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**PUBLIC-PRIVATE PARTNERSHIP'S CONTRACT IN
MALAYSIA: SOME AREAS OF CONCERN
IN A LAND SWAP ARRANGEMENT**

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Abstract

This paper seeks to explore the public-private partnership initiative and salient provisions of government contracts in Malaysia. This paper further examines some areas of concern emphasising on a land swap type of contract. There are still many other provisions that need to be addressed for example on obligations, design and constructions, choosing the right type of contracts, operations and maintenance, sub-contracts, relief events, liability and damages, performance security, default and termination and dispute resolutions which is not dealt in this paper.

Keywords: Government contracts, salient provisions, public-private partnership, land swap contract, Malaysia.

INTRODUCTION

There have been many issues revolving around Public-Private Partnership (PPP) including inadequate regulatory frameworks to protect the public interests and the government, including transparent procurement as an essential element in PPP. Businesswise, protecting the public interest is often lacks priority as it is regarded as not conducive to private profit.

As there is no specific legislation to govern PPP in Malaysia, parties rely heavily on the provisions in the contract. It is important that the PPP contract strikes a balance between the government's interest which actually representing the public's interests and the private party's profit driven objective. Areas of concern could be multiple to ensure that the people's interests are duly protected but for

the purpose of this paper, observation is only made to a land swap contract. This paper will solely deal and scrutinize with the salient provisions concentrating on matters of importance of a PPP's land swap contract. It is suggested for purpose of viability, which some areas of concern as discussed, be taken into consideration when contracting a PPP of a land swap arrangement.

LITERATURE REVIEW

Private participation in government projects started widely in the 1980s due to the world economic crisis and according to Altman (2012), it had in fact started much earlier in Europe since the 1960s for Spain and in the 1970s for France. The term 'privatisation' was commonly used for projects involving private entity. California Debt and Investments Advisory Commission (2007) described the term "*privatization to refer to any shift of government activities or functions from a public agency to the private sector*".

Does public-private partnership (PPP) which is also known as P3 the same as privatisation? There have been dissenting views and disagreements that PPP is privatisation. According to Osborne & SP (2000), privatisation and PPP are two different things but it all started due to the financial constraint on Governments to fund public projects. The differences between privatisation and PPP are mainly in terms of ownership, contract structure and risk. Benefits of PPP includes saving of public funding, diversified expertise and shared responsibilities between the public sector and the private entity.

Definition Of Public-Private Partnership

Definition by the World Bank Group (2017) on PPP

"PPP is a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance"

Altman (2012) described PPP as

"an option for the design, procurement, and construction of a project when more traditional project delivery systems either are unavailable or are deemed less effective at producing the desired results. PPP generally is a contractual relationship through which some of the functions or activities commonly performed by a public entity are transferred to entities in the private sector. The participation of the private sector in such arrangements can be minor or quite extensive, but there is always some sharing of responsibility between the public and private sectors in a P3 project"

Furthermore, Allan (1999) also state that

"PPP is a cooperative between the public and private sectors, built on the expertise of each partner, that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards; and / or an arrangement between two or more entities"

that enables them to work cooperatively towards shared or compatible objectives and in which there is some degree of shared authority and responsibility, joint investment of resources, shared risk taking and mutual benefit”

In Malaysia, PPP is defined by the Public-Private Unit, an agency under the Prime Minister’s Department of Malaysia known as Unit Kerjasama Awam Swasta (UKAS) as “*Smart partnership arrangement between Government and private sector for the purpose of providing public infrastructure, community facilities and related services. Characterized by the sharing of investment, risk, responsibility and reward between the partners*”.

Commonly, PPP is resorted when a government entity needs funding, technical expertise or sharing of risks and management responsibilities in public assets and services. This initiative is an arrangement with a private party on a long term contract.

PPP in Malaysia

The history

PPP is not new in Malaysia. Based on the history of privatisation and later public-private Initiatives (PFI) and PPP, Malaysia is also an early comer. Privatisation policy in Malaysia started in 1983 under the Malaysia incorporated Policy. Following this, a privatisation guideline was drafted in 1985 by the Economic Planning Unit (EPU) as a guideline to all government entity on privatisation. The objectives of privatisation are to-

- relieve/reduce financial & administrative burden of the Government,
- improve efficiency, increase productivity of services & Government enterprises, facilitate/promote economic growth in the economy through higher investment from the private sector (private sector as engine of growth),
- reduce the size and presence of the public sector in the economy,
- help meet the restructuring objectives of the National Development Policy vis-à-vis the ownership pattern in the economy, and
- encourage competition an efficiency in allocation of scarce national resources

On the other hand, PPP was duly announced during the Ninth Malaysia Plan in 2006. PPP implementation in Malaysia is governed by the Privatization Master Plan and the PPP Guidelines 2009 published by UKAS. PPP is continuously encouraged in the Eleventh Malaysia Plan, 2016-2020 which is premised on the Malaysian National Development Strategy to focus on rapidly delivering high impact outcomes to both the capital economy and people economy at affordable cost. The private sector investment is encouraged to modernise key economic sectors. For example EPU, Eleventh Malaysia Plan (2015, 16), in the Focus Area B of B1 Strategy on increasing access to affordable housing for

targeted groups, stated that *“the private sector will be encouraged to develop public housing which can be done through public-private partnerships”*.

