

STEMMING THE TIDE OF CORRUPTION IN PPP PROCUREMENT PROCESSES: BEING A PAPER DELIVERED BY YUSUF ALI SAN FCIArB (UK), FCIArB (NIG), FSPSP AT THE VIRTUAL CONFERENCE ORGANISED BY YUSUF O. ALI & CO. IN CONJUNCTION WITH DEPARTMENT OF BUSINESS LAW, FACULTY OF LAW, UNIVERSITY OF ILORIN HELD ON 13TH & 14TH OCTOBER, 2020

1.0 INTRODUCTION

Nigeria was tagged the giant of Africa years ago, not only because of its huge population but also because of its massive natural resources. The natural riches have however not translated into availability of infrastructure and real development. Like many developing countries, the country has a huge infrastructure deficit, it also has a very high potential for high returns on infrastructure investment.

Even though the country has adopted the Public-Private Partnerships (PPPs) initiative as a solution to its huge infrastructure gap, there have been serious challenges facing the operation of the PPP initiative in Nigeria. One of the major factors militating against the operation of PPP is corrupt practices. Corruption has eaten so deep into our society that it has become a second nature, nay first nature, of many citizens, not only in Nigeria but in most of the countries of the Commonwealth. In fact, it has been said in some quarters, corruption has become the public policy in some of these countries, inclusive of Nigeria.

The thrust of this paper is to look into the tide of corruption and how it can lead to the slow growth in the PPP procurement process in Nigeria. In discussing the focus of the topic, a short discourse will be made on the concept of PPP and its regulatory framework in Nigeria and a few selected countries.

2.0 WHAT IS PPP?

In its most basic sense, a partnership is any business or institutional association within which joint activity takes place. A PPP exists from one or more public organizations agreeing to act in conjunction with one or more private organizations.¹

A Public-private partnership (PPP) is often defined as a long-term contract between a private party and a government agency for providing public asset or service, in which the private party bears significant risk and management responsibility.² According to the World Bank, the term Public Private partnership can be referred to as arrangements, ranging from medium to long term, between the public and private sectors, whereby part of the services or works that fall under the domain of the public sector are provided by the private partners, with a detailed agreement for the delivery of public infrastructure and/ or public services.³

Commonly, PPP is resorted to when a government needs funding, technical expertise or sharing of risks and management responsibilities in public in the creation of public assets and services. This initiative is an arrangement with a private party on a long term contract.⁴ It is usually used to aid the government in the provision of public infrastructure such as power

¹ Pierre Sadran 'Public-private partnership' available at <https://www.britannica.com/topic/public-private-partnership>

² 'What is Public-private Partnerships?' available at <https://www2.deloitte.com/cn/en/pages/real-estate/articles/what-is-public-private-partnerships.html>

³ World Bank definition of Public-Private Partnerships available at <http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>

⁴ Said, Suzana. (2017). Public-Private Partnership's Contract in Malaysia: Some Areas of Concern in a Land Swap Arrangement. SRIWIJAYA INTERNATIONAL JOURNAL OF DYNAMIC ECONOMICS AND BUSINESS. 1. 239. 10.29259/sijdeb.v1i3.21.

generation plants and transmission or distribution networks, roads and bridges, seaports, airports, railways, inland container depots and logistics hubs, gas and petroleum infrastructure (such as storage depots and distribution pipelines etc) water supply, treatment and distribution systems, solid waste management, educational facilities, urban transport systems, housing and healthcare facilities.⁵

With the above conceptual analysis, we will now examine, in brief, the framework for Public-Private Partnerships in Nigeria and other climes.

