Proposal for projects which he understood as advertisement for government-initiated projects. The alleged practice of awarding concessions without competitive bidding is history. Giving credit to current practice, Respondent R12 stated, *So if we base it on the fact that they have advertised all their calls for proposals, I would say that the competition has increased up to a higher level, and is relatively transparent.* When asked whether the current competition practice needed to be improved, Respondent R12 suggested that if UKAS’ objective was to achieve competitive bidding and give an equal opportunity for everyone to participate and compete, UKAS had indeed achieved its objective. Considering his knowledge and observation on UKAS current practice, Respondent R12 stated ... *in terms of having fair opportunity*

to all through the advertisement, they achieve it. In another words, no restrictions. The researcher, however, did not manage to acquire statistics on the number of concessions calling for open Request for Proposal for government-initiated and unsolicited proposals.

- **Access to information** – In order to organise a fair and healthy competition exercise, each interested party should compete on a level playing field. The participants should have equal access to information on PPP procurement opportunities and should not be restricted. According to Respondent R12, notice of government-initiated projects is advertised on the UKAS website: *So in the advertisement, all the details, and documentation is there.* Respondent R4 further explained UKAS practice: *If it is for a Request for Proposal exercise, we will put the criteria that have to be met in the Request for Proposal document. Paid up capital; expertise; previous experience; consultants hired, etc. Normally the requirement of an Special Purpose Vehicle in a competitive exercise is stricter than a direct negotiation requirement*". Respondent R1 commented the same.

Access to information is also practised by UKAS for almost every procurement process. This can be seen from the response by Respondent R1, *"Made known means if you are a proponent, you will be made aware. Aware means that after the prequalification stage we will select qualified companies for Request for Proposal, let's say four or five companies, we conduct a briefing. We will tell the companies of the requirements, and then we will upload the question. You can access our website and look into the example of waste to energy projects. We received questions from companies for that project.* Access to sufficient information will allow the bidders to demonstrate complete knowledge in their proposal.

- **Open for new entry** – To attract players to enter the PPP industry and participate in PPP programmes, Respondent R2 indicated that UKAS have reduced the barrier. *Back then it was hard for us to get private sector participation in the PPP programme. So we have to set aside barriers for them*

to participate. I think we have moved forward. As much as UKAS wants to attract new entry to the market, there are still some restrictions on bidders which deter new entrants. Respondent R4 commented, Criteria in the Request for Proposal documents are intended to filter capable companies from the non-capable. But the few left are mainly the same companies who participate in most of the UKAS Request for Proposal exercises. We wanted to let the market open. However, Respondent R12 was of the opinion that the practice is fair enough; interested participants should meet the requirements set by UKAS. However, putting barriers to entry may eliminate the competitive element and potentially lead to the market becoming a monopoly or oligopoly.

- **Avoiding monopoly** –According to Respondent R4, UKAS tries to avoid monopoly: *We wanted to let the market open, and we would also like to avoid monopoly and practice fair distribution.* However, Respondent R4's further response demonstrates that practice is still selective in UKAS: *Let's say, the nature of the project itself, there were many projects in my section that I categorised as a simple project, especially hostels. I would love for them to be opened to qualified companies to ensure that we will get a competitive price. There are a lot of capable companies who can deliver. Then we will get a good response resulting in a healthy competition exercise.* However, on further examination, although most of the concessions awarded by Respondent R4's section used the mode of direct negotiation with a single company, no monopoly company was detected. There is a suggestion that UKAS has imposed a clause inside the concession agreement to avoid monopoly; Respondent R7 proclaimed, *If I'm not mistaken, there are clauses that forbid the concession holder to be involved with other PPP concessions. They are not allowed to participate in other concessions until they have completed the current concession. I see this as an effort by the government to curb the monopoly of the big players. But I don't know whether the enforcement is really done by the government.* However, since Respondent R7 is the only one to mention this practice, the researcher could not establish whether it is common in UKAS or a one-off practice.

- Swiss Challenge**– Based on the analysis conducted earlier, Swiss Challenge is not common practice in UKAS. It seems that this is not a favourable option even among private companies. Respondent R2 asserted that *Sometimes in order to get a job, the original proposer claims that they deserved to be awarded due to the ownership of Intellectual Property. However, if we check that they don't qualify for Intellectual Property, we will advertise for Request for Proposal.* Respondent R3 commented that by introducing the competition element for unsolicited proposals through Swiss Challenge, it was possible to obtain competitive pricing and alternative proposals.

Name	Sources	References
Competition Incorporated	13	214
Beyond Competition	3	4
New Economic Policy	8	21
Readiness of industry	8	22
Current level of competition	9	37
Procurement procedures for government initiated proposal	10	18
Procurement procedures for unsolicited proposal	11	48
Challenges in incorporating competition within procurement process	12	25
Problem in evaluating proposal	1	2
Competition can be costly	1	2
Bona fide of bidders	2	3
Can be time consuming	2	2
Intellectual property	3	5
Political or individual interest	9	11
Relevance of competition in PPP procurement processes	12	34

Figure 5.25 - Challenges in Incorporating Competition within the Procurement Process

5.14 Challenges in Incorporating Competition within Procurement Process

A number of issues were introduced by the respondents when they were asked about constraints and barriers to upholding competition; they have been coded into 12 sub-nodes. The responses are demonstrated in Figure 5.25.

- Political or individual interest** –A number of alleged abuses of power by the government on PPP projects have been highlighted in the newspapers. Companies have been awarded projects directly, without justification. Interestingly, seven out of the 13 respondents indicated political or individual

interest as a barrier to implementing competition. The nodes receiving the highest response gave the impression that this is the most common issue. In their own words, *The main issue is the political interference* (Respondent R8); *Back then there were only few players and so much political pressure* (Respondent R2); *However, in Malaysia, due to strong political influences, competitive exercises may have been set aside, and To a certain extent UKAS can evaluate, unless they have been instructed by higher authority to award a project to a certain company* (Respondent R11); *A PPP proposal can come from a few channels. Either initiated by the private sector and submitted to either the relevant ministries or directly to us, or proposed by the ministries/agencies themselves and even from politically motivated projects* (Respondent R4); and *Nowadays, there is no one-to-one direct negotiation unless there is an instruction* (Respondent R5). For Respondent R12, the alleged practice was in the past and the government should have improved by now: *So to squarely say that now the mentality of the implementers still appears to be talking about hush-hush, still talking about nepotism and cronyism, I think that situation has changed.* However, there is considerable proof that the practice may still be very much in place, as some of the respondents' projects were awarded to politically connected companies. These companies were exclusively awarded a concession even if they had no experience in PPP projects. Although inevitably lucrative long-term concessions attract political interest, the competitive procurement process should be a solution to address this issue.

- **Intellectual property** – Due to legal issues, intellectual property has been deterring some countries from introducing the Swiss Challenge and Best and Final Offer approaches. Respondent R2 pointed out that there were companies who use intellectual property as a merit to obtain an award directly after submitting the proposal. Respondent R1 said that there were also concerns regarding this matter, *We don't want people to duplicate other people's idea.* Respondent R1 continued, *I think it's plagiarism, and intellectual property rights are a fundamental issue in PPP.* This is where a legal framework for PPP is deemed to be important. Respondent R13 stated that under Malaysian

law and the judiciary, intellectual property is not something to be concerned about:

Going back on how our system works. The person who proposes has not much idea anyway. I would refer to a few cases I read. It was the designer who came up with the idea; this is according to the few court cases in Malaysia. The designer joint-ventured with the one who proposed. Back to your question, seldom do people patent their ideas; people patent their designs, and design comes from the designers. Unless a company like XXXX can design, then they hire a designer to do a detailed design. That would be a challenge. I don't think that would happen in Malaysia, especially with Bumiputera companies. I'm not that worried about that part.

Based on his legal background and experience, Respondent R13 proposed a solution: *if you want to conduct a Swiss Challenge, you have to impose a rule that the intellectual property has to be transferred or assigned to the government. The person who gets the job has to pay a sum of money for the intellectual property to the original proposer, then it can work.*

- **Bona fide of bidders** – It was suggested that the respondents found that open competition for the PPP procurement process might attract non-genuine bidders, therefore highlighting the intention of the bidders. Quoting Respondent R2, *Are they really interested in the project? We have to ensure that the bidders are really committed to carry on the projects for up to 30 years. Sometimes when we evaluate proposals received through a competitive process, everything is good on the papers submitted, but based on our experience of previous projects, they might not be able to deliver, to the extent of selling the project later.* The same issue was raised for a Swiss Challenge process by Respondent R9.
- **Can be time consuming** – The researcher encountered a complaint from one respondent that the process of organising and evaluating a proposal was time consuming. Respondent R1 gave an example of Swiss Challenge: *We tried Swiss Challenge, but our main concern was time and speed. We don't want*

people to duplicate other people's ideas. I think it's plagiarism and intellectual property rights are a fundamental issue in PPP. The other concern is the time consumed. Swiss Challenges can even take up to two years. It's too long. If six months, it's ok. But can it be done in six months? If we can accomplish the Swiss Challenge process within one year, it is considered as an achievement.

For Respondent R6, even logistics-wise a competitive process could take some time: *When the proposals were distributed to the external agencies, it was time consuming.* This may suggest that the actual competitive process did not contribute to the waiting period, but instead might be related to the efficiency of the delivery. No clear timeline is set by UKAS in their guideline. Clear guidelines should minimise the length of time consumed in organising and evaluating proposals.

- **Problems in evaluating proposals** – From Respondent R9's participation in the UKAS procurement process, *There were two rounds of bidding. When we first submitted our proposal, UKAS reviewed it. But they had a major problem of evaluating our proposal since it wasn't an apple-to-apple comparison.* For competitive procurement procedures for unsolicited proposals to be used in the future, Respondent R9 suggested the following: *If you're going to get another party to challenge the original proposer, they will face the problem like I told you to evaluate something that is not an apple-to-apple comparison.* As a consequence, difficulties in evaluating proposals may lengthen the overall process, which will affect both the government and the companies. Since PPP proposals are very subjective, it is important to note that ample time is needed in evaluating and scrutinising them for positive results on procurement.
- **Competition can be costly** – Involvement in a competitive procurement process can be costly to the bidders, and the cost will definitely be passed on to the government in the bidding price. Respondent R12 pointed out that not everything about competition in the procurement process is good: *Of course there are many disadvantages of open tendering, in particular the entry cost, which at the end of the day, the industry will have to pay, because the contractor will put it in their pricing. ... So for example, if we are going for*

open tender, and it is going to cost the industry so much, I do not know, like in the olden days, for hospital projects, we have contractors who submit their bid for simple design and build; it came up to RM 200k in those days, in the early 1990s. So if there are ten contractors? How much already? You imagine that amount the government or the client has got to pay. So if that is the case that is no use. It is suggested in some of the literature that competition will increase the bidding cost; however, the literature also recognises that within certain measures the benefits of the competitive procurement process may outweigh the high cost of bidding.

5.15 Summary

This chapter brought together key findings from the document review exercise and the experience of the respondents that reflects the actual practice of the UKAS procurement process. Based on the document review, the study found both resemblances and dissimilarities in the documents reviewed. The differences in the information regarding the procurement process and competition are quite obvious. These may result from changes in government needs over the years. Conversely, the drivers for the government in adopting PPP and privatisation have not changed much. Although the wording may look different, the content is still the same. Both programmes aim to improve the socio-economy of the Malaysian citizen, attaining efficiency, reducing the government's financial burden and facilitating economic growth. Even though it is only briefly explained, there is information in the Privatisation Master Plan regarding the procurement process for government- and private-initiated proposals. There is, however, insufficient information on procurement process activities in the UKAS guideline and website.

Through the interviews it was found that the status of PPP under UKAS is unclear. There was a mixed response from respondents with no one able to cite or link their claim to any statutory or legal documents. The status of UKAS PPP is vital as it determines the entire operation of UKAS, including the procurement process. The analysis showed that UKAS procurement practice has been executed not strictly according to the public procurement regulations. UKAS has been dependent on a flexible guideline balanced with extensive inter-agency committee screening, with the cabinet making the final decisions. Although flexibility may result in creativity and innovation, it may also lead to abuse of power in the absence of

detailed regulations. The respondents were optimistic that a clear framework might draw a boundary to clarify current practice.

Conventional public procurement was inadequate as an instrument to achieve the New Economic Policy, but the Malaysian Government continued to use PPP to achieve the same objective, despite avoiding the label of public procurement for UKAS PPP. The driver for the government in adopting PPP was not solely for PPP benefit, but more holistic. However, it is not known whether the government manages to get the best of PPP with current additional drivers. Nevertheless, notwithstanding its accountability as the government arm to manage PPP, UKAS' attempts to achieve the macro aim of PPP tend to cloud the importance and benefit of competition and other good governance such as transparency. Although a majority of the respondents acknowledged the need for competition in the UKAS procurement process, the challenge is to strike a balance between achieving the aims and upholding good governance. No doubt the respondents were very optimistic about the changes this research might bring.

Issues raised by the respondents were mostly in common, and similar to the issues faced by other practitioners globally. These issues can be resolved or minimised. The impact of not having a competitive procurement process seems to lead to larger and critical issues. The findings from the interviews have revealed the actual practice of the UKAS procurement process and the competition within it, complementing the document review. This information is important in understanding the whole phenomenon, and is essential to the development of the framework.

6.0 Discussion of Findings

6.1 Introduction

This chapter focuses on the final objective of the research, which is to develop a competition-based framework. In order to address this objective, the chapter synthesises the results of the literature and document reviews, and the interviews, offers readers' further meaning from the empirical findings.

The literature review provided a wide picture of the research scope. It looked at the concept of PPP overall, before investigating the best practice as implemented by numerous PPP practitioners around the world and then examining PPP in Malaysia. Chapter 3 examined the concept of competition and its application within PPP. Best practice procurement processes globally, including unsolicited proposals, were analysed, as were the constraints to incorporating competition within PPP. The Malaysian governance for public procurement and competition policy were examined in this chapter. Moving on to the case study, in Chapter 5 a review was conducted of important documents referred to by UKAS, before analysis of the results of the interviews. These empirical findings are contextualised in this chapter and used to develop the framework in an attempt to enhance the procurement process for infrastructure delivery in Malaysian PPP by incorporating competition. This chapter is divided into two sections: the first discusses UKAS procurement process and the findings on competition; and the second explains development of the framework.

6.2 Procurement Process under UKAS

This section explores the UKAS procurement process and what influences their governance. The literature suggested that there are multiple ways to govern PPP. Although the governance of PPP is very much dependent on country-specific determinants (Rufin & Rivera-Santos, 2012), no public sector should neglect the principles of good governance and accountability. The case study found that the governance of the UKAS procurement process is questionable. UKAS has been operating since 2006, and has managed to procure numerous PPP projects. In

Chapter 3, the researcher reviewed the procedures for Malaysian public procurement, proposing that UKAS is also bound by the same regulations. One of the major findings was that the respondents confirmed that UKAS did not follow the regulations for public procurement in Malaysia, or at least that they did not want to constraint themselves by adhering strictly to them. Furthermore, the respondents confirmed that there are no specific regulations for administering PPP within UKAS. In fact, several respondents believed that a specific act or regulations would only restrict UKAS from being flexible in implementation. The respondents listed UKAS' own guideline as the authoritative document, in addition to the Privatisation Master Plan. Hence, the manner of UKAS' procurement process according to these documents was further investigated. The information available in these documents revealed surprising discrepancies between them.

6.2.1 Role of UKAS

In reality, little is known about UKAS' role and their degree of involvement in PPP implementation in Malaysia. UKAS comes under the jurisdiction of the Prime Minister's Department, which was granted certain discretionary powers under the Ministerial Functions Act 1969 (Act 2). In exercising the powers conferred by the Ministerial Functions Act, under the Ministers of the Federal Government (No.2) Order 2013 (P.U (A) 184/2013) it was gazetted that UKAS should be responsible for planning, coordinating, evaluating, negotiating and supervising procurements for privatisation and PPP projects. In addition, UKAS is responsible for policy making regarding PPP for the government of Malaysia. Wang et al. (2012) described UKAS' role as planning and processing PPP project proposals. Respondent R1 explained that the concept of UKAS' involvement was centralised planning and decentralised implementation, their involvement lasting only until the finalisation of the concession agreement. UKAS is not a party of any PPP contract. Although in theory they are supposed to facilitate and realise the PPP intentions of ministries and agencies, in practice they play more of a role in leading and deciding what they consider best for the ministries and agencies. This arrangement has led to problems post-contract where, for example, there was contradiction with other stakeholders such as the end users. Respondents R6 and R7 were of the opinion that UKAS needed to extend their involvement to project implementation, since they were very much involved in the deal making in earlier phases.

