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## **Constraints to incorporate competition in public-private partnerships in Malaysia**

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**Abstract:** Competition in procurement not only benefits government and taxpayers but also provides an equal market for the private sector. Competitive procurement stimulates market creativity, as it discourages anti-competitive behaviour. Despite the complexity of the PPP procurement process, the world is now promoting competition within it, an element yet to be fully implemented in Malaysia. This paper analyses the constraints that Malaysia faces in effectively maintaining PPP competition. Within the case study research strategy, semi-structured interviews and content analysis were used as data collection and analysing methods. The study found that in its efforts to make the PPP program a success, the Malaysian PPP has followed flexible implementation, with less emphasis on competition. The effect of focusing only on PPP's macro aim has resulted in a lack of competition in practice. The current challenge is to strike a balance between achieving aims and maintaining governance and therefore getting the best out of PPP in Malaysia.

**Keywords:** competitive procurement; public-private partnership; PPP; good governance; corruption; Malaysia.

**Reference** to this paper should be made as follows: Zin Zawawi, M.I., Rathnasinghe, A.P. and Kulatunga, U. (xxxx) 'Constraints to incorporate competition in public-private partnerships in Malaysia', *Int. J. Procurement Management*, Vol. X, No. Y, pp.xxx-xxx.

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## 1 Introduction

There have been rapid increases over recent years in the use of public-private partnerships (PPPs) in place of traditional procurement. PPP has been utilised by governments around the world as an alternative approach to the traditional procurement methods (Khaderi et al., 2019; Palcic et al., 2019; O'Shea et al., 2018), due to the benefits gained from private sector participation such as alternative financing (Khaderi et al., 2019; Dewulf et al., 2012; The World Bank, 2017a), positive impact on quality and efficiency (Sadeghi et al., 2019; Ceruti, 2017; WBI, 2017), and providing value for money (Hu and Han, 2018; Yescombe and Farquharson, 2018; WBI, 2017).

In Malaysia, the attraction of features such as optimising government 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 (Ahmad Shafiei, 2017). Nevertheless, the good reputation of PPP programs has been smeared by critiques and allegations. There have been allegations of abuse of power by the government with a lack of competitive bidding in awarding contracts (Satar, 2019; Wang et al., 2012). These allegations might discourage private investors from participating in PPP programs in Malaysia.

Competition within the procurement process is recognised as a significant element for PPP. Competition in the procurement process leads to desirable results for the procuring authority, by achieving value for money, encouraging innovation and promoting efficiency (Broms et al., 2019; Buzzetto et al., 2020). According to Sulser (2018), most governments insist on the competition being upheld in PPP. Nevertheless, there is evidence that competition is still lacking within the PPP procurement process, thus the idea of obtaining efficiency from the private sector may not be fully realised (Zawawi, 2017).

In line with the aspiration of the Government of Malaysia to incorporate competition within its PPP procurement process, this paper aims to investigate the constraints for the government of Malaysia in its effort to uphold competition within the PPP procurement process. Accordingly, the paper is structured as follows. First, it provides a comprehensive literature review on the relevance of competition and constraints of PPP

procurement process. Next, the research method, comprising research and data analysis technique, is elaborated. This is followed by the findings and conclusions.

## **2 Literature review**

### *2.1 The relevance of competition within the PPP procurement process*

The PPP market is large and central to a nation's economy in providing infrastructure. For instance, PPP transactions are estimated to be worth \$1.5 trillion investment worldwide (The World Bank, 2017b). These results in more than 5,000 numbers of infrastructures and developments delivered which includes social infrastructure such as railways, schools, hospitals, roads, bridges and others (Palcic et al., 2019). These numbers demonstrate the significant amount spent by governments in procuring for the public through the means of PPP. Considering a large amount of money spent, the goal of the governments should be to procure the best value on behalf of the taxpayers, thus implying that competition is the best tool to achieve the goal (Sadeghi et al., 2019).

Competition is a crucial element in reducing the cost of infrastructure to a procuring authority (Broms et al., 2019). Advocating competition within procurement does not only benefit the public authority and the taxpayers, but it also creates a fair business opportunity for the private sector (Buzzetto et al., 2020). Through the competitive procurement process, each qualified bidder is entitled to a fair and equal opportunity to participate and win a public contract (Hu and Han, 2018). Competitive procurement drives innovation and efficiency from business entities as it discourages anti-competitive behaviour (Grandia and Meehan, 2017). Effective competition policy in PPP increases the propensity to attract the private sector to invest in PPP programs, freedom from corruption (bid-rigging/kickbacks/misrepresentation), recognition of intellectual property rights and ethical decision making (Sulser, 2018).