3.0 PPP IN NIGERIA

Nigeria adopted the Public-Private Partnerships (PPPs) initiative, in 2005, as a solution to its huge infrastructure gap. A number of projects have been executed and are being executed in Nigeria through PPP, some of which are Murtala Muhammed Airport 2 between Bi-Courtney Limited and the Federal Government, Delivery of 3.4bcf of Gas by 2020 between NNPC and Seplat Petroleum Development Company Limited, Lekki Road Concession etc.⁶ The Federal Government of Nigeria has laws and regulations aimed at providing a conducive atmosphere for the people in the private sector that intend to do business in Nigeria. These laws and regulations are laws administered jointly with anti-corruption laws to control the PPP regime in the country. Some of these laws include:

⁵ 'Public Private Partnerships in Nigeria' available at <https://www.lexology.com/library/detail.aspx?g=dabbe5fb-ffae-4504-9c55-b7b86e07207b>

⁶ Dayo Adu et al 'Nigeria: Public-Private Partnerships: The Prospects For Standard Infrastructural Developments In Nigeria' available at <https://www.mondaq.com/nigeria/government-contracts-procurement-ppp/789438/public-private-partnerships-the-prospects-for-standard-infrastructural-developments-in-nigeria>

1. The Infrastructure Concession Regulatory Commission (Establishment) Act 2005 provides for the participation of private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the Federal Government through concessions and the establishment of the Commission to regulate and supervise concession contracts in Nigeria.⁷
2. The Public Procurement Act 2007 which provides for the establishment of the National Council on Public Procurement and the Bureau of Public Procurement in Nigeria as the regulatory agencies responsible for the monitoring and oversight of public procurements, harmonising the existing government policies and practices by regulating, setting the necessary standards and developing the legal framework and professional capacity for public procurement in Nigeria.⁸
3. The Fiscal Responsibility Act 2007 which provides for the prudent management of the nations resources, secure greater accountability and transparency in Fiscal operations within the medium term of Fiscal Policy Framework, and the establishment of the Fiscal Responsibility Commission which would ensure the promotion of the nation's economic objectives.
4. The National Policy on Public Private Partnerships in Nigeria and its Supplementary Notes which provides clear, consistent and a detailed process and procedure guides for all aspects of infrastructure development through PPPs and implementation ranging from project identification, evaluation, selection, procurement, operation, maintenance and performance monitoring.

⁷ See the Explanatory Note to the ICRC Act, 2005

⁸ See the Preamble to the Public Procurement Act , CAP P44, Laws of the Federation of Nigeria, 2010.

5. The Freedom of Information Act 2011 which helps in enthrone transparency, unearthing facts, battling corruption and holding public officials and institutions accountable in PPP procurement.
6. The Economic and Financial Crimes Commission Act (EFCC) Act 2004, which establishes a Commission empowered to combat financial and economic crimes. The Commission is empowered to prevent, investigate, prosecute and penalize economic and financial crimes and is charged with the responsibility of enforcing the provisions of other laws and regulations relating to economic and financial crimes.⁹ The Commission is also an agency of government responsible for fighting terrorism.¹⁰
7. The Independent Corrupt Practices and Other Related Offences Commission, (ICPC) Act 2000 which prohibits and prescribes punishment for corrupt practices and other related offences and establishes a Commission vested with the responsibilities of investigation and prosecution of offenders.¹¹

4.0 PPP IN OTHER CLIMES

4.01 SINGAPORE: PPPs are not new to Singapore. Singapore is the first Southeast Asian country to adopt PPP models for social infrastructure development. While this partnership model is often touted as a Singaporean government “best practice,” the success of this model depends on sector and

⁹ The laws and regulations include the Money Laundering Act 1995, the Money Laundering (Prohibition) act 2004, the Advance Fee Fraud and Other Fraud Related Offences Act 1995, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994 and the Banks and other Financial Institutions Act 1991 and Miscellaneous Offences Act

¹⁰ See Section 15 of the Act.

¹¹ See the preamble to the Act and Section 3 of the Act.

project type.¹² Singapore has made use of PPPs as vehicles for various projects, including water treatment plants, waste disposal plants and education infrastructure. The largest PPP Singapore has engaged in to date is the Sports Hub, which brings together private bank financing for the Sports Hub Consortium to build and manage Singapore's key national sporting facilities, with an annual payment by the Government for use of these facilities.