Despite this, credit should be given to UKAS; throughout their PPP implementation they manage to accomplish the three main functions of a PPP unit suggested by PPIAF (2012):

developing the PPP programme and its policy; facilitating and coordinating PPP projects for government entities; and educating stakeholders regarding the programme.

UKAS does not list decision making as one of its roles, but only prepares reports to be presented to inter-agency committees such as JKAS and JTAS before every decision is made by the cabinet. This micro-management by the cabinet approval is interpreted in two ways: it demonstrates that PPP under UKAS has very much political support, and that the cabinet wants to monitor and control every step of UKAS.

6.2.2 Procurement Process: The Governance

UKAS is very flexible in its procurement process. Proposals are facilitated and treated differently according to their context. Nevertheless, UKAS' procurement process are only initiated once approval in principle has been received from the cabinet ministers for a proposal to proceed. Only then can the preparation of the Request for Proposal documents and invitation to participate be realised. It is not specified in any of the documents reviewed how UKAS decides on the route of the procurement process for a proposal.

There are inconsistencies in decision making concerning the procurement process for government-initiated projects. Findings from the interviews confirmed that the cabinet ministers' approval in principle includes which procurement process to use. The decisions, however, are based on the preliminary evaluation of proposals and recommendation by multi-tiered inter-agency committees. According to UKAS, (2015a, 2015b, 2015c, 2015d) there are inter-agency committees with different functions, JPP JKAS and JTAS, which review and evaluate PPP proposals and make recommendations to the cabinet. Findings revealed UKAS adopt their own internal assessment in deciding whether to employ PPP procurement for a proposal. The preliminary assessment details, however, are not made available to the public, and it is unclear how UKAS assessment works. Respondent R12 suggested that established procurement tools such as the Public Sector Comparator are themselves a form of competition. For instance, a proposal is required to compete with the government estimates in the Public Sector Comparator assessment.

There is a lack of information on the availability of any published rules or guidelines for the cabinet to adhere to, hence there is no clarity about the decisions made for previous concessions. Respondents R4 and R5 pointed out that there were instances where the cabinet did not follow the recommendations of the inter-agency committee. This is not surprising,

since the cabinet holds unfettered power within the UKAS procurement process. Headed by the Prime Minister, it is the highest executive authority for the government's activities, including procurement. Members are empowered under the legislature and made responsible for administering the law. The advantage of having cabinet decide is the ability to resolve problems under different jurisdictions of the relevant minister. Collective cabinet decisions should theoretically be in line with the national budget and government priorities, since all ministers are involved. Nevertheless, as described in the earlier chapter, cabinet members are political appointees from the party that has been ruling Malaysia for more than half a century. Tan (2008) suggested that similar practice during the privatisation era saw many conflicts of interest in the award of privatisation concessions. The concession award of UKAS PPP has also been alleged by the opposition party to be awarded to companies linked to the ruling party (Zahid, 2014). It appears that current practice in UKAS PPP gives the cabinet absolute discretion in making all decisions. This will increase the tendency for abuse of power and corruption.

Similar to the Privatisation Master Plan, the UKAS guideline does not specify in systematic detail their procurement process. As an authoritative document, the guideline can be criticised as lacking clarity. Respondents R2 and R4 agreed that the UKAS guideline is too general for the whole PPP implementation. Nevertheless, Respondent R2 justified that the generic nature of the guideline was purposely intended to set out basic guidance to allow for flexibility, and that its content was adequate. The UKAS guideline is aware of its own limitations, claiming that it is a generic document.

Each proposal is treated in a different way by UKAS. This has resulted in inconsistency in practice and transparency issues. Detailed and standardised procedures are considered important for PPP implementation (Aziz, 2007). The UKAS guideline, however, does not provide this and may affect PPP implementation in the long term. The confusion created by the generic nature of the guideline has made UKAS a subject for investigation by government watchdog agencies: the police, audit department, and the anti-corruption commission. Respondent R5 considered that there is nothing wrong with UKAS practice, as it is still in line with the public procurement regulations and good governance. Interested parties of PPPs and existing stakeholders may also check the UKAS website for information. However, there is different information on the UKAS website, which still lacks detail on UKAS procurement process. The absence of clarity demonstrated in the UKAS authoritative documents increases the vulnerability of UKAS practice to ethical misconduct.

6.2.2.1 Procurement Notice

The procurement notice or advertisement is intended to attract participation from the private sector for the forthcoming project. The aim is to draw widespread attention and thus create competition through the number of participants. As discussed in Chapter 3, in EU countries in projects qualifying under EU directives as public contracts or works concessions, the procurement process starts officially with the publication of a procurement notice in the OJEU. The UKAS guideline does not explicitly regulate which projects should be advertised. In contrast to the guideline, the Privatisation Master Plan proposed that all government-initiated projects be subject to a competitive bidding exercise. Apparently, there is lack of detail on the manner of publication of notice or advertisement for invitation to bid for UKAS projects. According to Respondent 12, UKAS did make efforts to advertise government-initiated projects on their website, although Respondents R6 and R7 disagreed that UKAS advertised, based on their own experience. Advertising is an important medium to announce the government's intention to develop infrastructure. Within the advertisement, the contracting authority should release sufficient information describing the projects; their purpose; qualification requirements (Craven, 2011); the procurement process timeline; and other important information (The Infrastructure Consortium for Africa & Partnerships UK, 2009). This enables interested bidders to prepare to participate. Adequate access to information will lead to a healthy and fair competitive environment among bidders.

6.2.2.2 Request for Proposal

There is criticism of the way in which most of UKAS contracts were awarded through direct negotiation without competitive tender (Zahid, 2014). This was also experienced by the respondents. Respondent R1 declared that direct negotiation with a single company has been the default procurement process for highway construction. Despite this, comments from other respondents revealed that UKAS has adopted three types of procurement procedures for government-initiated proposals: open tender, selective tender and direct negotiation. Unfortunately, statistics on the type of procurement procedures employed by UKAS were not officially available.

In the Privatisation Master Plan, competitive bidding is obligatory for all government-initiated proposals. The competitive bidding exercise was supposed to be open to the public or specific target players. Nevertheless, there were no details in the Plan on the manner of this exercise.

In contrast with the government-initiated proposals, for private-initiated proposals, contracts were awarded based on a first-come-first-served-basis to encourage private sector participation. Jomo and Syn, (2003) listed major infrastructure privatisation projects awarded without a competitive bidding exercise. Even with the Plan's clear provision for competitive bidding for government-initiated proposals, there are still some projects included in the list of government-initiated proposal projects which were awarded through direct negotiation with a single company (Anuar, 2012).

In some countries, only capable bidders are invited for Request for Proposal exercise. These qualified bidders are screened against the qualification criteria set, before being invited to participate in the tendering process. Similarly, UKAS use a pre-qualification exercise in certain projects to screen only competent and capable companies to participate in the procurement process. The recommendations of which projects should take the pre-qualification approach are made by the inter-agency committee and decided by the cabinet. The number of shortlisted candidates to be invited for Request for Proposal also depends on the cabinet decision.

It is essential for the contracting authority to secure optimum competition through an optimum number of participants. Too small a number of bidders may lead to collusive behaviour (Marques & Berg, 2011), while large numbers might deter participation due to less chance of winning (Garsse, 2008). The optimum number to achieve competition is subjective. Hansen (2003) pointed out that even three bidders can be competitive. Under the EU procurement directive, the minimum number of tenderers shortlisted for a restrictive tender is suggested as five, and for a negotiated tender the contracting authority should identify at least three rather than negotiating with a single company (Bovis, 2010). Estache and Iimi (2008) suggested that the minimum number of bidders to achieve intense competition for an infrastructure project is eight. The intention of achieving optimum competition is for economic efficiency, and a large number of bidders will also avoid collusive behaviour and corruption.

6.2.2.3 Interaction with Bidders

Prior to submission of the final bid, dialogue sessions with bidders should be engaged in, as beneficial to both parties. In the dialogue sessions between the contracting authority and potential bidders, clarification should be made on all aspects of the proposed development,

including the scope of the work, contracts, and post-construction responsibilities (The World Bank et al., 2014). This engagement must be conducted with each bidder to allow all bidders to access as much information as possible regarding the advertised projects prior to submitting final bids, hence allowing fair and healthy competitive bidding. Dialogue with each tenderer before the submission of the tender may help bidders equally to understand the whole process clearly and help to clarify any issues. The interaction with bidders will also help government to identify and improve any terms and conditions of the contract before it is awarded, making the contract more robust.

No interaction with bidders should be made after the submission of the final bid, except for clarification. This is to prevent any changes after the bid is submitted and to diminish concerns about transparency and fairness. UKAS normally organise a site visit and pre-bid briefing on the same day. Following these, UKAS allow written queries within a day or two, and guarantee to respond within three working days after the receipt of a query.

One of the flow charts on the UKAS website shows that a Value Management workshop is conducted before the preparation and invitation of Request for Proposal, but on investigation this is meant for the practice of direct negotiation. Further investigation discovered that on occasions UKAS conducted Value Management workshops after the Special Purpose Vehicle had been chosen. In an open or restrictive tender, the Value Management workshop may be conducted before the Request for Proposal with the ministries or agencies initiating the proposal. Another Value Management workshop with the successful bidder is conducted after the tender process. Through the workshop, UKAS are able to ensure that proposals are kept within their target in terms of price and scope. Where there is little concern about this practice for direct negotiations, there are worries about the unequal treatment in post-bid dialogues in a competitive bidding exercise. Although it may be good for the government to achieve their goals, any changes to the original proposal for the preferred bidder are unfair to the other unsuccessful bidders, who might be able to incorporate these changes in their bid if given equal treatment. Hence, it is important for the bidders to access comprehensive information before submitting their final bid.

6.2.2.4 Evaluation and Selection of Preferred Bidder

Following the submission of tenders by bidders, the period of evaluations occurs. Neither the UKAS guideline nor the website specify the evaluation criteria. Pre-determined evaluation

criteria should encourage maximum participation of genuine bidders. The selection of the most suitable Special Purpose Vehicle is vital in determining the success of the project (Kwak et al., 2009). This important information was not found in any of the documents reviewed. Under the Malaysian public procurement regulations, the evaluation criteria to be employed are clearly indicated. Publishing or notifying the bidders and public of the evaluation methods guarantees no impartiality in the evaluation to favour a particular bidder. Respondents R3 and R5 stressed that UKAS conducted several phases of evaluation. The early phase saw each proposal being evaluated for compliance with the requirements set out in the Request for Proposal. The interviews also revealed the evaluation criteria UKAS used when evaluating a proposal. Although in the process a feasibility study had been conducted in making the decision to choose which PPP route, the feasibility of the proposal was again examined as one of the main criteria.

Proposals received from the private sector may exceed what was required by the government, and hence not be feasible. On the other hand, UKAS found that most of the time the requirements of the ministries and agencies were excessive. UKAS believe it is important that the proposal should be buildable and financially sustainable by the ministries and agencies, which in this case is the end user. In ensuring the bidder delivers effectively, UKAS emphasise the assessment of the bidders' technical and financial strength to ensure they possess sufficient resources to undertake the project they propose. These two criteria are considered critical by UKAS to ensure that a bidder is fit to deliver its commitment throughout the entire concession period. A checklist for background information includes previous performance, current jobs in hand, experience and managerial capacity. Complicated projects require highly trained and skilled personnel. These criteria, however, may deter a new entry from breaking into the PPP industry.

Bidders' financial capacity is established through submission of evidence on financial standing and access to financial resources (debt and equity). Since bidders are also required to finance the project, UKAS requires them to submit financial arrangements and proposed payment mechanisms for scrutiny. It is also important to UKAS that the proposal is commercially sound and robust. Although the financing obligation is transferred to the bidder, UKAS need to establish that there would be no or minimum financial risk in the proposal. A high level of bankability encourages lenders and investors to participate in the project.

UKAS did not specify any methods to evaluate proposals in any of the published documents. Respondents R2 and R5 mentioned that the methods are not publicised since it is for internal use only. However, this information needs to be transparent. Respondent R1 did give a glimpse of the methods employed by UKAS to evaluate proposals: scoring methods and weighting. Commonly a pre-set weighting is fixed for specific criteria and proposals are given a score to be compared later with the overall score. The pre-set weightings however, vary according to industry and other factors decided by the inter-agency committee. UKAS also experimented with a Likert scale scoring for proposal evaluation. Currently, the flexibility and lack of transparency in the evaluation methods make it vulnerable to abuse of power and suspicion of manipulation of the scoring methods to indulge in favouritism for certain companies. Another important factor in evaluation of a proposal pointed out by one respondent is of course the price. Although UKAS do not use the lowest-price approach, the bidding price offered by the bidder or proposer is essential and needs to be within the budget approved by the cabinet and in line with government priorities so that it will not be a burden in the future.

It is not known how UKAS select the bidders to be considered for the award of the contract. Nevertheless, the UKAS guideline indicates that ministries and agencies shortlist three companies to be submitted to UKAS for selection. In reality, evaluation is conducted by the inter-agency committee, and UKAS bring the shortlisted companies to the cabinet for approval. Ismail (2013) suggested that the number of shortlisted companies should be increased to more than three. Although the tender board in the Malaysian Public Procurement Regulations is told to choose the offer most advantageous to the government, it is not known how the cabinet chooses the winning bid for PPP. Discretion in choosing the winning bid depends on the prerogative of the cabinet, raising much ambiguity.

The successful bidder is notified by UKAS. Negotiations on the terms and conditions of the contract then take place. Prior to contract signing, endorsement from the cabinet for the final contract agreement must be obtained. The signing of the concession agreement ends the procurement process.

6.2.2.5 Unsolicited Proposals

Besides government-initiated proposals, the UKAS guideline encourages unsolicited proposals. The Malaysian government has welcomed private-initiated proposals since the

privatisation programme, to encourage local participants to participate in privatisation. It promises to award concessions based on a first-come-first-served-basis, subject to their meeting the government's requirements. The government's aim was to reward innovation in the local private sector. However, as explained in Chapter 5, proposals which did not meet the requirements fixed by the government will be put through a competitive bidding exercise. Although in the Privatisation Master Plan, no label was used in describing the procurement process, the content is similar to a Swiss Challenge, Bonus System or Best and Final Offer System, where the original proposer is invited to participate in the competitive tender. If the winning bidder is not the original proposer, the winning bidder shall compensate the original proposer for costs, including those incurred in preparing the proposal.

The UKAS guideline offers no explicit rules for unsolicited proposals, which share the same route as the government-initiated proposals. The private sector may submit proposals direct to UKAS or through the relevant ministries or agencies. The proposal will then be evaluated by UKAS and brought to the cabinet for decision. As a measure to ensure that any proposed infrastructure is needed, the interviews revealed that whenever UKAS received an unsolicited proposal, they would cross-refer it with the ministries' or agencies' development plans. Priority is given to proposals already falling within existing planning. This move taken by the government is to ensure that all unsolicited proposals approved to proceed are consistent with or comparable to the national development planning and budget. In this way, unsolicited proposals will not affect or distort existing priorities.

Nevertheless, this practice increases the possibility of corruption. Any person(s) within the contracting authority may disclose the information to any company regarding any development projects needed or planned by the ministry. The so-called unsolicited proposal will have the advantage of being awarded through direct negotiation, as current practice does not require unsolicited proposals to undergo competitive bidding, according to UKAS default practice. Even though one respondent pointed out that this might be the only way the government can get their infrastructure, this makes it vulnerable to individuals who pursue self-gain at the expense of the taxpayer's money.

As discussed in the literature review, an unsolicited proposal originates from the private sector and is not submitted in response to request from the contracting authority. The private sector is responsible for the project's feasibility and all other associated studies for the proposal. For example, it is supposed to use its own resources to develop the proposal. The

private sector is also taking a risk on the bankability of the proposed project. Based on UKAS practice, the private sector with this information will have the upper hand and bear less risk in submitting a proposal, as the work is already on the government priority list and in demand.