There are multiple ways of organising competition within procurement. Chan and Fung (2016) argue that competition policy in PPP should be able to stimulate innovation in the private sector. Carbonara and Pellegrino (2018) believe that competitive pressure should be put on the service provider throughout the whole PPP development to maximise the management skills of the private sector.

Generally, competition in PPP is implemented during the 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 (Carbonara and Pellegrino, 2018). The creation of intensity of competition during the bidding process makes it an ideal tool for the government to promote competition in PPP (Dong et al., 2018; Asian Development Bank, 2018). According to O'Shea et al. (2018), there is a relationship between the presence of competition in procurement and the behaviour of bidders. The competitive tension created in procurement process drives bidders to bid aggressively to enhance their chance of winning, sometimes with a low price (Sadeghi et al., 2019). It also gives the advantage to the procuring authority to be able to choose the most suitable bidder, compared to ad hoc selection. 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 (Dong et al., 2018), which will encourage opportunistic

behaviour by bidders in charging excessive profit from the procuring 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.

## *2.2 Constraints experienced to implement competition globally*

Despite recognising that the relevance of competition within the procurement process, there have been arguments that since the complex nature of PPP is not similar to public procurement, should or can the procurement process be conducted the same as public procurement (Ross and Yan, 2015). 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 (Zawawi, 2017).

## *2.3 Complexity of PPP*

PPP procurement is significantly more complicated than traditional procurement (Ross and Yan, 2015). As practised by most of the countries, common procedures in public procurement have been adopted by the procuring authority in acquiring infrastructure through PPP (Khaderi et al., 2019). However, features of PPP require specialised resources and custom protocols, increasing complexity. The notion of an open competitive procurement process is best suited when the procuring authority can provide clear and comprehensive requirements for bidding purposes (Haruvy and Jap, 2013). This is quite challenging for PPP since the scope of PPP is so wide and subjective as it involves financing, design, constructing and operating the infrastructure. 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 (Palcic et al., 2019), high administration costs (Khaderi et al., 2019), a minimum number of bidders to ensure that competition is intense (Hu and Han, 2018), and the need for negotiation between parties (Xing et al., 2020).

Although the procurement process of open procedures injects competition into the process, it leaves little space for flexibility to address the complexity of PPP (Sadeghi et al., 2019), hence making it less preferable among practitioners. In contrast, the negotiation procedure is adopted for its flexibility. However, the alleged misuse of the negotiation process with the preferred bidder undermines the competition principle (Yescombe and Farquharson, 2018; Haruvy and Jap, 2013).

## *2.4 Tendering cost*

The tension created in a competitive procedure impacts the behaviour of bidders and motivates them to produce innovative and attractive proposals (Carbonara and Pellegrino, 2018). Nevertheless, in preparing their proposals, bidders invariably incur high costs (WBI, 2017). According to KPMG Corporate Finance (Aust.) Pty. Ltd. (2015), 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 where the cost of tendering grows in proportion to the size of the project (Yescombe and Farquharson, 2018).

van 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. 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 (Hu and Han, 2018). Competition works when there is participation, but a small number of bidders undermines competition and encourages anti-competitive behaviour such as collusion (Buzzetto et al., 2020).

Nonetheless, although most of the literature mentions that the cost of bidding is high for PPP, APMG International (2019) 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 (Khaderi et al., 2019). Realising the importance of competition, some approaches address the issue of the high cost of tendering by including reimbursement of part of the cost of bid preparation (Yescombe and Farquharson, 2018; WBI, 2017).

### *2.5 Lengthy process*

The PPP procurement process is not only complex but is also protracted (Weththasinghe et al., 2016). 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 (Yescombe and Farquharson, 2018). The longest PPP procurement duration exercised in the UK took nearly five years, and the shortest just under two years (HM Treasury, 2018). In Ireland, the government found out 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., 2015; 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 (Thomassen et al., 2016). Therefore, it fails to achieve a sufficient number of bidders which undermines the essential competition.

Procuring authorities have nothing to gain from a lengthy process as longer the time taken in finalising the deal with the private sector, greater the cost incurs to the procuring authority, including construction costs and related fees (Yescombe and Farquharson, 2018). Generally, 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 the financial institution. Therefore, failure to start the project within a certain target date might lead to changes in the key terms and even renegotiation (Buzzetto et al., 2020).