There is currently no central PPP Law or Agency in Singapore, but the Ministry of Finance regulates PPP projects, formulates PPP policies, raises awareness and knowledge of PPP, and works closely with public agencies on implementation of PPP projects. In this respect, the Ministry of Finance set up PPP Advisory Council with the objective to provide advice to public agencies exploring PPP and to facilitate resolution of cross-agency issues.¹³ Some of the regulations formulated by the Ministry of Finance include¹⁴

- Public Private Partnership Handbook¹⁵
- Government Procurement Regulations¹⁶
- Government Procurement (Challenge Proceedings) Regulations¹⁷
- Government Procurement (Application) Order¹⁸
- Government Procurement Act¹⁹

¹² ASEAN BEAT 'The Problem with PPPs in Singapore' available at <https://thediplomat.com/2016/09/the-problem-with-ppps-in-singapore/>

¹³ PPP Policy, Legal and Institutional Frameworks in Asia and the Pacific. United Nations Economic and Social Commission for Asia. Available at https://www.unescap.org/sites/default/files/PPP%20Policy-Legal-Institutional%20Frameworks_2017.pdf

¹⁴ Public-Private Partnerships Laws / Concession Laws available at <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concession-laws>

¹⁵ dated March 2 2012

¹⁶ No. S 269-2014 dated April 4 2014

¹⁷ G.N. No. S 215-2002 revised February 29, 2014

¹⁸ G.N. No. S 217-2002 revised February 29 2004

¹⁹ Chapter 120 revised May 30 1998

4.02 MALAYSIA: In Malaysia, just like in Singapore, there is no formal PPP law. PPP projects are implemented under various guidelines, in addition to the individual laws for each sector (e.g. Electricity Supply Act, Railways Act and Federal Roads Act). These guidelines present the PPP framework, as well as the requirements and selection procedures for PPP projects and project companies, but neither of these guidelines and laws have detailed provisions.²⁰ The relevant guidelines include Privatisation Master Plan, PPP Guidelines and Facilitation Fund Guidelines.²¹

In Malaysia, the Secretariat for planning and coordination of PPP projects is the Public-Private Unit, an agency under the Prime Minister's Department of Malaysia known as Unit Kerjasama Awam Swasta (UKAS)²² As stated in the UKAS Guideline (2009), the PPP selection process starts with identifying the projects by the relevant agency at the ministry level and negotiated at UKAS which is chaired by the Chief Secretary of Malaysia. PPP has been used to construct notable public projects in Malaysia, like Mass Rapid Transit (MRT) project, Light Rail Transit (LRT), High Speed Rail project and construction of new water treatment plants.²³

4.03 UNITED STATES OF AMERICA

There is no uniform statutory definition of PPP in the US. The range of projects that each state may use to procure from, or partner with the private

²⁰ 'Overview of the Malaysian PPP framework' available at <https://www.inhousecommunity.com/article/overview-of-the-malaysian-ppp-framework/>

²¹ Ibid.

²² Unit Kerjasama Awam Swasta (Public-Private Privatisation Unit), Prime Minister's Department, 2009 Guideline. Available at <http://www.ukas.gov.my/en/about-ukas>

²³ Ibid note 9

sector for the delivery or operation of infrastructure varies from state to state.

In states where, for instance, PPP-enabling legislation is limited to specific types of projects, such as transportation, it is commonly the state's Department of Transportation that is charged with the execution and performance of the applicable PPP project. In other states, a centralised PPP authority (which may be an authority created expressly to fulfil such a role, an office within a department of the state government or an existing parastatal of the state) is in charge of coordinating the PPP policy for the state. In some cases, such an authority is also directly in charge of implementing and executing the PPP directly with the private sector, and in others it is a government agency (e.g., the Department of Transportation) that executes the PPP under the supervision of the centralised PPP authority. States that have created centralised PPP authorities include California, Colorado, Georgia, Michigan, Oregon, Virginia and Washington. All of these authorities exist within the department of transportation or treasury. Among these states, the PPP authorities of California and Michigan have a broad sector mandate, while other state authorities are focused primarily, if not solely, on transportation. In other states, the PPP programme has been entrusted to more than one authority.²⁴