As explained in Chapter 5, UKAS' experiment with Swiss Challenge were not as successful as expected. Respondent R3 claimed that, through Swiss Challenge UKAS managed to obtain competitive pricing. Nevertheless, Respondents R2 and R9 felt that both Swiss Challenge were unethical, as they were unfair on the original proposer who had spent resources in preparing the proposal. Respondent R13 felt that the exercise was merely a waste of time and money, as in the end the original proposer would always have an advantage over other bidders. Another challenge highlighted was attracting other bidders to join the Swiss Challenge when they knew that the original proposer had the advantage in knowing what was required, how to do it and what business model to propose. There was a perception in the industry that these exercises were merely a formality, indicating that UKAS procedures were seen as discouraging bidders and depriving the PPP market of competition.

6.2.3 PPP Status

The legal status of PPP as public or non-public procurement is essential to the whole administration of PPP. In order to understand UKAS' irregularities in their procurement process, the researcher set out to identify the status of their PPP implementation. It was surprising to find out that every respondent, especially personnel from UKAS, the policy maker, was uncertain of the status of PPP. This uncertainty about the legal status does indeed have an impact on UKAS PPP transactions. Mixed responses were received about the status of UKAS PPP, but in their personal view, some respondents saw UKAS PPP as non-public procurement, perhaps explaining why UKAS did not follow the public procurement regulations. Avoiding the rigid procedures involved in public procurement might explain the reluctance of UKAS to commit to these regulations.

Other respondents considered that PPP is part of public procurement. One respondent argued that, even though the initial funding comes from the private sector, in the end the government will still pay for the built infrastructure. PPP is just another way of procuring and delivering public infrastructure. PPP fits public procurement features except for the private funding. It should be noted, however that some concessions have been partly funded by the government-linked bank, so less credit risk is borne by the private sector. Wang et al. (2012) stressed that

this arrangement of funding cannot be considered as private financing since they were still guaranteed by the government.

Respondent R12 suggested that Malaysia is not alone in this matter, since most countries have a blurry demarcation between the status of PPP as public procurement or otherwise. Different approaches have been identified between common-law and civil-law countries. Countries that have adopted civil law may have better methods to identify the status of PPP. Under EU directives, PPP is considered as a public contract and hence is a public procurement. However, this does not make each PPP transaction by EU member country easier than previously. PPP itself is a complex procurement with diverse financial arrangements and asset ownership. EU public procurement always gives competition priority. Hence, prior to 2006 the implementation of PPP did not fit perfectly into available procurement processes for public contracts under the EU public procurement directives. Recognising the issues and concern regarding awarding of PPP concessions, the EU introduced the Public Procurement Directive 2004/18/EC which allow PPP (but not all) to be procured more easily using the competitive dialogue procedure. These regulations were an attempt by the EU to cater for modern procurement methods such as PPP, while still upholding the EU treaty and general principles of law decided by the EU Court of Justice, such as equality of treatment and transparency. The 2004 regulations were updated with a new version in 2014.

There are suggestions in the literature for establishing a clear institutional framework for PPP implementation by enacting a specific PPP law or regulations. Although this has proven helpful in certain countries, PPP advanced practitioners as in the UK and Australia have shown that PPP can still be run within the existing public procurement framework. Nevertheless, this can only be successful if the foundation of the country's current institutional framework is clear on boundaries to facilitate PPP. In the absence of clear regulations, UKAS facilitate PPP implementation on a project-by-project basis, final decisions being made by the cabinet. In this way, UKAS believe that they are catering for the needs of each project through flexible practice. This, however, has resulted in inconsistencies, lack of transparency and susceptibility to unethical conduct such as abuse of power and corruption.

Completing transactions in the malleable private market does not automatically give UKAS the right to forget their responsibility. As discussed earlier, UKAS is a government agency responsible for planning, coordinating, evaluating, negotiating and supervising all

privatisation and PPP projects, including the corridor development under the purview of the Ministers of the Federal Government (No.2) Order 2013 (P.U (A) 184/2013). All decisions for UKAS are also made by cabinet ministers, the highest executive power in the Malaysian legislature. The findings indicated that despite the complexity of PPP, which is not the typical public process used to procure infrastructure, PPP projects procured by UKAS are motivated solely by consideration of public interest. PPP involves future financial commitment from the government and the taxpayers themselves in certain PPP models. From the evidence presented above, it is clear that UKAS PPP status is indeed a public contract. Thus, the procurement process and the governance of UKAS PPP should not deviate from the public procurement regulations.

6.2.4 Additional Drivers

Another crucial point observed was the government's drivers for adopting PPP, which strongly influenced the decision on the procurement process chosen and the shaping of a national PPP institutional framework itself. The respondents listed the drivers for adopting PPP as the funding methods; the urgent need for infrastructure; private sector participation; risk sharing; comprehensive scope; following global trends; and reducing expenditure. Although the UKAS guidelines did not specify the drivers for the government in adopting PPP, in addition to the common drivers the government did list in the Privatisation Master Plan additional drivers for adopting privatisation, specifically achieving the aims of the New Economic Policy. Even though there is no explicit text in the UKAS guidelines regarding additional drivers, respondents confirmed that PPP through UKAS is a continuation of the privatisation programme, and hence one of the instruments for the government to achieve the aims of the New Economic Policy. Malaysia is not the only country who has additional drivers in adopting PPP, as Wang et al. (2012) suggested that China, Indonesia, India and Thailand, for example, have also done so. Furthermore, their report suggested that it is a common practice for developing countries to do so. According to the interviews, besides socio-economic engineering through PPP, the government is trying to develop more local capabilities. The ruling regime also uses the infrastructure built as evidence of performance.

Priority among the drivers of UKAS PPP is, however, outside the scope of this research. It is no doubt a challenge for UKAS to strike a balance between the additional drivers and prime drivers. The literature suggested that these additional drivers most likely would shadow other drivers that the contracting authority needs to emphasise, such as value for money. The

findings illustrated that in one instance experienced by the respondents, JKAS suggested that direct negotiation with a single company be employed instead of advertising the project for competitive bidding. The justification given was to curb the domination of big PPP players. This is in line with the findings from the interview with a policy maker, that non-complex projects were prioritised to *Bumiputera* companies, to the extent of awarding concessions through direct negotiation to a single company. No justification was offered by the government for the selection criteria for these companies, thus exacerbating speculation and suspicion about the genuine programme.

6.2.5 Issues Governing the Procurement Process

Given the complexity of PPP, the UKAS procurement process are not without issues. Respondents shared their experience and opinions of the issues that have been shadowing UKAS. Some issues are common globally, while others are specific to the Malaysian context.

As highlighted in the discussion above, UKAS have been inconsistent in their procurement process. The findings suggested that the root of the inconsistency was due to the absence of detail guidelines and the flexible practice of UKAS. Whilst UKAS have managed to deliver PPP despite the inconsistencies, the problem should be addressed and not polished or ignored. Interviews with UKAS personnel revealed that they are well aware of the problem. Nevertheless, they stressed that PPP is best when each project is treated differently. Under the guidance of the multi-tiered inter-agency committee, UKAS believe this will keep their practice in check and not break any law; after all, final decisions are made by the highest executive authority.

Although the pressure to fund proposed infrastructure had initially been lifted, the respondents were still concerned about the future deficit of leasing costs, given the higher private sector cost of financing and risk. Respondents R1 and R5 gave an assurance that as cabinet approved all PPP projects, concessions remained within the national budget. Apparently, UKAS and the government of Malaysia treat PPP as another source of funding to fill in budget gaps, by creating future fiscal commitments. This is no different from the use of a credit card. The MOF, however, is concerned that the future government expenses combined with current PPP commitments will create a greater fiscal cost for the government. PPP debt is currently bypassing expenditure control and put under Off Budget expenses. This practice can lead to more problems, such as non-transparent transactions and creating large contingent liabilities,

thus undermining efforts to sustain the nation's macro-economic position. Since government commitment to PPP is high, it is important to ensure full disclosure of future payment obligations.

Respondents R4, R8, R11 and R13 also called for UKAS to be more transparent in their practice. The literature review shows lack of transparency ever since the beginning of the privatisation programme. The public are also demanding greater transparency in the government's purchase of goods and services. As part of the government, UKAS is accountable and answerable to the public. The decision to keep some information for internal use only indicates the lack of transparency practice by UKAS. Transparency has always been emphasised in the Malaysian Public Procurement Regulations, which are clear on every procedure and process, even the evaluation method and selection of the preferred bidder. This is very much in contrast with UKAS' procurement process. Transparency in the procurement process is important as it guarantees potential investors consistency in the procurement process, with no interference or undue restriction. In spite of this, the government has been criticised for lack of transparency in the procurement process, specifically in how the Special Purpose Vehicle is selected. This has led to misunderstanding among the public, so improving transparency will be worthwhile in helping to diminish misconceptions.

Respondents highlighted lack of understanding as one of the issues in implementing PPP. In the early years, both private and public sectors had a poor understanding of implementation of the PPP concept by UKAS. UKAS received many unrealistic proposals in the expectation of the exclusive award of concessions. Furthermore, the researcher discovered that the respondents only vaguely understood the concept of unsolicited proposals in PPP. Most considered that any proposal from the private sector was unsolicited, even though the project was already on the government's development list. As highlighted earlier, the current practice concerning unsolicited proposals may result from the absence of clear guidelines, making it vulnerable to manipulation.

Lack of capacity in UKAS was also being highlighted by respondents. UKAS personnel were seen as inexperienced by other stakeholders. For example, one respondent felt that UKAS need to have in-house experts to evaluate their financial and life-cycle costing, observing that UKAS relied too much on information provided by the proposer. A PPP unit should have a balance of skills and experienced personnel to fulfil its role. In its early years, UKAS consisted mainly of staff with limited technical knowledge and expertise in PPP. They

therefore organised secondment of staff from and to Government Linked Companies (GLC) to develop the knowledge and training of their own staff. The inter-agency committee was also an attempt by UKAS to bring specialists and subject matter experts from various government agencies to assist UKAS in its operation.

Respondent R1 also claimed that the procurement process of UKAS PPP were more time consuming than in conventional procurement. This is understandable, since the realisation process of a proposal is difficult. It includes lengthy negotiations and going back and forth to cabinet meetings for every decision. Furthermore, the involvement of multi-tiered inter-agency committees also extended the timeline. Respondent R3 believed that conventional procurement is more straightforward even for the same problem, such as land matters. Outside the research context, Respondent R3 indicated that even the construction period for a PPP project is longer than with traditional procurement.

Another issue brought up was the high turnover of invited members of the committees, which disrupted progress. Apparently, the respondent from UKAS did not feel that this would affect the continuity of their excellent service to stakeholders, as it was part of the business and UKAS was well prepared to take necessary action every time a new member was appointed.

Lastly, UKAS face administrative problems with some states having different ruling political parties from the federal government. However, no details of this problem were explained. The researcher can only assume that problems arise due to different authorities' policy on land matters.

6.3 Relevance of Competition within PPP Procurement Process

In the Privatisation Master Plan, the government clearly promoted contestability and prioritised competitive bidding procedures for all government-initiated proposals. Even for unsolicited proposals, the Plan suggested introducing competitive bidding procedures for unsuccessful negotiations. This shows that the government acknowledged the impact of competition for privatisation implementation. However, the government stance on competition is unclear in PPP implementation. There is no mention in the guideline or website on competition policy or preference for the UKAS PPP procurement process.

The interviews revealed that the great majority of respondents (12 out of 13) recognised the relevance of competition within the procurement process. They added that the government

would be able to reap benefits from a competitive exercise, including value for money. This is in accordance with a survey conducted on Malaysian PPP by Ismail (2013), where respondents pointed out competitive tendering procedures as the most important factor in achieving value for money in a PPP project. Effective competition in the procurement process will encourage bidders to make high-quality proposals with a competitive true market value, enabling the government to select the best offer. There is also evidence from the literature review that competition will encourage companies to be more innovative compared than in a monopoly situation. Competitive bidding allows government to pick the most capable company from a large pool of bidders, and respondents pointed out that the best possible bid will guarantee a high quality of service delivered by the selected company.

Competition within the procurement process is also salient for the government to retain their bargaining power. This will result in a better price for the concession as it reflects the real market price compared to the escalated price of direct negotiation with a single company. Respondent R13 pointed out that competition is the key to enhancing the accountability of the government. Since UKAS are accountable for ensuring that resources are effectively used, they should develop accountable procurement process that guarantee fairness and impartiality, especially in awarding the contract. This will benefit all stakeholders including the partnership, thus creating value for the community.

Despite acknowledging the significance of competition within the procurement process, Respondents R1 and R2 were of the opinion that in UKAS PPP, competition is not the main focus or objective. Their argument was that competition itself does not guarantee the success of a project. If competition is aiming for value for money, UKAS were able to achieve this through their Value Management workshops, even when not calling for competitive bidding. However, neglecting competition causes harm to the many, while the profits generally go to the few. The impact of higher charges to users from privatisation, linked to direct negotiation awards places a burden on the people of Malaysia to the present day.

6.4 Readiness for Competition

In order to promote healthy and genuine competition, it is necessary to have a dynamic market that can exert competitive pressure as intended. In markets with a sufficient number of players, competition induces efficient use of resources, producing a quality product for a competitive price for the consumer. The respondents felt that the PPP industry is still being

dominated by a few big companies and their sister companies, especially in certain sectors with a complex nature. Nevertheless, there has been an increase of participation from the private sector at every available opportunity, including the submission of unsolicited proposals. However, in several instances new entrants have been deterred by the criteria set by UKAS in the evaluation stages. This is not surprising since UKAS need to be highly selective in their partners, as the PPP contract requires a long-term commitment, especially financially. This has been an obstacle for smaller companies. Although the submissions from new entrants may sometimes reflect their lack of maturity, they are still a good sign for the future of PPP in Malaysia as it takes time to develop the capability of the private sector. On the other hand, it is the responsibility of UKAS as the PPP unit, and the government of Malaysia, to create an open and level playing platform to attract more participants from the private sector. This can be done with a comprehensive institutional framework which includes a sound competition policy.

6.5 New Economic Policy

The New Economic Policy has been the national agenda since it was announced in the 1970's. Since then, public procurement has been one of the government's instruments in achieving the aims of the New Economic Policy. Respondents R2 and R5 confirmed that PPP under UKAS is also an instrument of the government for achieving the Policy's aims. The Privatisation Master Plan explicitly stated that privatisation is formally aimed at increasing *Bumiputera* participation. To achieve this, the government imposed the condition that privatised projects should be 30 percent owned by *Bumiputera* companies, while a minimum quota of 30 percent of the work contract must be awarded to *Bumiputera* companies. One of the problems with this policy is the tendency of *Bumiputera* contractors to sub-contract their allotment to others for instant profit, instead of building their own capacity to create resilient *Bumiputera* companies (McCrudden & Gross, 2006).

UKAS does not publish any details of their approach within the procurement process to achieve the aims of the New Economic Policy. Nevertheless, based on the interviews, the *modus operandi* used appears to be more or less the same. The same minimum percentage as in the public procurement regulations is reserved for the Special Purpose Vehicle equity, and the portion of work contracts to be awarded to *Bumiputera* contractors. Most of the respondents acknowledged that the New Economic Policy is an overarching policy which should be continued until its objectives are met. The significance of achieving its aims can be

seen in the Malaysian government's success in negotiating the *Bumiputera* agenda in the nation's latest venture in Trans Pacific Partnership Agreement.

The New Economic Policy has been criticised for supporting only well connected *Bumiputera* rather than giving the benefits to the whole *Bumiputera* community. There is evidence that the Policy has not achieved its target, even after the privatisation programme (Jomo, 2004). Ramli et al. (2013) presented a long list of negative impacts brought about by the policy within the government's procurement. This includes money politics, rent-seeking behaviour, political patronage and dependency syndrome.

Nevertheless, Respondent R13 stressed that the New Economic Policy was not to be blamed for the irresponsible actions of certain opportunists, although admitting that the *Bumiputera* has no doubt been benefiting from it. Over time, the programme has had a positive effect on empowering *Bumiputera* entrepreneurs and conglomerates. Believing that there are many capable *Bumiputera* companies available, the respondent suggested that instead of exclusive awards to well-connected *Bumiputera* companies, a healthy competitive exercise should be conducted in which all *Bumiputera* companies could participate.