### *2.6 Renegotiation*

Renegotiation in PPP is conducted if there are variations to the terms of the concession agreement (Xing et al., 2020). 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 (Sarmiento and Renneboog, 2016), the discovery of errors (Xing et al., 2020), the special purpose vehicle (SPV) having financial difficulties (WBI, 2017; Iossa, 2015), requirements changes and new information, unjustifiable repayment levels (Pollock and Price, 2013) and contract restructuring to address contract incompleteness (Nikolaidis and Roumboutsos, 2014). Some renegotiation may be seen as ensuring the continuity of the development and keeping the SPV from insolvency (WBI, 2017).

In practice, there is potential for renegotiation during the post-award period (Neto et al., 2017; Iossa, 2015). The diversity of PPP arrangements and the long-term concession period makes the competitive procurement process challenging and vulnerable to renegotiation post-award (Menezes and Ryan, 2015). Often, the winning bid is based on unrealistic beliefs based on too many uncertainties (Thomassen et al., 2016); 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 (Uyarra et al., 2014). Offers might underestimate or overestimate key variables in the concession agreement, such as forecast revenue or the cost of construction (Neto et al., 2017). 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 (APMG International, 2019). Xing et al. (2020) suggested that a comprehensive explanation on the contract to the bidders during the bidding exercise may avoid the possibility of renegotiation.

Renegotiation is often triggered by the private sector and is seen as opportunistic behaviour (Neto et al., 2017; 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 an extra profit (Xing et al., 2020; Uyarra et al., 2014). According to Iossa (2015), the private sector knows that the procuring 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 SPV. Therefore, amendment due to renegotiation is a distortion to the competitive procurement process. It also diminishes the benefit gained from the competition effect. Ultimately, the winning bid is no longer the best offer, as other bidders might submit different offers (Saussier and Tirole, 2015).

## *2.7 Intellectual property right*

As practised by the EU members, the need for dialogue before the award of the concession is acknowledged to address the complexity of PPP by being more flexible (Amonya, 2017). 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 competitive tension between bidders (Wondimu et al., 2017). 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 (Cambridge University, 2018).

**Table 1** Malaysia PPP policy timeline

<i>Market-led economy</i>		<i>State-led economy</i>		<i>Liberalisation</i>		<i>Towards a developed nation – Vision 2020</i>				
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)
						<i>Privatisation</i>		<i>PFI</i>		
						Malaysia Incorporated Policy (1983)		PFI (2006)		
						Privatisation Policy (1983)		Treasury Guidelines (2006)		
						Guidelines on Privatisation (1985)		Guidelines on PPP (2009)		
						Privatisation Masterplan (1991)		New Wave PPP (2010)		
						<i>Implementing agency</i>		<i>Implementing agency</i>		
						Economic Planning Unit (EPU)		Unit Kerjasama Awam Swasta (UKAS)		

Note: MP – Malaysia Plan.

Source: Modified from Wang et al. (2012)

If 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 a competitive dialogue exercise. Li and Alon (2019) stressed the importance of protection of certain information, but this must not prevent any competition. Throughout the dialogue process, bidders need to obtain information on the required specification and the output expected, to propose the best solution to the procuring authority (Haugbølle et al., 2015). Clear identification of secrecy and an appropriate manner in handling the intellectual property issue will allow the competition pressure to exist, while the procuring authority can achieve value for money from the project (Moe et al., 2017). Therefore, convincing of potential bidders about a fair procurement process with a guaranteed protective policy for intellectual property would attract bidders (Li and Alon, 2019).

The dilemma faced by the procuring 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 to uphold good governance (The World Bank, 2017c). 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 submitting innovative proposals (Yescombe and Farquharson, 2018). Typically, according to Lembo et al. (2019), compensation is given to the original proposer in the event of them not being the winning bidder, to ensure the transfer of ownership of the proposal to the procuring authority.

Despite the constraints discussed by prior researches from the context of global PPP implementation, to the best knowledge of the author, there is no similar study on the Malaysian context. Thus, this research is much needed to fill in the gap in the literature. In response to the importance of competition within the PPP procurement process and the effort of the Malaysian Government to uphold competition, the need further arises for this research. The constraints highlighted in the findings should be taken into consideration as it might hinder a competitive procurement process from been organised.