4.04 UNITED KINGDOM

In the United Kingdom, there is no PPP law as such, there is no general provision of law which gives all public bodies the power to enter into PPP

²⁴ The Public-Private Partnership Law Review - Edition 6 UNITED STATES available at <https://thelawreviews.co.uk/edition/the-public-private-partnership-law-review-edition-6/1225150/united-states>

arrangements. Powers tend to be derived from a public body's constitutional documents or from specific legislation. UK PPP projects are therefore promoted under the general legislative powers of government and public bodies.²⁵ The bodies responsible for PPP in the United Kingdom are²⁶ Her Majesty's Treasury,²⁷ the Cabinet Office,²⁸ the Infrastructure and Projects Authority (IPA),²⁹ procuring bodies,³⁰ independent regulators, planning authorities,³¹ and the Comptroller and National Audit Office.³²

The UK has changed the Public Sector Directive (2004/18/EC which applies to public works contracts, public supply contracts and public service contracts) and the Utilities Directive (2004/17/EC for entities operating in the water, energy, transport and postal services sectors) into national legislation through the Public Contracts Regulations (SI 2006/5) and the Utilities Contracts Regulations (SI 2006/6). Provided the project value is above specified thresholds, procurement must comply with these regulations.³³

4.0 THE REASONS / PURPOSES FOR PPP

²⁵ United Kingdom – England PPP Units and Related Institutional Framework June 2012 available at https://www.eib.org/attachments/epcc/epcc_uk_england_ppp_unit_and_related_institutional_framework_en.pdf

²⁶ National Infrastructure Delivery Plan 2016-2021', Infrastructure and Projects Authority available at www.gov.uk/government/publications/national-infrastructure-delivery-plan-2016-to-2021

²⁷ which is responsible for the control of public spending and sets the general direction and policy on PPP. It also approves the project business cases

²⁸ which oversees the standards and efficiency of government functions and procurement and approves procurement structures

²⁹ which helps translate long-term planning into successful projects

³⁰ Responsible for structuring and procuring projects

³¹ Decides whether to grant development consent for a project.

³² Saddled with the responsibility of scrutinizing government spending

³³ Ibid note 19.

1. Increasingly, government all over the world, do not have the resources to finance many critical economic and social projects. Therefore, to free the government and its funds from provision of public infrastructure, both economic and social, PPP will facilitate affordable and improved services to the users in a responsible and sustainable manner.
2. To ensure that private resources are deployed for the benefit of the people. PPP, if well implemented will help the government to achieve better value for money for the taxpayers by ensuring that infrastructure projects were delivered on time and to cost, and that assets were well maintained.³⁴
3. It reduces inefficiency in the running of the outfit because the government is not properly equipped. A well implemented PPP regime would typically improve efficiency in the public sector and increase capacity development for local businesses.
4. If properly put into operation, it reduces corruption in the public space and improve accountability in the provision of infrastructure and public services. It will ensure the principles of transparency, free and fair competition, non-discrimination, equality and proportionality.
5. The PPP system is a means of harnessing the private sector's management skills and commercial expertise because the private sector, in most cases, is able to mobilize more technical know-how, especially for high-tech infrastructure e.g. electrical railway.
6. It is one of the easiest ways to attract Foreign Direct Investment into a country. This will in turn stimulate growth and development in the country and ensure transfer of skills that will produce indigenous experts

³⁴ HM Treasury (2012) A new approach to public private partnerships. Crown, London, p 15

- that can run their own operations professionally for the benefit of the country.
7. It is a veritable tool for human capital development and provides better employment opportunities for citizens. PPP not only encourages efficient allocation of public and private resources through leverage and long term capacity development but it also provides an opportunity for innovation, competitiveness and subsequent reduction in poverty levels.
 8. The execution of capital projects by government is usually plagued by delay in delivery, PPP can remedy this because there is adequate documentation and negotiation of the performance standards, risk-allocation mechanisms, responsibilities, rewards, and penalties in a transparent and commercially realistic manner.