Besides the preferential treatment to *Bumiputera* companies, there are also restrictions on foreign companies' involvement in UKAS PPP. The policy has been consistent from the start of the privatisation programme. Nevertheless, acknowledging the need for foreign experts' involvement in complex projects, the maximum percentage equity owned by a foreign company has been reduced in PPP, compared to conventional procurement. The Privatisation Master Plan listed several requirements for a project when considering the involvement of a foreign company. However, there are no details regarding foreign involvement in the UKAS guideline or website. One respondent pointed out that by limiting foreign involvement, the government may not be able to attract foreign experts to participate in PPP programmes. On the other hand, due to the rules on the equity of ownership, foreign companies are required to form partnerships with domestic companies. This measure allows the domestic partner to secure expertise from their foreign partner and enables transfer of technology throughout the process.

6.6 Challenges in Incorporating Competition within the Procurement Process

Despite their eagerness to enhance the current policy of competition within the UKAS procurement process, the respondents highlighted several issues. The constraints identified in

the case study are not alien to other PPP practitioners, hence many strategies and solutions have been suggested to tackle the issues raised. Among of the constraints highlighted was the political or individual interest in concessions. Respondents stated there are many circumstances of political patronage in UKAS projects. Political pressure may also to an extent have exploited UKAS. The allegation that certain companies have been given exclusive awards has been pervasive since privatisation, and continues in the current PPP programme. Although in theory the public service should always be apolitical, Siddiquee (2005) claimed that in Malaysia, the public service has always been intimate with politicians. Given the absence of clear guidelines for competition, and the lack of transparency, political neutrality is hard to achieve. Attempts to enhance the current competitive practice and policy within the procurement process are demanded to ensure transparency in the selection of the Special Purpose Vehicle, to combat and control any attempt at corruption.

Intellectual property has always been an intangible area in PPP, especially for unsolicited proposals. Intellectual property is all about safeguarding the material developed by the proposer, and its ownership should always be protected in order to encourage innovation and private sector participation in PPP. In countries which consider unsolicited proposals, compensation is made to the original proponent in the event that they fail to secure the contract (Hodges & Dellacha, 2007b). This arrangement should be communicated to other bidders as early as the notice of procurement. In return, the contracting authority is allowed to use the proposal for one-off development, or as agreed with the original proponent.

Failure to resolve the intellectual property issue may restrict the contracting authority in continuing with the development. Nonetheless, this depends on each country's regulation of licensing, patents and intellectual property. UKAS is not concerned with the issue of intellectual property. Although most of the companies submitting unsolicited proposals request exclusive award of the proposed project on the grounds of intellectual property, UKAS will ensure that the claim is legitimate. In fact, most of the time, the claim is baseless. However, the legal framework of UKAS PPP is unclear on the transfer or assignment of intellectual property to the government. If needed, the transfer of this right should be negotiated and transferred before pursuing the competitive bidding exercise. The amount of compensation shall be determined on a project basis, given the nature of PPP. Currently, the approach used by other countries is applied to UKAS projects.

Throughout the life of UKAS, it has been observed that the number of participants in PPP has increased, so UKAS might not be having a problem in recruiting numbers for effective competition. However, the competitive exercise may also attract non-genuine bidders. The Malaysian construction industry has long been infested with rent-seeking companies aspiring to rapid wealth, privatisation projects included. This is not surprising since the lengthy contract with the government is seen as a lucrative opportunity for rent-seeking behaviour. However, the possibility of a rent-seeking company succeeding through direct negotiation with a sole company is greater than through a competitive procurement process. Throughout the competitive procurement process, UKAS should be able to reduce the rent-seeking behaviour in the tender evaluation stages. Tenderers will be thoroughly evaluated for their technical and financial capability, to eliminate companies that prove to be incompetent.

It is noteworthy that there is no clear timeline or schedule for procurement process in the UKAS guideline or website. They only listed their customer charter aim for meeting deadlines for a few of their procedures. Respondents claimed that a competitive procedure is time consuming, especially in introducing competition for unsolicited proposals, but the PPP procurement process is always lengthy because of its complexity. In the UK, the average tendering period is 34 months (Saussier et al., 2009), while Australia listed 14 to 19 months for their procurement process period (Grieken & Morgan-Payler, 2014). According to Dholakia and Dholakia (1994), under Malaysian privatisation it took a minimum of one to two years for a procurement process to be completed. There are no statistics for the average length of UKAS procurement process. The problem with a lengthy process is that it discourages bidders from participating in the competitive exercise. Long procurement process are also expensive, explained in the literature by lengthy negotiations, political barriers (Babatunde et al., 2014), unclear or absent project objectives (Romeiras de Lemos, 2002). One respondent maintained that the delay experienced in UKAS was due to the inefficiency of the procurement process itself. The involvement of many inter-agency committees makes coordination challenging. Difficulties in evaluating tenders are also found to contribute to the length of the process. It is no secret that PPP evaluation is more complex than conventional procurement, and in a competitive bidding exercise multiple bids are received. To carry out a realistic apple-to-apple comparison is not easy with PPP proposals, although there are long-term benefits in conducting it thorough evaluation to ensure the most qualified bidders are successful. Nevertheless, UKAS could find a way to improve the procurement process schedule by cutting red tape and bureaucracy to reduce the current unnecessary length of time.

Besides the lengthy process, much of the literature identified the high cost of bidding in the competitive exercise within the standard procurement process, and one respondent agreed that this is the same case for UKAS PPP. This may discourage new entrants and even existing players from participating in the bidding exercise, reducing competition. However, in practice the winning bid will recover the costs incurred by implicitly ‘front loading’ them in preparing a detailed and comprehensive proposal, and hence making government the party who has to pay later. For unsuccessful bidders, the government may consider introducing an honorarium as a token of their participation. Although this might involve some additional cost to the government, the benefits of the competitive procurement process may outweigh the high cost of bidding. As indicated by one of the respondents, UKAS have a bigger aim from PPP than looking solely at the monetary return. This strategy would stimulate the development of local entrepreneurs and encourage them to become involved in the PPP industry, unlike the current strategy of exclusive direct negotiation procedure.

6.7 Formation of Framework

Throughout this study, the researcher has methodically analysed the current UKAS procurement process and the competition policy incorporated within it. Understanding the current practice of UKAS is vital to the development of the framework, in evaluating the current practice, effort and the gap that needs to be filled. The development of the frameworks build on the findings from the literature review, the case study and the researchers’s analysis of the subject matter.

The literature shows that Malaysia is an avid PPP user in infrastructure development. The publicised reasons for the government to adopt PPP are mostly economic or productivity related. As illustrated in Figure 6.26, the drivers include reducing government expenditure, improving efficiency, ensuring value for money, and optimal sharing of risk, responsibilities and/or resources. These drivers are in line with those of other PPP practitioners globally. However, in contrast with other practitioners, Malaysia has the New Economic Policy as an additional driver of PPP. The case study indicates that UKAS is challenged to reconcile and strike a balance between getting the best from both PPP and the national agenda. Furthermore, as a PPP unit, UKAS needs to drive the PPP industry.

The researcher also established that UKAS PPP is part of public procurement, whose aim to serve the public interest should be the priority. Hence, as illustrated in Figure 6.26, good

governance should be the dominant UKAS driver, aiming to safeguard public interest while trying to achieve equilibrium for all drivers. Although the research itself does not focus on prioritising UKAS drivers or their equilibrium, whatever else is decided UKAS must be bound by the sphere of the good governance since UKAS PPP is part of the public procurement. Additional drivers such as the New Economic Policy should not be a dilemma if good governance is foremost. Good governance should be the standard, and in upholding it as a hallmark it should ensure efficient use of resources, fairness, transparency and accountability. To date, UKAS has been too focused on achieving the drivers, tending to subjugate good governance as justified by the decisions of the cabinet.

A significant proportion of the respondents acknowledged that competition within the procurement process is relevant to achieving economic benefits from PPP. This is in line with the discussion in section 3.4 where competition is considered vital to achieve economic benefit and also to prevent unethical misconduct in handling procurement. Despite the importance of competition, this is not the main purpose of UKAS in PPP. Economic benefit such as value for money is claimed to be achieved through other means. UKAS have been selective in their practice, choosing not to be bound by public procurement regulations by denying that PPP is part of public procurement. However, the Malaysian public procurement regulations emphasise competition and transparency. Competition is the proven way to safeguard government procurement from ethical misconduct and corruption. Hence the sphere of good governance in Figure 6.26 should be achieved through incorporating competition into the UKAS procurement process.

The cabinet holds a large degree of power over the UKAS procurement process. It can be seen as absolutely discretionary, which is alarming. Under the principle of administrative law, no power should be absolute. The government has been criticised for alleged corruption and gaining from the award of PPP concessions. Although there is no litigation against UKAS regarding their administration and procedures, there is nevertheless an abundance of court cases on government administration regarding absolute discretion and public interest.

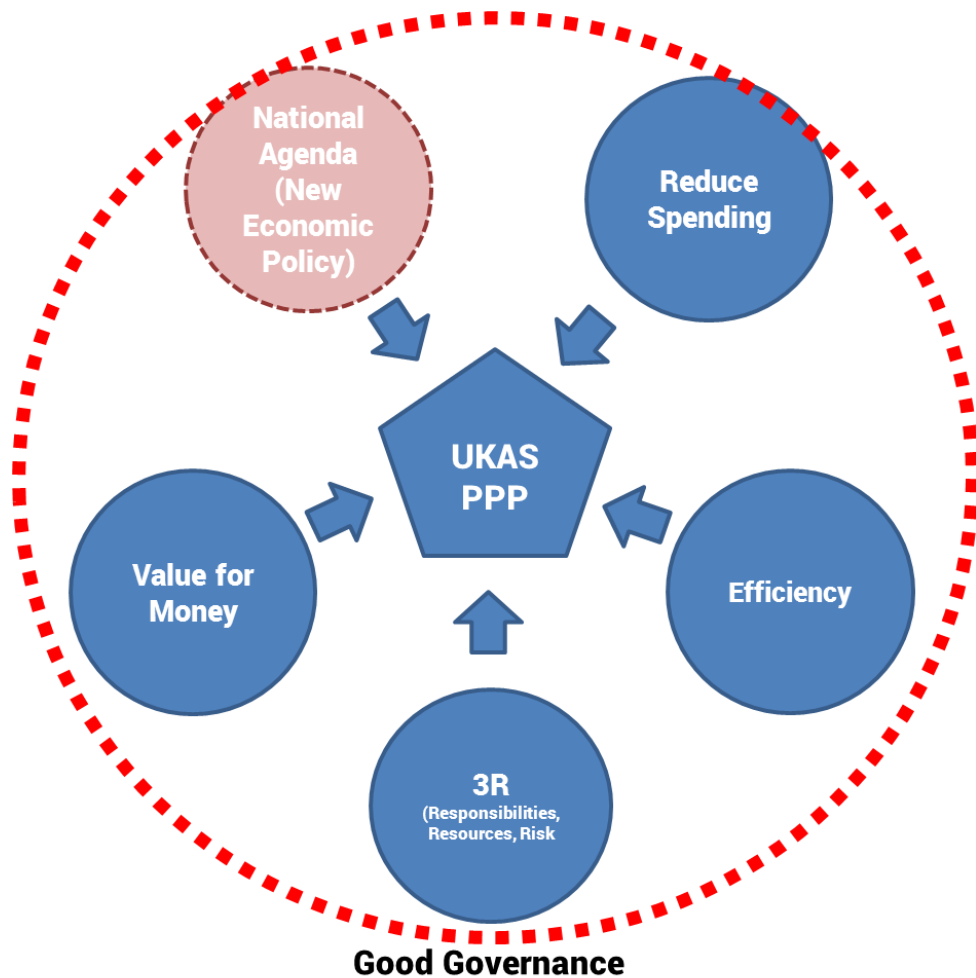


Figure 6.26 - Proposed Role of Good Governance

Although the cabinet was vested with the power of the executive authority under Article 39 of the Malaysian Federal Constitution, any arm of government, including the cabinet or any minister vested with power, is still subject to Malaysian Law, especially in discharging their duties. In the landmark case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*¹¹, the Director of the Land Executive Committee (a government agency) was accused of acting in excess of his power. The company concerned had been ordered to accept the amendment to the title of a piece of land from perpetuity to a 99-year lease. The director's ruling was found unlawful by the judge, who cautioned:

Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably.

¹¹ [1979] 1 MLJ 135

This ruling has set a great precedent for government administration. Prior to this case, the power of government agencies and ministers was seen as unfettered. Another recent case of relevance to UKAS is that of *Bato Bagi & Ors. v Kerajaan Negeri Sarawak & Another Appeal*¹². In this case, the judge applied the principles laid down in the above case:

In my view, the impugned sections may just be a general guideline since it is left to the discretion of the Minister. But even if it is a discretion it should not be untrammelled and unfettered of which the courts frown upon.

In relation to UKAS procurement process, there are no controlling instrument assuring that cabinet discretion is properly used. In the absence of a clear guideline or regulation for the cabinet to follow, absolute discretion allows the cabinet to impose whatever it thinks fit or reasonable, including prioritising the interest of the ruling party in a matter of public importance. The limited level of transparency in the UKAS procurement process, and its silence on criticism regarding prejudice and unfair process in awarding contracts, make the cabinet appear accountable for an unreasonable exercise of power. To further appreciate these findings, the researcher interpreted the judgement and emphasised the significance of incorporating competition within the procurement process as a tool to keep UKAS in their place, serving the public interest and reducing the impact of discretionary authority that the cabinet currently possesses in the UKAS procurement process.

The researcher acknowledges the current challenges to incorporate competition within the procurement process, as highlighted by the respondents and in the literature review. Unfortunately, no research has been conducted into the impact of these challenges. In addition to the challenges highlighted by the respondents, the researcher suggested that there is also market failure due to the long-term practice of restricting competition (New Economic Policy). This challenge can be resolved and would become less of an issue with reform involving cultural change and commitment from the government. Accordingly, the researcher recommends that the framework should not be limited by the challenges identified, as they are still present even with a non-competitive procurement process.

¹² [2011] 8 CL 766

6.7.1 The Frameworks

By taking into consideration the distinct features of project development of government-initiated and unsolicited proposals, the researcher developed two different frameworks to cater for the different needs and priorities of each route. These frameworks are intended to enhance competitive practice incorporated within the procurement process. It is important to emphasise that, as discussed in an earlier chapter, the framework is needed primarily to achieve good governance as required under the law, and not solely for economic benefit or value for money. According to the findings, the initial implementation of Malaysian PPP saw UKAS focus on the drivers discussed in an earlier chapter; nevertheless, UKAS acknowledge that it is time to recognise the drivers in the context of exercising good governance. This does not mean that government would be unable to accomplish its aims; rather, the frameworks place competition as a tool to achieve good governance and as a safeguard for the taxpayer that the government needs to comply with. The frameworks developed are more streamlined and are shown in Figure 6.27 (government-initiated proposals) and Figure 6.28 (unsolicited proposals).

The frameworks draw on the approach of fostering competition and preventing anti-competitive behaviour within the procurement process. Reinforced with more stringent procedures, they are also expected to ensure discretion is exercised reasonably. The frameworks are built on four attributes as discussed in section 3.4:

- i. Fostering more competition;
- ii. Preventing collusive behaviour;
- iii. Avoiding corruption;
- iv. Exploiting economies of scale and scope.

Figure 6.27 shows the framework for government-initiated proposals, from the proposal stage until the contract has been awarded. The red boxes indicate the area that has been enhanced in accordance with one or more of the attributes above. The framework recognises the current practice where a solicited proposal is initiated by a ministry or agency and is already included in their development plan. The role of the ministries and agencies remains the same, and includes identifying the needs of the infrastructure and proposing a project plan to UKAS. Upon receiving the proposal, UKAS conduct a feasibility and bankability evaluation. Currently, the evaluations are not transparent and are not available to the public. Evidence of

assessment should be made accessible. The lack of transparency allows the possibility of manipulation of the evaluation and choosing a PPP which is not advantageous to the government in terms of value for money. In current system, the evaluation then will be tabled in the cabinet meeting for approval in principle.