## 2.8 *PPP in Malaysia*

According to Ahmad et al. (2018a), 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. Under PPP arrangements, the Malaysian Government is no longer seen as providing infrastructure to the public, but as buying services from the private sector (Muhammad and Johar, 2018).

Benefiting from the results of working with the private sector in infrastructure development in the 1980s, the government later introduced the public finance initiative (PFI) as an enhancement to its previous privatisation program (Khaderi et al., 2019). The Government of Malaysia is committed to continuing the special relationship with the private sector in privatisation and PFI in developing the nation (Sarvari et al., 2019). Hence in the recent, Tenth Malaysia Plan, the government introduced PPP targeted to increase the number of PPP projects, establishing a facilitation fund and achieving the balance between government, government-linked companies (GLCs) and the private



sector (Rashid, 2014). Table 1 illustrates the timeline of policy development for private sector involvement in the Malaysian national development plan.

Despite a long history of the evolution of PPP in Malaysia, the current model of PPP and its practice of competition are less understood (Hashim et al., 2016). 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). PPP is adopted in numerous industries including transportation, health, highways and education (Baker & McKenzie, 2015).

Despite the vision and targets by the government for the good governance of the procurement regime, there are still weaknesses identified in PPP practices that give a negative impact on the campaign and efforts by the government (Hashim et al., 2017). Identified weaknesses in Malaysian procurement are the absence of open and competitive tendering, especially for foreign suppliers, widespread corruption, lack of transparency (Lee et al., 2018; Jones, 2013), corruption, bid-rigging, kickbacks, misrepresentation of facts, proxy companies (Sarvari et al., 2019), and unethical decision making (Mohamad et al., 2018).

### **3 Methodology**

This research adopted an abductive research approach to investigate the PPP phenomena. Abductive research approach has been established as a fusion of the deductive and inductive research approach which facilitates obtaining analytical findings by referring back and forth the philosophy and application (Saunders et al., 2019). It promotes gathering a broader variety of data and carrying out the study in both qualitative and quantitative forms (Zelechowska et al., 2020). Moreover, abductive reasoning is a form of logical inference that starts with an observation/ existing knowledge which advanced to find the most likely conclusions based on those observations/existing knowledge (Askeland, 2020). Although the abductive approach shares the mutual goal with induction approach in producing a theory, the distinction lies at the point of the conclusion of the research. The ultimate goal of the abductive approach inclines towards discovering new results through the understanding of the new or existing phenomena in a novel way (Dubois and Gadde, 2002; Kovács and Spens, 2005). Accordingly, authors firstly deduced the background areas, the need for competition within PPP and constraints/key challenges to incorporate competition within PPP procurement process from the global context and within Malaysia, through secondary data and literature. Following that, the research was advanced towards induction by deriving the key constraints that hinder the incorporation of competition within the PPP procurement process in the context of Malaysia through empirical evidence.

Case study research strategy has been selected as the research strategy for this study. The research emphasises the practitioners' input on their views and experience. Therefore, a case study is deemed to be the best research strategy to the questions 'how' and 'why' of the research aim addressed from the study (i.e., constraints to incorporate competition in the Malaysian PPP process), and to gain a greater understanding of real-life instances (Yin, 2014).

In Malaysia, there is a central agency (referred to as Malaysian PPP unit hereof) that manages PPP procurement. Malaysian PPP unit was setup 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. As advocated by Yin (2014), a single case study is suitable when the objectives of the research are to *capture the circumstances and conditions of an everyday situation*. Further, a single case study is suitable for a *critical, unusual, common, revelatory or longitudinal case*. Malaysian PPP unit is the sole PPP agency setup in Malaysia which is responsible for PPP implementation. Therefore, it falls within the ‘critical’ case study category based on Yin’s (2014) definitions. Further, as there are no comparable PPP units in Malaysia, multiple case studies within the Malaysian context are out of the question. Therefore, a single, holistic case study was selected from the options available within the case study research strategy (Yin, 2014). The single case study was designed to investigate the implementation of PPP in Malaysia and enable exploration of how the competition is applied within the Malaysian PPP unit to discover the constraints in incorporating competition within the procurement process. The unit of analysis in this research is narrowed down to ‘competition within the PPP procurement processes’.