Thus, private participation has been actively involved in Malaysia since 1980's and continues to play an important role as reflected in the Malaysia Eleventh Plan.

PPP's Implementation

The Secretariat for planning and coordination of PPP projects is UKAS 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. Various discussions on matters concerning technical, finance and legal issues will be sorted out at UKAS which shall include analysis of needs statement of all affected sectors and value management lab to ascertain the value for money of the project. The decisions are all made by the Cabinet consisting of all ministers and chaired by the Prime Minister as the approving authority. For purpose of PPP, once a private party is selected, a special purpose vehicle (SPV) company will be incorporated solely to manage the project. This is to ensure that all matters on finance are 'ring-fenced' and not mixed with other affairs of business and that the management of the SPV company is focused and specialised only for that particular project. Among the PPP projects are the first Penang Bridge, Stormwater Management and Road Tunnel (SMART), Putrajaya Centre of Administration and Pan Borneo Highway Sarawak, just to name a few.

Salient Provisions in the Contract Document

There is no specific legislation in Malaysia on privatisation or PPP, thus all PPPs are executed on contractual terms and based on government policies. According to Purice (2016), as of now there are only Kuwait and Emirate of Dubai that have PPP's legislation.

In Malaysia, under usual circumstances, the parties to the PPP contracts are the Federal Government and the SPV company representing the private entity and for land swap contracts, Syarikat Tanah and Harta Sdn. Bhd, a wholly owned company by the Minister of Finance, a body corporate incorporated under the Minister of Finance (Incorporation) Act 1957 (Revised 1989), will also be a party to facilitate dealings on land matters relating to the projects with third parties.

The contract documents of a PPP project differ according to the type of contracts which could be contract for maintenance, services or construction. Among the salient provisions of a Government contract are company's obligations, scope and duration of contract, land matters, delay and liquidated ascertained damages (LAD), bond – including land bond, maintenance bond, design guarantee bond, performance bond, dispute resolution mechanism, environmental law, indemnity and termination clause. The contract document will be scrutinized by the Attorney General's Chambers as the Government legal advisor upon negotiations by the parties of the PPP project.

Issues on PPP

There have been many issues revolving around PPP including inadequate regulatory frameworks to protect the public interests and the government, including transparent procurement as an essential element in PPP. Celeste Pagano (2009) commented that protecting the public interest is often not conducive to private profit.

According to Rowlson (2012) “there is always the concern that the project (PPP) will not be constructed properly, or the private partner will run out of funding for the project. Irrespective of any bonding, the state may be required to take the reins of the project midway through construction. There is also the justifiable concern that the private entity will cut corners and sacrifice quality for profitability.”.

Hashim, Al Che Ani and Ismail K (2017, 274), on PPP projects in Malaysia said that

“PPP in Malaysia are struggling in facing few issues and challenges in the aspect of project implementation, performance assessment and monitoring. The three factors were identified as a contributing factor that creates an issues and challenges from selected PPP models across the globe; namely human, technical and financial factor.”

Ismail. K, Takim R and Nawawi (2010) criticised that PPP in Malaysia “lacks transparency in the tendering process, absence of referred guidelines, incomplete Key Performance Indicator (KPI), less training and education”.

In terms of rights of the people on constitutionality issue, Beermann (1999) argued that

“While the public may ultimately benefit economically from public-private partnership development, the legal mechanisms used in public-private partnerships to skirt the constitution violate the public trust by (1) precluding the public from obtaining information regarding these projects; (2) denying the taxpaying public their right to participate in public choices and spending decisions that affect them; and (3) severely impinging on the public's state constitutional right to the referendum process.”

FINDINGS

Some Areas of Concern of a PPP Land Swap Contract in Malaysia

There is no specific legislation to govern PPP in Malaysia, thus parties rely heavily on the provisions in the contract. It is important that the PPP contract strikes a balance between the government’s interest which actually representing the public’s interests and the private party’s profit driven objective. Areas of concern could be multiple but for purpose of this paper, observation is only made to a land swap contract and limited to the terms relating to exchange land, land bond, funding and time.

Exchange Land

Exchange land is the mode of payment in a land swap contract. In this type of contract, the exchange land is the project's consideration. The value of the exchange land is determined during negotiation of the contract. Thus, in a land swap contract, the exchange land is at stake where the value of the land and the execution date of transfer of the exchange land are crucial to ensure that the project is worth the value of the exchange land. It is suggested that the exchange land shall be transferred and registered under the name of the SPV company only upon full completion of the project and not otherwise to safeguard the government's interests which indirectly safeguard the money of the people. However the SPV company may disagree unless it is financially stable to fund the project as well as repay its lenders.