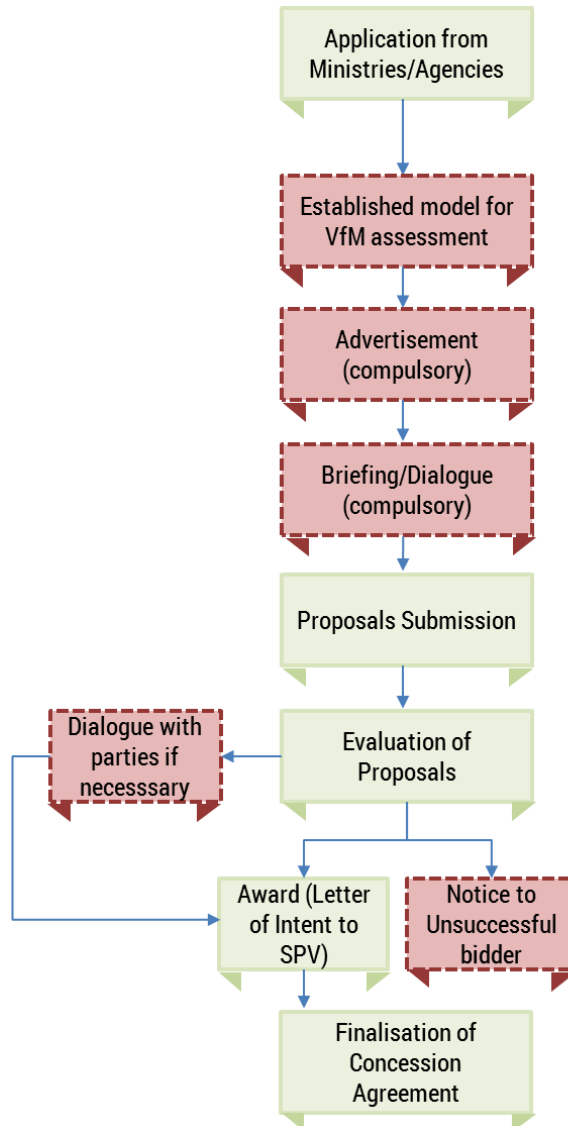


Figure 6.27 – Framework for Government-Initiated Proposals

Although the researcher acknowledges that different models produce materially different results, the framework suggests that established and robust value-for-money assessment be adopted for evaluation at the feasibility stage and afterwards. Following a widely accepted model, such as the Public Sector Comparator, enables the government to be transparent in their evaluation, especially in deciding the advantageous use of PPP for proposals submitted by ministries and agencies. The comparator also enables the government to include competition between the PPP proposal and the reference project.

Since a comprehensive assessment is expected to assess and compare the merits of using PPP with other conventional government finance procurement methods, the researcher also suggests that decisions should be made by the inter-agency committee rather than the cabinet. The highest UKAS inter-agency committee involves the heads of relevant ministries and agencies, who are capable and qualified to make decisions from the perspective of the national economy and government policy.

If the proposal by the ministries or agencies is executed through PPP, the next process is the invitation to Request for Proposal. Currently the decision on procurement procedures depends on the cabinet decision along with approval in principle. Once a project is confirmed, the framework suggests a mandatory competitive tendering procedures for all government-initiated proposals, in order to foster competition. A procurement notice should be advertised to announce the government's intention and to solicit bids from the private sector. The procurement notice demonstrates that the government's decisions are transparent, giving equal treatment to all participants and not discriminating between *Bumiputera* and non-*Bumiputera* companies. Another suggestion is that *Bumiputera* companies may be given an advantage in terms of additional points later in the evaluation.

In continuing the aspirations of the New Economic Policy in PPP implementation under UKAS, the framework suggests that the policy on the percentage of equity and percentage of work contract to be awarded to *Bumiputera* companies should remain. In the event that the government would like to use PPP to develop *Bumiputera* entrepreneurship, the government should have identified the type and threshold of non-complex projects in advance. These projects should be open only to *Bumiputera* owned companies, instead of awarding concessions to a single company through direct negotiation procedure using *Bumiputera* as the reason.

Consequently, interested parties are allowed to participate by buying the tender documents. Due to the complex nature of PPP tenders, the framework suggests a series of briefing or dialogue sessions with the parties prior to submission. The dialogues are intended as a platform to facilitate access and exchange of information between the parties. This interaction will give parties a better understanding of the project, the requirements and addressing enquiries. The government would also be able to draft a better contract based on the feedback from the dialogue.

Subsequent to the submission of tenders is the selection review stage. No changes are suggested to UKAS' current evaluation methods of submissions. However, the framework suggests that the UKAS evaluation methods and criteria are made known in advance to the tenderers at the stage of the procurement notice or the tender document. Announcing these in advance would increase stakeholders' and bidders' confidence in the regulatory process, with the assurance that there is no manipulation or bias.

As evaluating PPP proposals is not an easy task, the framework suggests that further sessions of dialogue are conducted with each bidder for further clarification, if required. This process is not a negotiation procedure and no changes would be allowed to the original bid. The framework suggests that a minimum of five bidders be shortlisted by the inter-agency committee to be taken to the cabinet for decision. The cabinet should be given clear guidelines for selecting the most beneficial offer from the preferred bidder.

In addition to the notification to the successful bidder, the framework suggests that unsuccessful bidders are also notified of the justification for selection, enabling *Bumiputera* companies in particular to remove flaws in any future bids, following the award is the process of finalising the concession agreement with the selected Special Purpose Vehicle.

The framework for the unsolicited proposal procurement process is shown in Figure 6.28. It suggests that the term unsolicited proposal is clearly defined and enforced: it is an original business proposal from a private entity for infrastructure development in which it is the intention of the entity to invest. The proposal should also not have been submitted in response to a request by UKAS/ministries/agencies, nor have been part of their development plans. In addition to the definition of uniqueness in the Privatisation Master Plan, in the event that a proposal submitted does not qualify as an unsolicited proposal, it should be rejected.

Following the receipt of a proposal from private parties, an assessment using an established model is suggested to test its feasibility and value for money. Models such as the Public Sector Comparator compare the proposal with the reference project and government databases to identify the worthiness of the proposal either by PPP or conventional public procurement. The decision to proceed with the unsolicited proposal as PPP should be decided at the highest tier of inter-agency committee. However, the deliberation of the cabinet is required for contracts of especially great value.

The framework suggests that it be mandatory for any successful proposal to go through a competitive bidding exercise such as a Swiss Challenge or Bonus System. However, the original proposer must be notified of the government's intention. If the original proposer agrees with the suggestion, agreement should be reached regarding issues like the transfer of intellectual property and compensation in the event of an unsuccessful bid. In pursuing the next step, UKAS shall advertise the Request for Alternate Proposals in the same way as for solicited proposals. The procurement notice should include the information that the exercise is part of a Swiss Challenge or Bonus System. However, if the infrastructure is complex it is advisable that only a targeted group is invited to participate in the tender exercise. UKAS must notify interested parties of the outline content of the original proposal to enable them to submit alternative proposals.

The number of bidders is important to achieve effective competition. Should there be fewer than five bidders submitting alternate proposals, the exercise will be cancelled, and bidders will be compensated for the cost incurred in preparing the bid. In this case, the government may enter into direct negotiation with the original proposer if it decides to proceed.

After their receipt from the bidders, the alternate proposals shall be evaluated according to the criteria and mechanism stated earlier in the procurement notice and Request for Alternate Proposal documents. Any advantage or bonus points awarded to the original proposer shall be disclosed to other bidders in advance. Through the evaluation, the inter-agency committee should submit a minimum shortlist of five bidders (if achievable) to the cabinet for decision. From the selection to the post-award stage, the framework for unsolicited proposals follows that for government-initiated proposals. The losing bidders will be compensated by the government for the costs incurred in preparing their bid. If the original proposer is unsuccessful, he is entitled to compensation as agreed when consenting to the competitive bidding exercise.

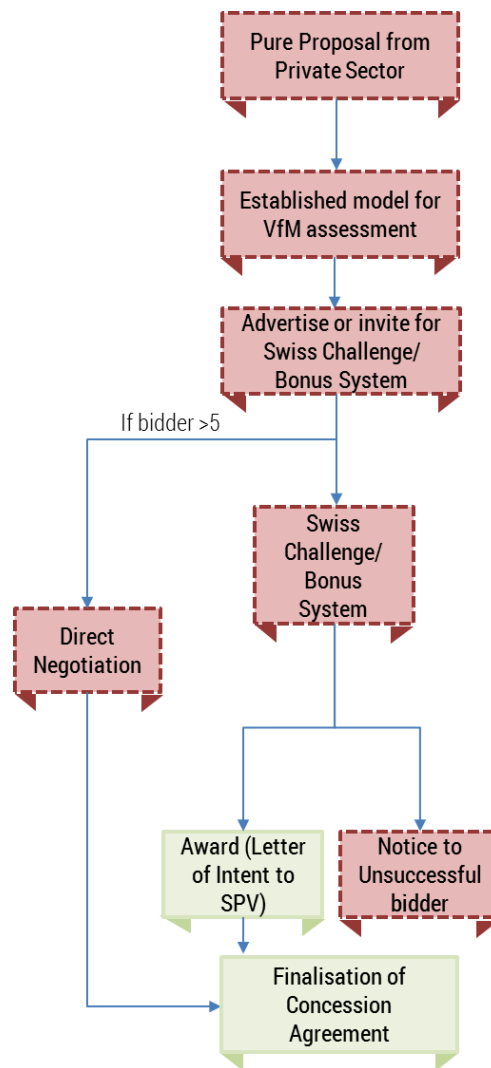


Figure 6.28 – Framework for Unsolicited Proposals

The researcher has attempted to streamline the previous approach of UKAS in incorporating competition within the procurement process. Previously, UKAS focused on why in the first place they opted for PPP. To achieve this UKAS faced a formidable challenge in driving the programme to a certain level of maturity. UKAS chose instead to be flexible in their implementation and successfully overcame the challenges with the full support of the government.

Nevertheless, compared with UKAS’ existing approach, the frameworks focus on upholding good governance through a stringent competition policy while meeting the PPP aims. The great power of the cabinet in micro-managing UKAS PPP is streamlined in the framework to encourage fair play. Based on the findings, the absolute discretion of cabinet has been accepted positively by UKAS as it helps to resolve problems and reduce red tape. The administrative law in Malaysia is, however, against this and believes that there should be

limits to exercising discretion. With the motive to enhance the competition practice within the procurement process for Malaysian PPP, the frameworks presented is formulated based the findings on the research finding on innovative procurement process developed to address the complexity of PPP. Importantly the proposed frameworks take into consideration the whole governance of UKAS which add the novelty of this research PPP.

Among the enhancement of the proposed framework is the competition created through mandatory open procedure and the increase of shortlisted numbers of bidders to be considered for the award. The competition among bidders may result in obtaining competitive price and higher quality of bids. The competition effect can drive the bidders to produce a proposal that may not be achieved with a non-competitive process. Meanwhile, the introduction of dialogue process between the public authority and bidders provides flexibility for both party to address complexity of PPP while maintaining transparency and equal treatment for bidders. The dialogue aim for a clearer understanding to produce a robust proposal and concession agreement. Mandatory of competitive procedure for unsolicited proposal also allows the government to benefit from competitive procedure and reducing the practice of direct negotiation with a single company which is essential to avoid corruption. Other notable enhancement proposed is by increasing the level of transparency of the procurement process. Transparency demonstrates that the bona fide of the public authority in awarding the project hence encouraging new entrants and existing players to participate. The summary of proposed enhancement to the competition practice is as shown in Figure 6.29.

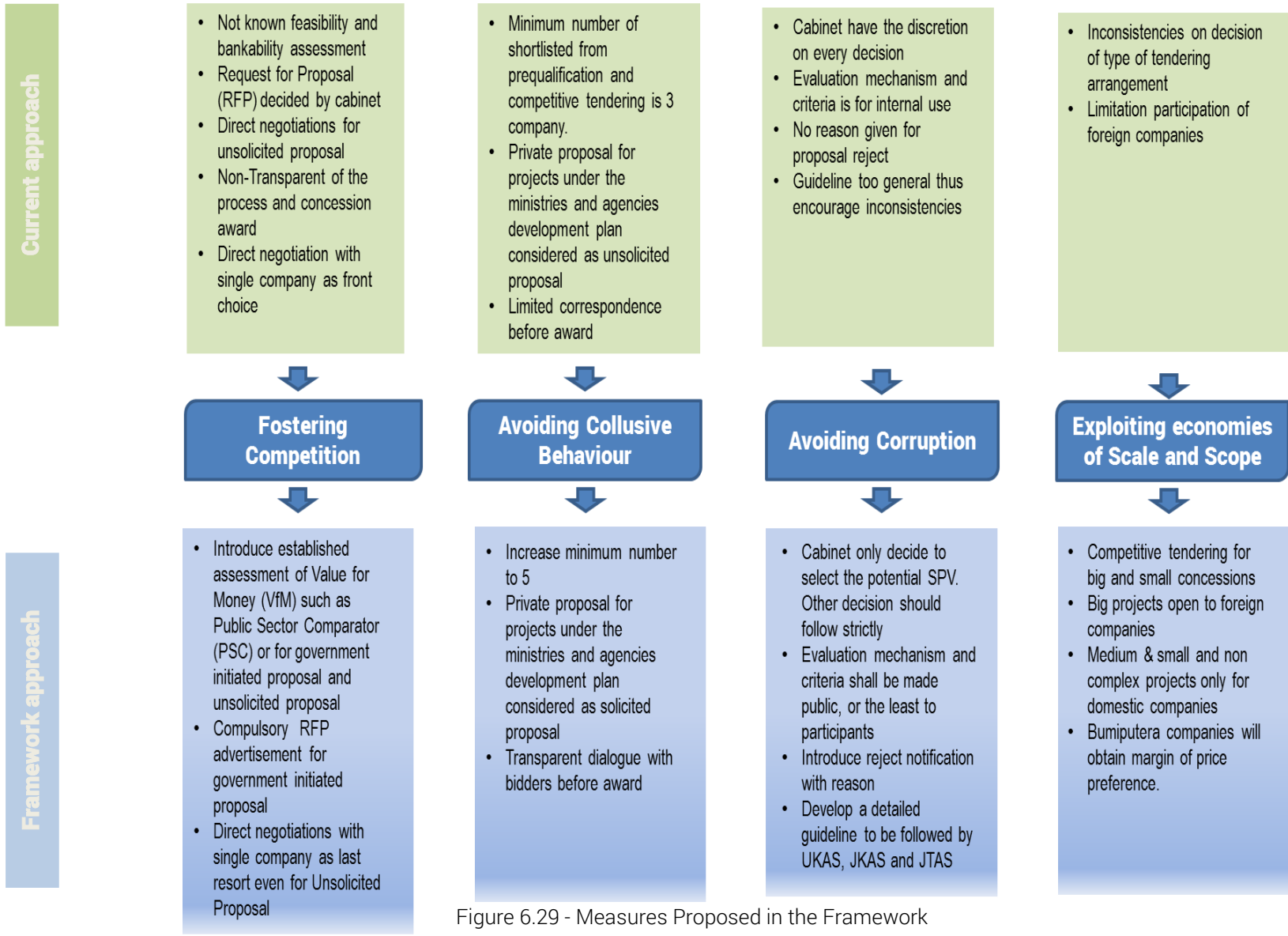


Figure 6.29 - Measures Proposed in the Framework

6.8 Validating the Framework

The frameworks are deemed to fill the competition gap in UKAS' current practice. They represent the findings synthesised from the literature review and case study. In order to confirm the frameworks' credibility, the researcher sought the judgement of the main stakeholders. The exercise to validate the frameworks focuses on confirming that the proposed measures would enhance competition and the potential for use by the industry.

For this purpose, the researcher conducted semi-structured interviews with identified respondents representing different types of stakeholder involved with the UKAS procurement process, and who would be affected by the application of the frameworks. These stakeholders are listed in Table 6.23.

Table 6.23- Justification for Identified Stakeholders

Respondents	Identifier	Capacity as stakeholder	Justification
Chairman of the Public Account Committee (PAC) for Parliament of Malaysia	R ^a	Public	Selected for his role in overseeing the government's financial commitment and its role in ensuring accountability and good governance in government activities.
Director of Policy Section, UKAS (Representing UKAS Director General)	R ^b	Government	Selected for his role in policy making and managing PPP programmes for the government of Malaysia.
Deputy Director of PFI Unit, in the Public University in Malaysia.	R ^c	Client	Selected as one of the organisations with the most number of projects using UKAS procurement process.
Project Director for a concession procured under the UKAS procurement process	R ^d	Practitioner in Industry	Selected for the experience of the organisation and of the project director in Special Purpose Vehicles and UKAS.