5.0 POSSIBLE AREAS OF CORRUPTION IN PPP

Even though, the PPP procurement procedure is structured to check corruption, it is possible the process can be maneuvered. Where this happens, it weakens citizens' confidence in public institutions. The result is that the cost of the execution of the project will be unreasonably high and/or its quality will be considerably lower at the expense of end-users and tax payers.³⁵ Below are the possible different forms of corruption in the PPP procurement process.

1. Bribery: This is the offering of something which is most often money but can also be goods or services in order to gain an unfair advantage. Common advantages can be to sway a person's opinion, action, or decision, reduce amount of fees collected, speed up a government grant,

³⁵ E Iossa and D Martimort, 'Corruption in public private partnerships' (2011) available at <<https://art.torvergata.it/retrieve/handle/2108/90927/183738/IOSSAMARTIMORTCorruptioninPPP11Dec11.pdf>>

or change outcomes of legal processes, threatening or inflicting harm to a person, their reputation, or their property in order to unjustly obtain money, actions, services, or other goods from that person.³⁶ In the PPP procurement process, the use of bribery can be employed in any of the three stages of the project (i.e. decision stage, tender stage and contract execution),³⁷ to thwart the process in favour of a particular investor. The Organisation for Economic Cooperation and Development (OECD) Foreign Bribery Report (2014) provides evidence that public procurement is vulnerable to corruption. The Report states that more than half of foreign bribery cases reported occurred in the process to obtain public procurement contracts. Almost two-thirds of foreign bribery cases studied occurred in sectors closely associated with contracts or licencing through public procurement e.g. the extractive, construction, transportation and storage, information and communication sectors.³⁸

2. Extortion - This could come in form of
 - a. Few cabal coming up to control the market and form protection gangs and ensure that others are denied opportunity in particular areas of PPP. They may grant their preferred bidders advantage over other bidders by actively leaking inside-information on requirements and conditions that other bidders do not get. They may also tailor-make

³⁶ According to World Bank report (1997 p.20) "Bribes can influence the allocation of monetary benefits (for evasion, subsidies, pensions, or unemployment insurance.) Bribes can be used to reduce amount of taxes or other fees collected by government from private parties. In many countries tax bill is negotiable. Bribes may be demanded or offered for the issuance of license that conveys an exclusive right, such as a land development concession or exploitation of a natural resources. Sometimes politicians and bureaucrats deliberately put in place policies that create control rights, which they profit from by selling. Bribes can speed up the government's granting of permission to carry out legal activities. Bribes can alter outcomes of the legal and regulatory process, by inducing the government either to fail to stop illegal activities or to unduly favor party over another in court or other legal proceeding."

³⁷ Iossa, E. and Martimort, D. 'Corruption in public private partnerships'(2011) available at <https://www.u4.no/corruption-in-public-private-partnerships>

³⁸ OECD (2014), OECD Foreign Bribery Report, available at <http://dx.doi.org/10.1787/9789264226616-en>

elements of the process that fits the company owned by their preferred bidder, and find ways to create unfair biases when bids are evaluated. Hence, corruption can render an inefficient bidder the successful, winning bidder.

- b. Settlement/toll taking, where some officials will stand between the private bodies and government agencies that are to engage in PPP. Under this head, individuals with access to people in high places trade on the influence of high ranking government officials and make gains from it.
3. Misappropriation, either of money or property. Public officials sometimes come up with projects that are not needed or that are not in the immediate needs of the community. This gives them an opportunity to get funds to misappropriate.
4. Engagement of unqualified entities to execute PPP by reason of inducement – In a bid to aim for higher profits than what is possible under true and open competition, the individuals in charge of selection may be willing to engage in corrupt practices to ensure that their preferred bidder wins the contract. They can for example invite only one company to bid. The terms may be tailored so they are the only providers who can meet them – discouraging other companies to bid. This is usually done in total disregard for merit and ability to deliver according to specification.
5. There could be conflict of interest - This usually comes to play in the selection procedure. The contracting authority may have vested interest in the projects and the companies involved in the bidding. This would inevitably result in a clash of interest. These issues may be under the surface and not readily apparent during the selection procedure; but since

any instance of corruption can tarnish both the public and the private sectors' reputations, it is crucial to be as cautious as possible regarding conflicts of interest. Most common conflict of interest situations are related to personal, family or business interests and activities, gifts and hospitality, disclosure of confidential information, and future employment.³⁹