### *3.1 Data collection techniques*

Semi-structured interviews have been used as the data collection technique for the study. The nature of this study requires to comprehensively inquire on the constraints to incorporate competition within the PPP process in Malaysia. Accordingly, gathering the narratives related to the existing practices of managing unsolicited proposals, constraints to incorporate ‘competition’ within the current PPP process based on the experience of the respondents were considered to be critical in the study. Hence, the semi-structured interviews were selected over a questionnaire survey as they facilitate probing into a research question in a detailed manner with the ability to inquire flexibly by adding follow up questions. Accordingly, primary data was gathered from a total of 13 semi-structured interviews with participants chosen for their engagement and involvement with the Malaysian PPP unit. Based on the aim of the research, the research requires quality in the sample rather than quantity. Thus, purposive sampling was selected. Purposive sampling is a subset 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., 2019). Respondents were deliberately selected based on their knowledge, experience and involvement with the Malaysian PPP unit’s procurement process. To minimise the researcher’s bias related to purposive sampling, the transcribed interview transcripts were checked by the respondents. Further, the selection of most appropriate respondents with the required knowledge and experience in PPP strategic level was achieved through few levels of purposive sampling based on their involvement in PPP (i.e., consultants, practitioners and experts/academics) and their administrative role within the PPP unit (i.e., operational and tactical). Consequently, this enabled the study to attain the opinions of the key personnel from all the critical sub-units within the PPP unit. Each identified respondent has his role and experience with the PPP procurement process. Profile of the interviewees is given in Table 2.

**Table 2** Profile of the respondents

<i>Sampling type</i>	<i>Criteria</i>	<i>Respondent identifier</i>	<i>Experience* in PPP</i>	<i>Objective</i>	<i>Numbers of respondents</i>
Purposive	Malaysian PPP Unit personnel	Malaysian PPP Unit tactical – Respondent 1 (R1)	5 years	To understand the PPP implementation and the competition policy adopted from the policymaking perspective. Further, to confirm the actual practice with the published guidelines and regulations.	5 respondents
		Malaysian PPP Unit tactical – Respondent 2 (R2)	15 years		
		Malaysian PPP Unit technical – Respondent 3 (R3)	2 years		
		Malaysian PPP Unit operational – Respondent 4 (R4)	6 years		
		Malaysian PPP Unit operational – Respondent 5 (R5)	11 years		
Purposive	PPP practitioner who experienced with Malaysian PPP Unit procurement process	Client – Respondent 6 (R6)	0–5 projects	To learn about the benefits, experience and perceptions of this first-line of Malaysian PPP Unit.	5 respondents
		Consultants to financier – Respondent 7 (R7)	0–5 projects		
		SPV – Respondent 8 (R8)	0–5 projects		
		SPV – Respondent 9 (R9)	0–5 projects		
		The project management company for SPV – Respondent 10 (R10)	0–5 projects		
Purposive	PPP expert	PPP policy expert – Respondent 11 (R11)	12 years	To learn about the expert's view on PPP phenomena in Malaysia.	3 respondents
		PPP policy expert – Respondent 12 (R12)	15 years		
		PPP policy (industry) expert – Respondent 13 (R13)	18 years		

Note: Experience\* – Some of the experts' experiences have been indicated through the number of PPP projects that they have been directly involved in.

### 3.2 *Data analysis*

The transcripts of the interviews were organised and analysed systematically. The text from the interviews was then analysed using content analysis, with the focus on discovering and understanding the Malaysian PPP practice, in particular the procurement process and competition. The advantage of using content analysis of data is its systematic ability to deal with raw and overwhelming amounts of data (Joffe and Yardley, 2004). It also offers the possibility to examine the respondents' responses through multiple approaches to find statements which are significant to the research. To investigate the constraints associated in incorporating competition with PPP, the interview guidelines were formed to cover various themes relating to PPP implementation in Malaysia namely; the need for competition in PPP, requirement of policies, available PPP processes and the role of PPP Unit in Malaysia (refer Appendix).

## 4 **Findings and discussion**

Although there have been allegations to say that competition within the Malaysian PPP is lacking, overall, it can be seen that Malaysia has not set aside the competition element within its procurement process. R10 observed that there are some competition elements in the Malaysian PPP unit's guideline. This indicates that Malaysian PPP unit's practice is said to be improved over their previous practice. Agreeing with R10's views, R2 also commented that "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, R12 insisted that it does not matter whether PPP is complex or not, but to obtain value for money, a competitive tender exercise is a must.

Despite the eagerness to enhance the policy of competition within the Malaysian PPP, respondents highlighted the below issues:

- political or individual interest
- intellectual property rights of the bidders
- *bonafide* of bidders
- extensive time is taken for the PPP process
- problems in evaluating PPP proposals
- the cost associated with the PPP process.