The respondents were interviewed face to-face at different times and locations, according to their preference. Initially, they were briefly presented with a summary of the research, its findings and the formation of the frameworks. The interviews were based on pro-forma questions designed to get feedback on the frameworks' strategy to enhance competition, and acceptance of the frameworks. The feedback on the acceptance of the frameworks is illustrated in Table 6.24.

Table 6.24 - Response to the Framework

Theme	Questions	R ^a	R ^b	R ^c	R ^d
Representation of the framework	Do you find the framework presented useful?	Yes, as I look at it	I understand that the competition within your framework is to achieve good governance and I think your framework is comprehensive. When we started the PPP programme we did what we had to do, but the current situation is different; the stakeholders demand more transparency, and we have to facilitate that. So everything that you did is the direction that we need to go now. It is in line with UKAS' vision.	Your framework is better than the framework we used previously, but I do have a concern about making it reality.	I'm ok with the framework, but to implement it you need to look at the details, especially the implementation, but it should be ok.
	What are the advantages of the framework?	It can create efficiency, reduce cost and at the same time we do not want the <i>Bumiputera</i> companies to be complacent. They should know how to do business and compete in the proper way. There should be no more short-cuts, political patronage, cronyism or other bias.	The framework is fair and what we have in mind.	The measures suggested will definitely enhance competition within the procurement process.	The way I look at it, you are getting more people involved: the dialogue, the notice. On transparency, I see your framework addresses it well. Currently UKAS is not really transparent.

	<p>What are the disadvantages of the framework?</p>	<p>I can't find one, in my opinion, this is good.</p>	<p>I think it needs some adjustment and to be tied up with the international best practice. UKAS need to study in detail the consequences of the enhancements made, such as dialogue, Public Sector Comparator evaluation and others. The ideal would be an enhancement not only in UKAS but with other stakeholders such as ministries and others. For example, UKAS sometimes receives applications from ministries or agencies to award to a certain company,</p>	<p>You didn't mention anything regarding time or schedule for your framework.</p>	<p>For me it's the competitive bidding exercise for unsolicited proposals. If the government is able to really compensate us, it should be ok</p>
	<p>Do you think the framework enhances the competitive element of the current procurement process?</p>	<p>Yes.</p>	<p>Yes.</p>	<p>Yes. I think in terms of value for money, we will definitely benefit from your framework. However due to the stringent procedures, I think it will take a longer time than the current process. Long term wise, I believe through your framework the government would be able to partner with the best company. We can't get that through direct negotiation.</p>	<p>Yes.</p>

In general, the feedback received was very positive, with each respondent agreeing that the framework enhances competition within the procurement process, compared to the current UKAS procurement process. The respondents were also optimistic for the framework to be adopted by UKAS. Some notable comments include scepticism about the idea of reducing the cabinet's power. The researcher, however, acknowledges the power and rank of the cabinet in the Malaysian administrative and legal framework. The framework only suggests that decisions on the procurement process do not need to be referred to the cabinet if the guidelines for the inter-agency committees are clear on which procurement process is to be adopted.

On the idea of a mandatory competitive bidding exercise for unsolicited proposals, Respondent R^d felt that the private sector would not be totally happy about it. However, if common unsolicited proposal issues such as intellectual property or compensation for costs incurred are addressed as well, Respondent R^d would welcome the proposal. As for further suggestions for improving the framework, Respondent R^c proposed that the frameworks include suggested timelines for each stage. Although this suggestion is useful, it is outside the scope of the current research.

Overall, the respondents agreed that the framework is achievable and would be accepted by stakeholders involved in the UKAS procurement process. However, further research into UKAS and relevant organisations is required since reform of the UKAS PPP programme would involve multiple stakeholders. Respondent R^a believed that the framework could be the catalyst for reform that is much needed, especially in competing with international companies and encouraging *Bumiputera* companies to be more mature, without full backing from the government.

6.8.1 Post Validation

Based on the comments received during the validation exercise, the frameworks have been refined where the researcher felt that amendment was needed to communicate better with the reader. No amendments have been made to the terminology or the structure of the frameworks. However, the authority involved has been inserted in the frameworks to demonstrate that the cabinet is still involved in PPP implementation by UKAS. This is because there was some confusion over the cabinet's involvement in the UKAS procurement process when the researcher suggested it should be reduced.

The refined frameworks are illustrated in Figures 6.30 and 6.31, with the refinement highlighted in purple.

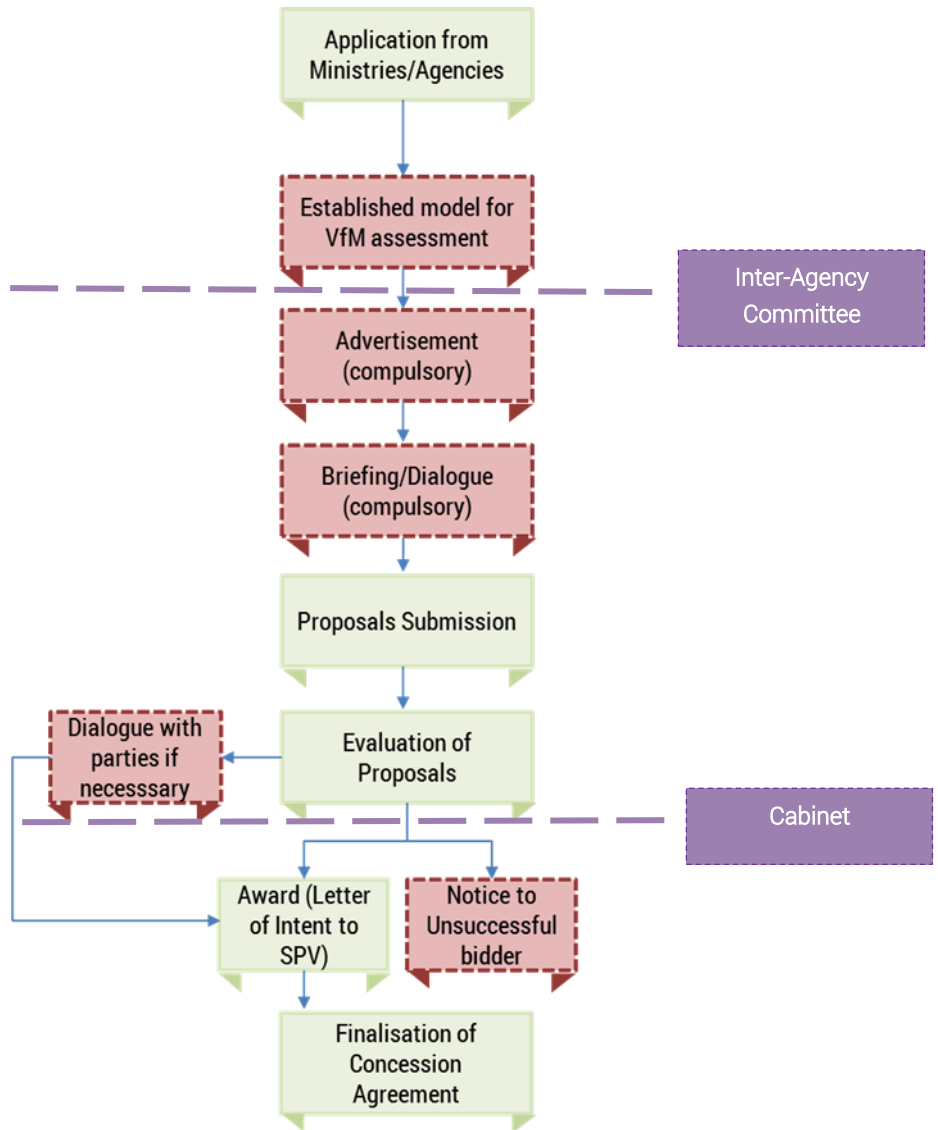


Figure 6.30 – Final Framework for Government-Initiated Proposals

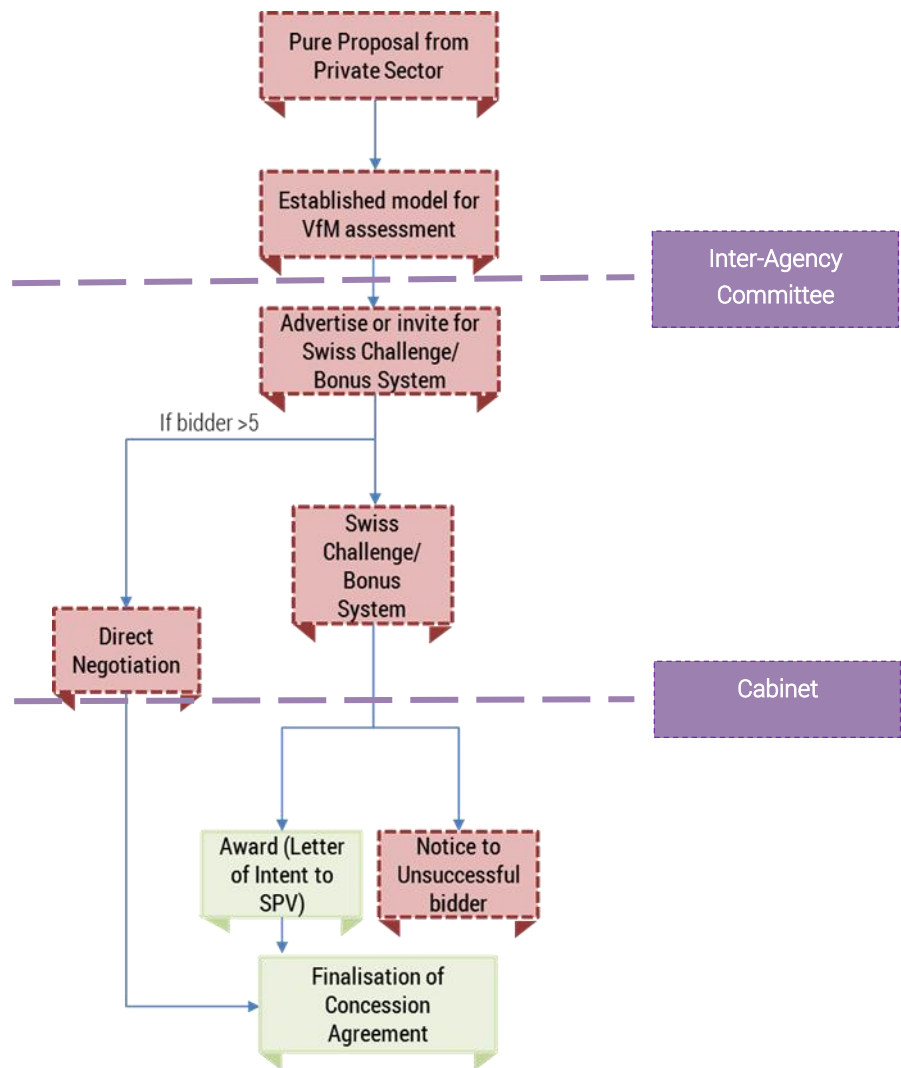


Figure 6.31 – Final Framework for Unsolicited Proposal

6.9 Summary

This chapter has critically discussed the findings which were significant in addressing research objective five, to develop a framework to enhance the competitive practice incorporated within the PPP procurement process. The chapter revealed that the belief and understanding of PPP as non-public procurement has made UKAS complacent about their current practice. Initially, they needed to make sure and push the programme to be successful. Hence, with the support of the government they coerced their way to identifying all the drivers for adopting PPP. Nevertheless, for this reason, PPP under UKAS has not been

without criticism, especially of the procurement process and the manner in which contracts are awarded.

The main finding in this chapter is that the current procurement process allows the cabinet to have unfettered power in micro-managing UKAS, which is alarming. Through legal interpretation of the decisions of the Malaysian judiciary on relevant cases, the researcher established that no public authority or government department should have such a large degree of discretionary powers. Besides fostering competition to achieve value for money, the researcher recognises that competition within the procurement process is salient in upholding good governance, thus ensuring procedural fairness, a transparent process and reasonable practice of discretionary power by the executive. All these together led the researcher to develop a framework to provide an instrument to govern PPP implementation, while safeguarding the interests of the taxpayer.

The response to the framework has been nothing but positive, with the anticipation of the policy maker for further research at the organisational level. Stakeholders agreed that the framework would be beneficial since the measures proposed would definitely improve competition within the procurement process, reform which is sorely needed. Although the framework was developed in the context of Malaysian PPP, it could also be applied in countries who adopt PPP with further aims.

7.0 Conclusion

7.1 Introduction

This chapter summarises and concludes the thesis by revisiting in the content of earlier chapters. Chapters 1-3 form the foundation. In Chapter 1, the researcher identified the concerns about lack of competition in PPP procurement and recognised the need for competition as an important factor in a successful PPP programme. These led to the characterisation of the aim and objectives of the research. Chapter 2 reviewed the literature regarding the concept and practice of PPP globally, before focusing on the Malaysian context. It established the overall setting of PPP practice worldwide, and looked in detail at the practice in the UK, recognised as the most advanced PPP practitioner. PPP practices in Malaysia were examined, historically and within the current context. In Chapter 3, the concept of competition in general was examined, before its application within the context of PPP procurement process. For global practice, the competition element incorporated in the EU PPP procurement process, established as a sound and effective competition policy for the benefit of the public, was examined. For unsolicited proposals, the researcher investigated the practice in countries which had introduced a competitive element in the procurement process. Chapter 3 continued with the synthesis of the constraints experienced by other PPP practitioners in organising a competitive procurement process, and ended with focusing on the competition policy and practice by UKAS for Malaysian PPP. The methodology and conduct of the research were outlined and described in Chapter 4. In brief, the research is an exploratory study, its axis the interpretivist stance, using a single case study approach with a combination of document reviews and semi-structured interviews to gather evidence. Findings drawn from the interviews were analysed in Chapter 5, and the findings from both sources were integrated and discussed in Chapter 6. The crystallised result was then used to formulate and develop the framework, which was elaborated at the end of the chapter.

In presenting the conclusion, this final chapter revisits the objectives of the research and their achievement. It then highlights the contribution of the research to the body of knowledge, and to stakeholders. Despite the significant output from this study, there are limitations which are

discussed later in this chapter. The thesis concludes with recommendations for the enhancement of practice and suggestions for future research.

7.2 Accomplishment of Research Objectives

As the aim of the study is to enhance the procurement process for infrastructure delivery in Malaysian PPP by incorporating competition, five research objectives were identified to steer the research in achieving its aim. The research objectives are:

- i. to understand and analyse the PPP procurement process with particular reference to competition;
- ii. to evaluate the challenges to incorporating competition within PPP procurement process globally;
- iii. to appraise and synthesise the PPP procurement process with particular reference to competition adopted by the Malaysian Government for infrastructure delivery;
- iv. to investigate the relevance of competition within the PPP procurement process in Malaysia;
- v. to develop and validate a competition-based PPP framework which targets improvement for Malaysian PPP.

In the next section, the researcher revisits each objective in order to review the degree of success in accomplishing it.

In addressing the research objectives, the need to understand PPP is crucial. The research explored the concept of PPP and its practice globally, to understand the drivers for governments to adopt it as an alternative approach to procuring infrastructure. The rise of PPP was, indeed, triggered by the pressure on governments to provide infrastructure. Despite the absence of a universal definition of PPP, Table 2.1 synthesised the different types of PPP arrangement and their major elements to establish common elements in their practice. The result indicated largely similar PPP practice between nations, but with some significant differences. The diversity in practice and differences in terms used are the reasons for the absence of a single agreed definition of PPP. The differences in practice result from national governments satisfying their legal frameworks and domestic market requirements.

Co-operation between public authorities and the private sector in providing infrastructure is not new. PPP, however, brought the co-operation between the two parties to a different scale, mainly through the increase in participation of the private sector in the public infrastructure development as seen in PPP. The responsibility of the government to provide public infrastructure has shifted to the private sector through PPP. In adopting PPP, governments commonly propagate co-operation, justified by economic diversity. In detail, Chapter 2 appraises the justifications for diversity offered by PPP that attracts governments to adopt PPP. The two main justifications are optimisation of risk, resources and responsibilities; and maximisation of value for the public sector. Despite wide recognition of these reasons for public authorities to employ PPP, there are concerns about the sincerity of governments in resorting for it. The structure of PPP from the contractual perspective is appraised, to complete the understanding of the concept.