6. Undeserved or illegal tax or waivers on imports or payment of duties and manipulation of the bid or procurement process for self aggrandizement – This is in some form of rent-seeking, that is to lobby the government for protection, subsidies, and preferential policies for a business. The aim is to avoid competition in the free market and to achieve monopoly-like situations and super-profits. The lobbying involved often include buying of public officials and politicians.
7. Weak oversight or lack of knowledge by officials who are to run the bid process for PPP. This will inadvertently create room for unscrupulous minded to take advantage of the laxity in the process to cheat the government or government entities that want to engage the private entities of PPP projects.
8. Deliberate cumbersome procurement process - The more cumbersome the procedure is, the more the chances of corruption. Many unscrupulous public servants deliberately create a rigmarole process, to perpetuate corruption by extorting money from desperate private entities or individuals that want to enjoy ease of doing business.
9. Lack of transparency in the PPP process - Transparency and openness are very cardinal to a successful Public Private Partnership contract. Where

³⁹ OECD work on public procurement available at <http://www.oecd.org/gov/public-procurement/>

there is a lack of transparency in the process, it leads to unaccountability and manipulations for private ends.

The list is inexhaustive and could be in the combination of any of the above or more.

7.0 HOW TO ADDRESS ISSUES OF CORRUPTION IN THE PPP PROCESS

The following are suggested as ways of combating the problems identified above:

1. The process of PPP should be transparent and honest. There should be adequate degree of transparency of the public procurement system in all stages of the procurement cycle. It is also important that all involved should possess a high level of integrity. Any form of conflict of interest should be disclosed immediately it arises.
2. The rules and the processes must be made simple and straightforward. A sound enabling environment for infrastructure investment, which entails high standards of public and corporate governance, transparency and the rule of law, including protection of property and contractual rights, should be introduced to promote the participation of the private sector in infrastructure development
3. There should be penalty clauses for forfeiture of a bid, once the bidder is discovered to have done anything to sabotage the process. It would ensure fair competition if there are sanctions for corrupt practices and companies with a proven track record of integrity breaches are excluded from further access to public procurement contracts. Further, anytime a call is made for bid, the list of companies and individuals ineligible to participate in their tendering process should accompany the publication.

- Anti corruption clauses should be introduced into all PPP contracts and should be enforced.
4. The rules and guidelines put in place to prevent corrupt practices in the PPP process must be scrupulously followed. It has been observed, that in spite of the anti-graft/anti-corruption laws in Nigeria, corruption persisted because the perpetrators do not fear any consequences. There should be no sacred cows and anyone found culpable should be made to face the full consequence. Impunity should be discouraged.
 5. There should be proper oversight functions allocated under the relevant laws. Oversight and control are important instruments for ensuring effective implementation of the public procurement process as a whole. Adequate controls in procurement should entail financial controls, internal audit and management controls and verification to ensure that legal, administrative and financial procedures are followed.
 6. The principles of *pacta sunt servanda* must be implemented to the letter. Sanctity of agreements is one sure way to fight the scourge of corruption in PPP contracts.

8.00 CONCLUSION

- 8.01 The Nigerian dream of availability of public infrastructure to the citizens is a realizable one, if the PPP procurement process is effectively and efficiently conducted. Collaborations through public-private partnership will help in bridging the information gap between the public and private sector, thereby reducing the level of poverty and promote access to social and economic infrastructure which are critical in national development.
- 8.02 However, the human and material wealth of the country cannot fully come to the fore as long as a corrupt few persist in plundering and

looting the commonwealth for their selfish ends. To achieve the intended aim of PPP, the government has to take drastic steps to curb corruption and its devastating effects. The points identified above are some of the steps that can be taken to address the issues.

- 8.03 To make a difference, all stakeholders involved in the PPP procurement should stock up on integrity, virtues and uprightness. This will ultimately translate to development for the good of all.