Land Bond

A land bond is a guarantee and works as a security for the due performance of the SPV company's obligations under the contract. The land bond is applicable when the exchange land is transferred before completion of the project. It is suggested that the amount to be deposited as a land bond needs to be adequate as complicated situations may arise. Conflict may arise if an exchange land has been registered to an SPV company even before the project is completed. Issues such as delay and quality of the project may affect the project as a whole and the contract may be terminated which in consequence will jeopardise the whole project. Thus, the government is hand tight to proceed further in case of a conflict or problem in the project implementation. Since payment of the project is by way of an exchange land, the amount of the land bond should reflect the value of the land. It is proposed that the amount of the land bond should be reviewed annually and based on the current market value until completion of the whole project. This is due to the fact that by the time the project is completed, the land value may increase excessively due to the development in the area thus the payment which was made by way of an exchange land would be way too high than what the completed project is worth. Any surplus of the land value should also be returned to the government.

Development on the Exchange Land

Under the land swap contract, the commercial development on the exchange land can be carried out while the PPP project is on-going immediately upon payment of the land bond. The concern is that more attention would be given to the commercialized project. It is acknowledged that the company is profit driven but it is best if the sole focus be on the PPP project until fully completed. The concurrent development may cost the PPP project its quality and targeted time for completion. Again, the issue is the financial capacity of the company as the commercialised project is one way for the company to raise money for payment to its lenders.

Delay in the registration of title of the Exchange Land

The exchange land must be transferred to the company within a certain period of time under the contract failing which the company may be granted an

extension of time to complete the project if such delay affects the ability of the company to complete the project. This suggests a clear indication that the company reliance on the exchange land as a mode of financing the project. Practically this is an imbalance terms for the government. It is again suggested that the chosen company must be financially stable and strong in its portfolio.

Funding

Another scenario which may affect the contract is when the company failed to obtain sufficient funding from financiers or defaulted in repayment. This will make it worse if the project is made as collateral. It is suggested that as funding is the most crucial element in a PPP project, selection of companies should be stringent and only offered to a company that is financially stable and strong in its portfolio and track records.

Time

Time is of the essence. Commencement date and effective date are also another important terms which implementation needed careful supervision and monitoring as it affects the execution and performance of the whole project.

Conclusion

It is suggested for purpose of viability, that some areas of concern such as exchange land, land bond, development on exchange land, delay in registration, funding and time, all as elaborated above, should be given further consideration so that the people's interests are duly protected. Due to the confidentiality of documents, direct examples were not produced, thus this paper touches briefly on the provisions that require utmost attention to safeguard the government's interests which means safeguarding the best interests of the people.

There are still many other provisions that need to be addressed for example on obligations, design and constructions, choosing the right type of contracts, operations and maintenance, sub-contracts, relief events, liability and damages, performance security, default and termination and dispute resolutions which is not dealt in this paper.

Ultimately, apart from the concerns, PPP is necessary for funding, technical expertise or sharing of risks and for management responsibilities as it is a beneficial and strategic tool for economic development of Malaysia.

REFERENCES

- Allan, J. R. 1999. Public –Private Partnerships: A Review of Literature and Practice, Saskatchewan Institute of Public Policy, Public Policy paper n.4.
- Altman J. Ross. 2012. Public-Private Partnerships In Construction, ALI CLE Course of Study Materials Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation, Cosponsored by the

Center for Urban Redevelopment Education (CURE), School of Urban & Regional Planning, Florida Atlantic University, August 2012

California Debt and Investments Advisory Commission. 2007. <http://www.treasurer.ca.gov/cdiac/publications/privatization.pdf>

Celeste Pagano. 2009. Proceed with Caution: Avoiding Hazards in Toll Road Privatizations, *83 St. John's L. Rev.* 351, 354.

Economic Planning Unit, Prime Minister's Office (Malaysia) documents on 11th Malaysia Plan, 21/5/2015.

Hashim, Al Che Ani & Ismail K. 2017. *Public Private Partnership (PPP) Project Performance in Malaysia: Identification of Issues and Challenges*, https://www.researchgate.net/publication/318117406_Public_Private_Partnership_PPP_Project_Performance_in_Malaysia_Identification_of_Issues_and_Challenges [accessed Aug 14, 2017].

Ismail.K, Takim.R & Nawawi A.H. 2010. Public private partnership strategies: Issues and Challenges in Malaysia, Second International Conference on Construction in Developing Countries (ICCIDC-II), Egypt, 2010.

Purice, J.C. Matei. 2016. Updates From Around The World: Dubai, *11 CLINT 9*, International Bar Association (IBA).

Nick Beermann. 1999. Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare?, *Seattle University Law Review Summer*, 1999 23 Seattle U. L. Rev. 175

Osborne, Stephen P. (2000). *Public-Private Partnership. Theory and Practice and International perspective*. London: Routledge.

Public-Private Partnership Reference Guide, World Bank Group Publication 2017.

Rowlson M. Brian. 2012. Public Private Partnerships: The Future of Public Construction in Florida?. *Florida Bar Journal*. July/August, 2012 Volume 86, No. 7

Unit Kerjasama Awam Swasta (Public-Private Privatisation Unit), Prime Minister's Department, 2009 Guideline.