The research also examines benchmarks of PPP practice globally. As the UK has been identified as the leading PPP practitioner, section 2.8 analyses in depth the history and evolution of PPP in that country, before turning to the aim of the thesis, exploration of the aspects of Malaysian PPP, its history, evolution and current practice. The legal framework, policy, and regulation of PPP operation in Malaysia are considered and compared with the UK, where similarities are found in the history and evolution of PPP, the drivers for adopting it, and its evolution from the privatisation programme.

7.2.1 Research Objective 1: To Understand and Analyse PPP Procurement Process with Particular Reference to Competition

The findings for Research Objective 1 were discussed in Chapter 3. As PPP is inherently a complex form of procurement, incorporating a competitive element in the process is no doubt an obstacle for government. Although the PPP procurement process is country-specific, the literature review showed that international experience considered competition as paramount, with most governments making significant efforts to incorporate it in PPP. Hence, the outcome expected from Research Objective 1 was to analyse the practice of governments in incorporating competition within the PPP procurement process.

In achieving Research Objective 1, Chapter 3 starts with understanding the concept and a definition of competition in general, concluding that the PPP market structure is a monopsony, with government as the sole buyer, facing multiple bidders as suppliers. Further

examination of the application of competition in PPP found that countries worldwide consider PPP as part of public procurement, to acquire goods, services or works, to be delivered to the public. In some countries this is clearly defined and regulated by specific laws for PPP implementation.

The efforts made by the EU to uphold competition in public procurement and PPP can be considered as a cornerstone. The EU's advanced competition policy provides a platform for companies for member states to compete equally and against any anti-competitive behaviour. The procurement procedures employed by the EU are identified as open tender, restricted tender, and negotiated procedures, and latest competitive dialogue, each fostered with a competitive element. The prequalification phase to shortlist bidders for negotiated procedure is notable. Chapter 3 also examined the different stages in the procurement processes and the element of competition incorporated within them. There is wide reporting of good practice in integrating measures to foster competition and to prevent anti-competitive behaviour within the different stages. These measures are important to regulate competition within PPP. In the EU directives on PPP, procurement processes are designed to achieve equality and public accountability.

Research Objective 1 would not be completely satisfied without an appraisal of unsolicited proposal practice, presented as part of Chapter 3. On one side are countries which reject the practice of unsolicited proposal, and on the other are countries which manage to organise competitive bidding for unsolicited proposals, administered in various ways. The most common criticism of competitive bidding for unsolicited proposals concerns intellectual property rights, which seriously challenge participation and are time consuming. Despite criticism, within a robust framework unsolicited proposals are proven to be a catalyst in obtaining innovative infrastructure to meet public sector needs. Based on the results of the literature review outlined above, competition within the procurement process was identified, thereby achieving Research Objective 1.

7.2.2 Research Objective 2: To Evaluate the Challenges to Incorporating Competition within PPP Procurement Process Globally

Research Objectives 2 was addressed through the comprehensive literature review in Chapter 3, identifying the challenges faced by practitioners in advocating competition. Among the prominent barriers are the complex nature of PPP, the high cost of tendering, the lengthy

process, the possibility of renegotiation and legal issues such as intellectual property rights. As highlighted in the research problem, even though practitioners acknowledge the importance of competition within the procurement process, in many cases it is still inadequate, probably because these challenges hinder practitioners in employing it.

Further evaluation of the challenges suggested that most of the countries attempt to address these challenges as competition remains relevant. For example, to encourage bidders to participate, some countries have introduced compensation to cover the cost incurred in bidding. Another example is the introduction of competitive dialogue (EU member states) and interactive tendering (Australia) to address the complex nature of PPP. The effort demonstrated by governments to overcome these challenges suggests that competition within the procurement process is essential. This is in line with the suggestion by KPMG Corporate Finance (Aust) Pty Ltd (2010), that lack of competition within the procurement process prevents the governments from obtaining best value for money from PPP.

The findings from this exercise leave no doubt that, despite the challenges to advocating competition within the procurement process, the determination of governments in stimulating competition within the market is essential. Although PPP escalates the involvement of the private sector in public procurement, the government should always uphold competition to ensure efficiency and safeguard the interests of the public.

7.2.3 Research Objective 3: To Appraise and Synthesise PPP Procurement Process with Particular Reference to Competition Adopted by the Malaysian Government for Infrastructure Delivery

Research Objective 3 was accomplished through a combination of two sources of evidence: document review and interviews. It focuses on comprehending the less-known procurement process employed by UKAS for the government of Malaysia in procuring and delivering infrastructure. Any existing gap identified in the current practice is filled by the formulation of the framework in Chapter 6. A series of reviews were conducted on official publications and unpublished documents produced to support the implementation of UKAS PPP. While these documents are authoritative documents, they do not specify the details of the procurement process employed by UKAS. Basically, the information provided in the documents differs, yet they have to be read together, *mutatis mutandis*. The lack of clarity of in these documents frequently results in inconsistent practice by UKAS.

The outcome of the interviews revealed that the generic nature of the UKAS documents is indeed intentional. The purpose is to allow flexibility within procurement under the belief that it encourages innovation. On the basis of the findings from the case study, UKAS has been governing its procurement process flexibly but not necessarily according to the Malaysian public procurement regulations. The justification given was that UKAS PPP is non-public procurement and does not fall under the jurisdiction of public procurement regulations, even though it was found that the UKAS guidelines state that UKAS PPP is part of public procurement. The absence of specific PPP law and clear definition of Malaysian PPP is clearly identified as a gap that contributes to this confusion. Nevertheless, UKAS does not violate any regulations as it operates with strong government support. Every decision for UKAS procurement process is referred to and decided by the cabinet, the highest executive authority in Malaysia.

The result of the interviews revealed that for government-initiated proposals, UKAS employed open tender, restrictive tender, and direct negotiation with a single company. Although UKAS also resorts occasionally to prequalification, two-stage tendering with prequalification is not commonly used to shortlist bidders as the pool of PPP players is small and the process required is cumbersome. Shortlisted names are obtained from an existing database or from the relevant ministries. UKAS encourages unsolicited proposals by the private sector, with the probability of awarding the concession to the original proposer, justified by attracting private sector participation. UKAS experimented with some of the best practice mechanisms for introducing competition to unsolicited proposals, such as Swiss Challenge, but prefers to stay with direct negotiation.

7.2.4 Research Objective 4: To Investigate the Relevance of Competition Within the PPP Procurement Process in Malaysia

Research Objective 4 was achieved by addressing the relevance of competition in the PPP procurement process in the context of Malaysian experience. Through a detailed review of authoritative UKAS documents, the relevance of competition was found to be limited. The sole document emphasising a competitive procurement process is the earliest one, the Privatisation Master Plan. However, actual practice does not follow all the guidelines of this Plan.

The relevance of competition within UKAS was therefore appraised through the interviews conducted. As analysed in Chapter 5, without hesitation most respondents agreed and recognised that competition is relevant within the UKAS procurement process. This is in line with the evidence of Ismail (2013) that competitive tender is perceived as the most important measure to achieve value for money for UKAS. Through the interviews, respondents also stressed that, despite the relevance of competition within the procurement process, UKAS faces a challenge in striking a balance between the economic drivers of PPP and the national agenda, hindering the actual practice of competition within procurement.

Research Objective 4 looks further into the challenges faced by UKAS in incorporating competition within its procurement process. As discussed in Chapter 6, several constraints are faced by UKAS in enforcing competition, one of them being the national agenda. The New Economic Policy, which requires the government to manage the manner of competition, is organised within the UKAS procurement process. UKAS and the cabinet have not been consistent in upholding competition to accomplish all the drivers highlighted in Chapters 5 and 6, resulting in an accusation of ethical misconduct and concern over the accountability of UKAS practice.

Further investigation, however, revealed that competition involves more than achieving economic benefits. As UKAS and the cabinet are still exercising public power, using public resources and providing services to the public, PPP by UKAS is very much part of public procurement and hence accountable to the taxpayer. In addition, having identified that under Malaysian law, UKAS and the cabinet are not allowed to exercise their powers and discretion unfettered, competition within the procurement process comes into play. Competition rules within the procurement process are a substantive mechanism to ensure the achievement of good governance within UKAS, and competition will also safeguard public interest and maximise value added for the taxpayers. In general, the relevance of competition has been answered through evidence and discussion presented in Chapters 5 and 6, thereby achieving Research Objective 4.

7.2.5 Research Objectives 5: To Develop and Validate a Competition-Based PPP Framework Which Targets Improvement for Malaysian PPP

The findings from Research Objectives 1, 2, 3 and 4 are the basis for development of the frameworks required in order to accomplish Research Objective 5. Investigation for the

research objectives allowed the researcher to examine the best practice and challenges for competition within the procurement process globally, before focusing on the Malaysian situation. Several propositions were put forward. First, the holistic responsibility of UKAS to satisfy the country's need for socio-economic engineering through PPP is addressed by the proposed frameworks which allows UKAS to achieve accountability without having to abandon any of its drivers.

The second proposition is that current UKAS practice gives the cabinet absolute discretion of powers. The public power held by UKAS and the cabinet in administering PPP needs to be stewarded with appropriate regulations so that it is not exercised unfettered, hence safeguarding the interests of the public. To address this proposition, competition is incorporated to regulate the procurement process and to uphold its integrity. The proposed frameworks are designed to induce and enhance current competition while preventing anti-competitive behaviour; with the measures proposed in the frameworks, it will be better regulated, with a higher standard of administration for PPP in Malaysia.

The third proposition, while conceding some scepticism with competitive procurement in Malaysia, is that the identified constraints, such as lengthy procedures, high cost of bidding and the *bona fides* of bidders, exist even with the current non-competitive framework. Hence the only difference with the introduction of a competitive procurement process is that government will obtain the benefits of competition. The research nevertheless identified that certain situations may not be suitable for a competitive procurement process; if that is the case, there are other options for UKAS. The development of the competition-based frameworks resulted in partial achievement of Research Objective 5.

Another outcome expected from Research Objective 5 is validating the frameworks developed throughout this research, and the validation exercises conducted with identified stakeholders received positive feedback. Respondents representing the main stakeholders: taxpayers, UKAS, practitioners and clients, agreed and applauded that the frameworks will enhance current competition within UKAS procurement. Revisions were made to the frameworks, with the addition of the authority involved conveying the message better and avoiding confusion. The final version of the frameworks was shown diagrammatically in Figures 6.30 and 6.31 in section 6.8.1. Developing and validating the framework indicates the accomplishment of Research Objective 5.

7.3 Research Contribution

The case study on competition policy within the procurement process for Malaysian PPP contributes to the field in several ways. The case study is impeccable, given its desire to achieve economic benefits from adopting PPP while maintaining the current policy of restricting competition due to the national agenda which engineers the socio-economy of its citizen. The question raised is whether PPP can achieve its best results when there is a limited competitive environment. This section presents the contributions made by this research.

7.3.1 Contribution to Knowledge

The research has made contributions to different dimensions of knowledge.

- a) In the context of PPP practice globally, this research adds to the existing bundle of knowledge on PPP. Specifically, it adds valuable information to the limited literature on Malaysian PPP through UKAS. This includes examination of the current scenario of Malaysian PPP, providing a comprehensive understanding of Malaysian PPP through UKAS. It includes the differences between Malaysian PPP and other global practitioners and the multi-faceted reasons for the current practice.
- b) The methodology designed for this research can also be adopted by other researchers to investigate similar problems in different countries.
- c) At an early stage of the research, the researcher concluded that competition is an essential element if PPP is to achieve value for money. Maintaining competition in government procurement ensures taxpayers' money is spent wisely to obtain services or goods at a reasonable price. Competition is incorporated within the PPP procurement process for its ability to achieve economic benefits. Despite the relevance of competition, the researcher identified a gap in organising and incorporating competition within the procurement process.
- d) This research concludes that Malaysian PPP has been able to introduce another way of achieving value for money besides competitive tendering: by organising a value management workshop. In fact, there is little information of similar

practice globally, so this contributes to knowledge and is an opportunity for future research.

- e) In this research, findings were made on the accountability of UKAS PPP as public procurement to taxpayers. It also become conscious of the unfettered power held by the cabinet in the UKAS procurement process. This is the antithesis of good governance, as it can lead to administrative abuse and ethical misconduct. In addition, with the lack of transparency in the UKAS procurement process, accountability practice is a major concern.
- f) Besides achieving value for money through a competitive exercise, competition is also seen as the main element in the framework to regulate the discretion held by the cabinet within the UKAS procurement process and to achieve a higher standard of good governance. Although this differs from the publicised role of competition, the findings made here are a significant contribution to the field of public procurement and public policy.

7.3.2 Contribution to Practice

This research also contributes to practice, as summarised below:

- a) Drawing on the findings made during the course of the research, Chapter 6 presented frameworks for UKAS to enhance the competitive elements. For the government of Malaysia, the frameworks are consistent with their motive for adopting PPP, to achieve holistic goals through the adoption of PPP; using the framework, they should not be concerned that any of the drivers are left out. As Malaysia has been adopting a protective policy to encourage *Bumiputera* companies, the frameworks contribute by broadening the perspective for *Bumiputera* companies to compete with each other to develop their competitive edge.
- b) As good governance is demanded from public agencies and the government, the competitive elements within the procurement process can serve as a regulator ensuring relevant laws are compelled with in the interest of the public. The application of this framework, which emphasises competitive

elements, is expected to address criticisms of the practice of political patronage, rent seeking and unfairness in awarding contracts which are currently associated with government procurement awarded as a non-competitive exercise. Reaching a high standard of good governance within the procurement process will improve the image of the government domestically and internationally, hence boosting the public perception and confidence of potential investors in the Malaysian PPP programme.

- c) The relevance of competition is recognised by most of the PPP practitioners, and has been adopted by advanced practitioners to achieve value for money. The competitive pressure created by the framework will lead to potential high-quality bids at competitive prices, hence benefiting the government and the taxpayers. In anticipation of application of the framework by UKAS, it is hoped that UKAS will achieve equal benefit.

7.4 Research Limitations

Despite the expected significance of the enhanced competition frameworks, the research is not without its limitations. Throughout this research the following challenges were encountered:

- i. In conducting the case study, the researcher sought to access a wide range of material relevant to the subject matter, but was not allowed to see project files and other internal procedure documents such as those on the tender evaluation mechanism. Since most of the UKAS documentation is restricted, this presents an obstacle and slightly affected the research design where it was planned to cross-analyse the UKAS procurement process for launched concessions with the authoritative documents. As most of the UKAS projects are still active, UKAS decided not to disclose commercially sensitive material to the public, including the researcher. Despite this limitation, the researcher obtained information on UKAS procurement process from the experience of the respondents.
- ii. The research focused on the national issue of Malaysian PPP reflects in best practice worldwide. However, PPP is largely a country-specific practice, and the frameworks produced are based on the Malaysian scenario with a specific

case study on the central PPP unit of the government; hence, application of the frameworks to other countries might need refinement according to their own context. Given the deliberately context-sensitive nature of the research, generalising the findings was not an aim, although countries with a similar context may adopt what seems best for them. As most countries have been able to benefit from a competitive procurement process, there is no reason why others should not be able benefit from their experience.

Despite the listed shortcomings, the research outcomes satisfy the aim and objectives and have been validated.

7.5 Future Recommendations

The outcomes of the research are based on a specific aim and specific methodology adopted to fill the gap identified. Therefore, the researcher considers that this thesis is a first step to future research based on its findings.

Further research should be conducted on the government's priority of the drivers identified in adopting PPP, to identify genuine reasons. Although PPP can be a catalyst in achieving infrastructure, PPP is not panacea for all problems, and there are concerns on the shortcomings of PPP, such as the creation of heavy debt for the future.

In response to the positive feedback and enthusiasm received for the competitive frameworks for UKAS, the possibility of integrating and testing these frameworks in an actual PPP concession should be considered by the next researcher. As people are concerned with the paradox of a lengthy process for a competitive procurement process, this is worth considering for future research, and may make the frameworks more robust.

In line with a survey study conducted by Ismail (2013), this thesis has found that competition is indeed relevant within the procurement process, but with a slightly different result. Different methodology was used for the two studies. Further research using different research designs, for example the adoption of multiple case studies or grounded theory, would be interesting, to see whether the same results are obtained. The result from such a study would definitely benefit the Malaysian PPP industry as a whole. In addition, although the research is centred around Malaysian PPP, the research design and the framework could be applied in countries adopting PPP with additional drivers, such as India, Thailand, China and Indonesia.