These issues will be discussed in detail together with the opinion of the respondents and the literature from the global context.

### 4.1 *Political and individual interest*

Seven out of the 13 respondents indicated political or individual interest as one of the main barriers to implement competition within the Malaysian PPP. According to the respondents, under the influence of political parties, companies have been awarded projects directly, without justification and in some of the circumstances concessions may have been provided based on individual interests of the politicians. In their own words,

“the main issue is the political interference” (R8), “there were only a few players and so much political pressure” (R2) some of the respondents commented. Respondents stated there are many circumstances of political patronage in PPP projects and political pressure may also to an extent have been exploited. R11 mentioned that “... in Malaysia, due to strong political influences, competitive exercises may have been set aside, and to a certain extent Malaysian PPP unit can evaluate, only if they have been instructed by higher authority to award a project to a certain company.” Respondents stated that even the channels of receiving PPP projects are sometimes influenced by politicians. “...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” (R4).

Commenting on the undue political influence, R12 had a different view. R12 believed that alleged practice was in the past and the government has improved. “...to squarely say that now the mentality of the implementers still appears to be talking about hush-hush (indirect influences), still talk 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 in theory, the public service should always be apolitical, Siddiquee et al. (2017) 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 within the current PPP in Malaysia, political neutrality is hard to achieve (Croke et al., 2019). Therefore, it can be argued that attempts to enhance the current competitive practice and policy within the procurement process are demanded to ensure transparency in the selection of the SPV, to combat and control any attempt at corruption.

#### *4.2 Intellectual property rights of the bidders*

Intellectual property is all about safeguarding the material developed by the proposer, and its owner should always be protected to encourage innovation and private sector participation in PPP. Due to legal issues, intellectual property has been deterring some countries from introducing the ‘swiss challenge’ and ‘best and final offer’ approaches (The World Bank, 2017b). These mechanisms involve multiple tendering 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 (Zawawi, 2017). Within the context of Malaysia, respondents had different perspectives regarding intellectual property rights linked with PPP. R2 pointed out that there were companies who use intellectual property as merit to obtain an award directly after submitting the proposal. R1 said that there were also concerns regarding this matter, “we don’t want people to duplicate other people’s ideas.” R1 continued, “I think it is plagiarism, and intellectual property rights are a fundamental issue in PPP.” As opposed to the above perspectives, R13 stated that under Malaysian law and the judiciary, intellectual property is not something to be concerned about: “I’m not that worried about intellectual property ...”

Authors argue that the failure to resolve the intellectual property issues may restrict the contracting authority in continuing with the development. Nonetheless, this depends on each country’s regulation of licensing, patents and intellectual property. R13 believes

that Malaysian PPP unit is not concerned with the issue of intellectual property at the moment. Although most of the companies submitting unsolicited proposals request an exclusive award of the proposed project on the grounds of intellectual property, the Malaysian PPP unit ensures that the claim is legitimate.

Based on the legal background and experience, R13 further proposes that “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...” The views of R13 are similar to the practices within the global context in addressing intellectual property rights when managing unsolicited proposals in PPP initiatives. For example, in countries which consider unsolicited proposals, compensation is made to the original proponent if they fail to secure the contract (Osei-Kyei et al., 2018). Further to Osei-Kyei et al. (2018), such arrangements should be clearly stated in the legal framework of PPP in the country and should be communicated to the 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 (Khaderi et al., 2019). However, the legal framework in Malaysian PPP is unclear on the transfer or assignment of intellectual property to the government (Hashim et al., 2017). 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.

#### *4.3 Bonafide of bidders*

Throughout the life of the Malaysian PPP unit, it has been observed that the number of participants in PPP has increased, so they might not be having a problem in recruiting numbers for effective competition. However, majority of the respondents feel that open competition for the PPP procurement process might attract non-genuine bidders. Quoting R2, “Are they interested in the project? We have to ensure that the bidders are committed to carrying 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 the Swiss challenge process by R9. The Malaysian construction industry has long been infested with rent-seeking companies aspiring to rapid wealth (Tan, 2015). Lengthy contracts with the government within PPP projects can be a lucrative opportunity for rent-seeking behaviour (Yescombe and Farquharson, 2018). However, Tan (2015) further argue that the possibility of a rent-seeking company succeeding through direct negotiation with a sole company is greater than through a competitive procurement process. Therefore, based on the competitive procurement process, Malaysian PPP unit 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.