7.6 Conclusion

Although PPP is not the only way for governments to meet the demands for infrastructure, the findings suggest that it is a preferred solution worldwide, because it offers more diversity than traditional procurement. For example, in the traditional setting the public sector is responsible for financing the proposed infrastructure, but with PPP the responsibility has been shifted to the private sector. The procurement is also expected to overcome some of the other shortcomings to using traditional procurement, such as inefficiency and delay in projects. Nevertheless, PPP is as challenging as it is complex in nature. The relevance of conducting a competitive procurement process has been highlighted as essential in maximising the benefits of PPP. This research has been undertaken to synthesise the competition policy incorporated by PPP practitioners globally and to analyse the practice in Malaysia. The findings suggest that even though there are constraints in organising the competitive procurement process within PPP, new procedures such as competitive dialogue have been introduced to ensure that a competitive exercise takes place whenever possible. As PPP develops long-term contractual relationships, integrity in selecting the private partner should be assured.

Despite PPP being introduced as recently as 2009, the involvement of the private sector as a partner in delivering infrastructure has already substantially benefitted the government of Malaysia. The study has confirmed that the government's PPP programme is a continuation of the privatisation and PFI programmes. To label the Malaysian PPP programme as being at the stage of infancy is inaccurate. Taking the market maturity curve as a benchmark, Malaysia has already achieved the stage one attributes, most of the stage two attributes and is already executing some of the advanced attributes of stage three, that is already midway along the maturity curve in its PPP programme. If the success of the programme is measured by the infrastructure delivered, credit should be given to the government and UKAS for their achievements to date, through working with the private sector from privatisation to PPP.

It is important to stress that the implementation of Malaysian PPP by UKAS is not straightforward. It is deployed by the government as one of the vehicles through which to achieve the aim of the New Economic Policy: an ethnicity-based affirmative-action policy designed to re-engineer the socio-economy of the people. In spite of criticism of the policy, the government's role and responsibility are holistic. The findings from this study suggest that, to kick-start the programme and drive industry, UKAS has been flexible in its procurement process where it is fully supported by cabinet ministers. The New Economic

Policy has been blamed for the lack of a competitive procurement process, but in fact the research findings suggest that the problem is not with the policy, but with its implementation.

Nonetheless, given that the PPP programme has been in progress for some time, restructuring on the governance of the procurement process is necessary, to reflect the integrity and transparency of the implementation of the programme and maximise the benefits of adopting PPP. Additionally, an improved competitive policy within the procurement process is essential to safeguard the taxpayers' money. Finally, the findings of this research provide useful guidance and valuable information on the competition practice within the procurement process, and the challenges faced within the global and Malaysian context. This research recommends the injection of a much-needed competitive element in the UKAS procurement process, without abandoning any of its drivers, thus maximising the benefits of adopting PPP.

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Academic Audit and Governance Committee

**College of Science and Technology Research Ethics Panel
(CST)**



To Muhammad Imran Bin Zin Zawawi (and Prof David Eaton)
cc: Prof Charles Egbu, Acting Head of School of SOBE
From Nathalie Audren Howarth, College Research Support Officer
Date 14/08/2014

MEMORANDUM

Subject: Approval of your Project by CST
Project Title: Improving Competition Within Public Private Partnership Procurement (PPP):
A Malaysian Case Study
REP Reference: CST 14/35

Following your responses to the Panel's queries, based on the information you provided, I can confirm that they have no objections on ethical grounds to your project.

If there are any changes to the project and/or its methodology, please inform the Panel as soon as possible.

Regards,

A handwritten signature in black ink, appearing to read "N. Audren". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nathalie Audren Howarth
College Research Support Officer

MUHAMMAD IMRAN BIN ZIN ZAWAWI
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UPE 40/200/19/3168
 (4)

6 November 2014

APPLICATION TO CONDUCT RESEARCH IN MALAYSIA

With reference to your application, I am pleased to inform you that your application to conduct research in Malaysia has been approved by the **Research Promotion and Co-Ordination Committee, Economic Planning Unit, Prime Minister's Department**. The details of the approval are as follows:

Researcher's name	:	MUHAMMAD IMRAN BIN ZIN ZAWAWI
Passport No./ I.C No	:	811224-14-5807
Nationality	:	MALAYSIA
Title of Research	:	"IMPROVING COMPETITION WITHIN PUBLIC PRIVATE PARTNERSHIP (PPP) PROCUREMENT PROCESS - A MALAYSIAN CASE STUDY"
Period of Research Approved	:	3 YEARS

2. Please collect your Research Pass in person from the Economic Planning Unit, Prime Minister's Department, Parcel B, Level 4 Block B5, Federal Government Administrative Centre, 62502 Putrajaya, Malaysia and **bring along two (2) colour passport size photographs**.

3. I would like to draw your attention to the undertaking signed by you that you will submit without cost to the Economic Planning Unit the following documents:

- a) A brief summary of your research findings on completion of your research and before you leave Malaysia; and
- b) Three (3) copies of your final dissertation/publication.

4. Kindly, **get an appointment date from us before you come to collect your research pass.**

5. Lastly, please submit a copy of your preliminary and final report directly to the State Government where you carried out your research. Thank you.

Yours sincerely,


(MUNIRAH BT. ABD MANAN)

For Director General,
Economic Planning Unit.

E-mail: munirah@epu.gov.my

Tel : 03 88882809

Fax : 03 88883798

ATTENTION

This letter is only to inform you the status of your application and **cannot be used as a research pass.**

Interview Guidelines for Research Entitled ‘Improving Competition within the Public Private Partnership (PPP) Procurement Processes in Malaysia’

Brief Description

Malaysia has started to promote Public Private Partnership (PPP) as one of the Government’s procurement processes of choice. PPP has been identified as one of the best procurement options for the government to optimise its spending while obtaining better value for money through the private sector’s expertise and innovation. Another highlight of PPP is the sharing of risks between the public sector and private sector in different phases throughout the implementation of procurement.

Competition in the PPP procurement process results in maximum innovation and efficiencies. Maintaining competition in government procurement ensures the taxpayers’ money is spent wisely as services or goods are obtained at a reasonable price. An effective competition policy in PPP also increases the rate of attracting the private sector to invest in PPP programmes. Hence the role of the government is vital in ensuring and stimulating competition in the procurement process. However, due to PPP’s complex characteristics, there is evidence that PPP lacks competition elements during the procurement process. With regard to this lack of competition, the research intends to analyse international and Malaysian PPP practices and the competition policies incorporated into the procurement process.

The research aim is to develop a competition based framework for the PPP Procurement Process in Malaysia which could serve as a guideline to promote and uphold competition in the PPP procurement process.

Interview Participants.

The proposed participants are personnel involved directly or indirectly in the chosen projects/developments. They are from UKAS, shareholders, SPV companies, construction companies, sub-contractor companies, fund/finance providers, academicians, etc. due to their knowledge and involvement in PPP implementation by the UKAS. The participants are chosen based on their:

- i) Expertise in UKAS procurement process;
- ii) Relevant experience of PPP project implemented by UKAS.

A different set of questions will be given to individuals from UKAS personnel and other participants.

Confidentiality

All data and information shall be used for research purposes only with the informed consent to the organization involved and the participants. No personal information that may be used to identify the participants in the study, publications or public presentations associated with the research will be disclosed. Codes and/or pseudonyms will be used in the data where necessary to protect your identity and anonymity.

Development of the PPP Competition Framework

There are two research themes identified for this research which are **Public Private Partnerships** and **Competition**. The framework will be constructed through the analysis of information obtained from the interviews and other sources of evidence collected within the context of the research themes. Every participant is encouraged to express personal opinions and experience which will be highly valued in this research. A set of relevant interview guidelines will be sent to the participants before the interview takes place.

The interview questions for UKAS personnel are as below:

Research Themes	Interview Questions	Role in Study
Introduction	Could you please tell me how long have you worked with UKAS?	Background of the respondent
	Could you elaborate your role and influence in the agency (UKAS)?	Background of the respondent
Public Private Partnership	Can you clarify whether PPP is considered as Public Procurement? [Follow up question for both yes or no] Could you tell me the relevant statute, current guidelines, principles and regulations used?	Understanding the current context of PPP implementation in Malaysia by UKAS
	What made the government focus and promote on the use of PPP? Any certain event?	Understanding the Government policy goals and objectives

	<p>[Follow up question]</p> <p>How would you compare PPP procurement with other Government procurements for infrastructure delivery? Are there any problem?</p>	To identify other procurement constraints/benefits
	<p>Could you elaborate on the procurement process determined by the agency (UKAS)?</p> <p>[Follow up question]</p> <p>Who were the main people in deciding the procurement process? Were they experts, leaders or decision makers.</p>	Understanding the social actors' interpretations, influence and meaning put on decision making
Competition	<p>How do you perceive the current competition policy applied and implied in the UKAS procurement process?</p> <p>[Follow up question]</p> <p>Tell me about the current guidelines, principles and regulations on competition implied and practiced by the agency (UKAS). Do you think it's enough?</p>	Understanding the current context of implementation of competition by UKAS
	<p>Who determined whether a proposal is feasible and acceptable? Can you please give an insight or view of a decision making process (objectives, rationale & argument) to choose the most appropriate private partner for a project/development?</p> <p>[Follow up question]</p> <p>Could you tell me the relevant statute, current guidelines, principles and regulations used?</p>	Understanding the rationale/justification of the decision making process by UKAS
	<p>Does UKAS receive many unsolicited proposals?</p> <p>Could you elaborate how UKAS dealt with unsolicited proposals?</p>	Understanding UKAS method to deal with unsolicited proposals
	<p>According to the Malaysian Ministry of Finance (MoF) Circular (PK 1/2013 or SPP 4/1995), in line with the New Economic Policy, Bumiputera companies are given priority in the government procurement. Does this circular apply to PPP?</p>	Understanding the Bumiputera policy applied and implied in UKAS PPP

	Could you elaborate in detail the implementation of this circular and any relevant <i>Bumiputera</i> policy in PPP implementation?	
	In general do you think competition is important in PPP implementation? [Follow up question] How about in Malaysian PPP?	To ascertain the importance of competition in PPP implementation.
	What are the barriers faced in implementing competition in Malaysian PPP?	To ascertain the importance of competition in PPP implementation.
Suggestions/Opinions/View	What would you suggest to improve UKAS PPP?	
	What other information do you think I might be interested in? Would you like to share with me?	

Thank you for your time and cooperation. For any clarification and queries regarding this study, you can contact the researcher or the supervisor of the researcher as set out below:

Researcher:

Muhammad Imran Bin Zin Zawawi
School of the Built Environment
University of Salford,
Manchester M5 4WT
United Kingdom
Email: m.i.zinzawawi@edu.salford.ac.uk
Telephone: +447763543639 (UK)

Supervisor:

Professor Dr. David Eaton
School of the Built Environment
University of Salford,
Manchester M5 4WT
United Kingdom
Email: D. Eaton@salford.ac.uk
Telephone: +441612955222(UK)

Interview Guidelines for Research Entitled ‘Improving Competition within the Public Private Partnership (PPP) Procurement Processes in Malaysia’

Brief Description

Malaysia has started to promote Public Private Partnership (PPP) as one of the Government’s procurement processes of choice. PPP has been identified as one of the best procurement options for the government to optimise its spending while obtaining better value for money through the private sector’s expertise and innovation. Another highlight of PPP is the sharing of risks between the public sector and private sector in different phases throughout the implementation of procurement.

Competition in the PPP procurement process results in maximum innovation and efficiencies. Maintaining competition in government procurement ensures the taxpayers’ money is spent wisely as services or goods are obtained at a reasonable price. An effective competition policy in PPP also increases the rate of attracting the private sector to invest in PPP programmes. Hence the role of the government is vital in ensuring and stimulating competition in the procurement process. However, due to PPP’s complex characteristics, there is evidence that PPP lacks competition elements during the procurement process. With regard to this lack of competition, the research intends to analyse international and Malaysian PPP practices and the competition policies incorporated into the procurement process.

The research aim is to develop a competition based framework for the PPP Procurement Process in Malaysia which could serve as a guideline to promote and uphold competition in the PPP procurement process.

Interview Participants.

The proposed participants are personnel involved directly or indirectly in the chosen projects/developments. They are from UKAS, shareholders, SPV companies, construction companies, sub-contractor companies, fund/finance providers, academicians, etc. due to their knowledge and involvement in PPP implementation by the UKAS. The participants are chosen based on their:

- i) Expertise in UKAS procurement process;
- ii) Relevant experience of PPP project implemented by UKAS.

A different set of questions will be given to individuals from UKAS personnel and other participants.

Confidentiality

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Development of the PPP Competition Framework

There are two research themes identified for this research which are **Public Private Partnerships** and **Competition**. The framework will be constructed through the analysis of information obtained from the interviews and other sources of evidence collected within the context of the research themes. Every participant is encouraged to express personal opinions and experience which will be highly valued in this research. A set of relevant interview guidelines will be sent to the participants before the interview takes place.

The interview questions for other UKAS PPP practitioners are as below:

Research Themes	Interview Questions	Role in Study
Introduction	Could you please tell me which organization you work for and its role under the PPP arrangement?	Background of the respondent
	Could you please elaborate your role in the above said PPP projects/developments?	Background of the respondent
Public Private Partnership	Which project has your organization been involved with? [Follow up question] Could you describe the procurement process involved? Are there any issues or problems?	Understanding the industry practitioners experience with PPP implementation by UKAS

	<p>How do you view the current state of PPP implementation in Malaysia undertaken by UKAS?</p> <p>[Follow up question]</p> <p>How would you compare PPP procurement with other Government procurements for infrastructure delivery?</p>	<p>Understanding the industry practitioners perception of implementation of PPP in Malaysia by UKAS</p>
	<p>What were the challenges faced by your organization in participating in PPP procurement managed by UKAS?</p>	<p>Understanding the potential constraints/benefits of implementation of PPP in Malaysia by UKAS</p>
	<p>Have you been involved in other PPP projects with other organizations?</p> <p>[follow up question]</p> <p>How would you compare with PPP by UKAS?</p>	<p>Compare and contrast the implementation of PPP in Malaysia by UKAS</p>
Competition	<p>How do you perceive the current competition policy implied in the UKAS procurement process?</p>	<p>Understanding the current context of implementation of competition by UKAS</p>
	<p>What are the strengths of your organization's proposals in the bidding exercise?</p> <p>[follow up question]</p> <p>Have you ever considered submitting an unsolicited?</p> <p>What are your strengths in doing so?</p>	<p>Understanding the competitive advantages of an organization</p>
	<p>In general do you think competition is important in PPP implementation?</p> <p>[Follow up question]</p> <p>Do we need to enhance current practice of competition in PPP?</p>	<p>Understanding the importance of competition in PPP implementation.</p>
Suggestions/Opinions/View	<p>What would you suggest to improve UKAS PPP?</p>	
	<p>What other information that you think I might be interested in? Would you like to share with me?</p>	

Thank you for your time and cooperation. For any clarification and queries regarding this study, you can contact the researcher or the supervisor of the researcher as set out below:

Researcher:

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Brief Description

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The interview questions for PPP experts are as below:

Research Themes	Interview Questions	Role in Study
Introduction	Could you please tell me which organization/institution you work for?	Background of the respondent
	Could you please elaborate your role in the development of PPP policy in UKAS?	Background of the respondent
Public Private Partnership	How do you see the current state of PPP implementation in Malaysia undertaken by UKAS?	Understanding the experts observation of implementation of PPP in Malaysia by UKAS
	What made the government focus and promote the use of PPP? Any certain event? [Follow up question] Whose interests were being promoted most?	Understanding the expert's assessment on government policy goals and objectives.

	Participants inside the government or outside the government?	
	Did you or your institution have the capacity to influence, inhibit or facilitate UKAS regulations or policy? [Follow up question] How about research regarding PPP?	Understanding the influence of experts in implementation of PPP in Malaysia by UKAS
Competition	How do you perceive the current competition policy implied in the UKAS procurement process?	Understanding the experts view of implementation of competition by UKAS
	In general do you think competition is important in PPP implementation? [Follow up question] Do we need to enhance current practice of competition in PPP?	Understanding experts view on the importance of competition in PPP implementation.
Suggestions/Opinions/View	What would you suggest to improve UKAS PPP?	
	What other information that you think I might be interested in? Would you like to share with me?	

Thank you for your time and cooperation. For any clarification and queries regarding this study, you can contact the researcher or the supervisor of the researcher as set out below:

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