#### *4.4 Extensive time taken for the PPP process*

It is noteworthy that there is no clear timeline or schedule for procurement processes in the Malaysian PPP Unit 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. R1 gave an example of the Swiss challenge: “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 R6, even logistics-wise a competitive process could take some time: “when the proposals were distributed to the external agencies, it is 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. From the global context too, the PPP procurement process is always lengthy because of its complexities. In the UK, the average tendering period is 34 months (Thomassen et al., 2016), while Australia listed 14 to 19 months for their procurement process period (van Grieken and Morgan-Payler, 2014). According to Estrin and Pelletier (2018), Malaysian privatisation took a minimum of one to two years for a general procurement process to be completed. The problem with a lengthy process is that it discourages bidders from participating in competitive exercise (Buzzetto et al., 2020). Long procurement processes are also expensive, explained in the literature by lengthy negotiations, political barriers, unclear or absent project objectives (Yescombe and Farquharson, 2018; Babatunde et al., 2014). R7 mentioned that the delay experienced in the Malaysian PPP unit was due to the inefficiency of the procurement process itself. The involvement of many inter-agency committees makes coordination challenging. There are no available statistics for the average length of PPP procurement process at the moment however, authors argue that clear guidelines should be incorporated within the Malaysian PPP unit to minimise the length of time taken for organising and evaluating proposals.

#### *4.5 Problems in evaluating PPP proposals*

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. Majority of the respondents were in the view that using competitive procurement procedures for unsolicited proposals can be challenging as they are not direct comparisons. R9 mentioned that: “If you’re going to get another party to challenge the original proposer, they will face the problem 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 to ensure the most qualified bidders are selected. Nevertheless, R8 claimed that the PPP unit could find a way to improve the procurement process schedule by cutting red tape and bureaucracy to reduce the current unnecessary length of time.

#### *4.6 Cost associated with the PPP process*

Involvement in a competitive procurement process can be costly to the bidders, and the cost will be passed on to the government in the bidding price. 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... and at the end imagine the amount the government or the client has got to pay.” It is suggested in some of the literature that competition will increase the bidding cost (Hanák and Muchová, 2015; Haruvy and Jap, 2013). However, the AGM International (2019) also recognises that within certain measures the benefits of the competitive procurement process may outweigh the high cost of bidding. The excessive cost could discourage new entrants and even existing players from participating in the bidding exercise, reducing competition (Khaderi et al., 2019).

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 (Garg and Mahapatra, 2019). For unsuccessful bidders, the government may consider introducing an honorarium as a token of their participation for the successive bidders (Ahmad et al., 2018b; Thomassen et al., 2016). 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 R5, PPP procurement process in Malaysia has a wide scope and expectation 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 the exclusive direct negotiation procedure.

## **5 Conclusions and way forward**

This paper brought together key findings from the document review and the experience of the respondents that reflects the actual practice of PPP in Malaysia. The driver of the previous ruling party of the Malaysian Government in adopting PPP was not solely for PPP benefit, but more holistic. Nevertheless, notwithstanding its accountability as the government arm to manage PPP, the Malaysian PPP unit attempts to achieve the macro aim of PPP tend to cloud the importance and benefit of competition. Although a majority of the respondents acknowledged the need for competition, the challenge is to strike a balance between achieving the aims and upholding good governance within the PPP. Among the main constraints to implementing competition in the Malaysian PPP, political or individual interest in concessions was highlighted. Respondents stated that there were circumstances of political patronage in the Malaysian PPP procurement process. Political pressure may also to an extent have exploited the Malaysian PPP unit. The allegation that certain companies have been given exclusive awards has been pervasive since privatisation and continues in the current PPP program. Although in theory, the public service should always be apolitical, it was revealed that in Malaysia, the public service has always been intimate with politicians. Given the absence of clear guidelines for the competition and the lack of transparency, political neutrality is hard to achieve.

Nevertheless, these constraints should be taken into consideration to overcome these challenges and subsequently would improve competition within the procurement process, a reform which is sorely needed. Identified constraints are required to address to integrate competitive component within the existing PPP process of the Malaysian PPP unit. Improving current guidelines, providing an honorarium to unsuccessful bidders to encourage participation, cutting red tape and bureaucracy to reduce the current unnecessary length of time were highlighted as suggestions by the respondents to overcome the identified constraints. The determination of government in stimulating competition within the procurement process seems like a new hope to the PPP in



Malaysia. As good governance is demanded by the public and from the government, the competitive elements within the procurement process can serve as a regulator, ensuring relevant laws are compelled within the interest of the public. Emphasising 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 program.

As with any empirical research, this study has limitations. The scope of the research was limited in investigating the constraints faced by PPP practitioners in the infrastructure industry. Future research, therefore, can be directed in expanding to the other industries (i.e., production, manufacturing, ICT) and how practitioners in those industries may integrate competition within their procurement approaches (PPPs) towards a win-win solution.

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## Appendix

### Sample of interview guideline

<i>Research themes</i>	<i>Current interview questions</i>	<i>Proposed new question</i>	<i>Role in study</i>
Introduction	Could you please tell me how long have you worked in 3PU?	Could you please tell me how long have you worked with 3PU?	Background of the respondent.
	Could you please explain what your job scope in 3PU is?	Could you elaborate your role and influence in the agency (3PU)?	Background of the respondent (the authority of the respondent).
Public-private partnership	How do you see the current state of PPP implementation in Malaysia undertaken by 3PU?	Can you clarify whether PPP is considered as public procurement? [Follow up question for both yes or no]	Understanding the current context of PPP implementation in Malaysia by 3PU.
	How would you compare PPP procurement with other government procurements for infrastructure delivery?	Could you tell me the relevant statute, current guidelines, principles and regulations used? What made the government focus and promote on the use of PPP? Any certain event? [Follow up question]	Understanding the government policy goals and objectives. And to identify other procurements constraints/benefits.
	How and why does the agency (3PU) determine the type of tendering which appropriate for PPP?	How would you compare PPP procurement with other government procurements for infrastructure delivery? Are there any problem? Could you elaborate on the procurement process, determine by the agency (3PU) [Follow up question]	Understanding the social actors interpretations, influence and meaning put on decision making.
	How do you perceive the current competition policy implied in the 3PU procurement process?	Who were the main people in deciding the procurement process? Were they experts, leaders or decision makers? How do you perceive the current competition policy applied and implied in the 3PU procurement process? [Follow up question]	Understanding the current context of implementation of competition by 3PU.
Competition	Can you please give an insight or view of a decision making process (objectives, rationale and argument) to choose the most appropriate private partner for a project/development?	Tell me about the current guidelines, principles and regulations on competition implied and practiced by the agency (3PU). Do you think it is enough? Who determined whether a proposal is feasible and acceptable? Can you please give an insight or view of a decision making process (objectives, rationale and argument) to choose the most appropriate private partner for a project/development? [Follow up question]	Understanding the rationale/justification of the decision making process by 3PU.
	Could you tell me the relevant statute, current guidelines, principles and regulations used?	Could you tell me the relevant statute, current guidelines, principles and regulations used?	
	Does 3PU receive many unsolicited proposals? Could you elaborate how 3PU dealt with unsolicited proposals?	Does 3PU receive many unsolicited proposals? Could you elaborate how 3PU dealt with unsolicited proposals?	Understanding 3PU method to deal with unsolicited proposal.

Sample of interview guideline (continued)

Research themes	Current interview questions	Proposed new question	Role in study
Competition	<p>Government procurement has been used worldwide by government to achieve social linkages. Take the example after the second world war, in the USA and Britain, in order to qualify for a government project, companies need to demonstrate feature, such as hiring disable</p> <p>With the new economic policy to empower Bumiputera in Malaysia, does PPP has been use to achieve social linkage?</p> <p>In general, do you think competition is important in PPP implementation?</p> <p>What are the barriers faced in implementing competition in PPP?</p>	<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> <p>Could you elaborate in detail the implementation of this circular and any relevant Bumiputera policy in PPP implementation?</p> <p>In general, do you think competition is important in PPP implementation? [Follow up question]</p> <p>How about in Malaysian PPP?</p> <p>What are the barriers faced in implementing competition in Malaysian PPP?</p> <p>What would you suggest to improve 3PU PPP?</p> <p>What other information do you think I might be interested in? Would you like to share with me?</p>	<p>Understanding the Bumiputera policy applied and implied in 3PU PPP.</p> <p>To ascertain the importance of competition in PPP implementation.</p> <p>To ascertain the importance of competition in PPP implementation.</p>
Suggestions/opinions/view	<p>What would you suggest to improve 3PU PPP?</p> <p>Do you have anything else to add?</p>	<p>What would you suggest to improve 3PU PPP?</p>	<p>To ascertain the importance of competition in PPP implementation.</p>