

PROCUREMENT AND INSTITUTIONAL RESPONSIBILITIES FOR PUBLIC-PRIVATE PARTNERSHIP (P3) IN KANO STATE: A CRITIQUE

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Abstract

Infrastructure is critical for meeting the rising aspiration of every government, especially, in developing countries. Such aspiration could, however, not be achieved without investment of the private sector and a balanced regulatory environment. Kano state which is the focal point of this article introduced P3 for quite a long period using different types of P3 contracts, complemented by various national and sub- national laws that are not P3 specific and therefore not suitable for P3 Procurement. This article using doctrinal research method by way of content analysis; appraises the legal and institutional regimes of P3 in Kano state, with a view to understanding whether the regimes are efficient and adequate to promote P3 in the state. The article posit that, Kano state adopted P3 as one of the important economic program for the development of its infrastructure assets, but it failed to provide specific public-private partnership law or establish a clear policy guidelines on PPP. Therefore, the existing framework is weak to support P3. Hence, the article proffers recommendations that will enhance and clarify the framework and help attract quality investors to the state.

Keywords: Infrastructure, Procurement, Public -Private -Partnership, Risks.

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1.1 Introduction

Governments have long recognized the vital role that modern energy, telecommunications, transport and water services play in economic growth and poverty alleviation. But providing infrastructure services is inherently challenging. Investment is large and lumpy, and often in sunk assets. There are concerns about monopolistic power of statutory bodies, and their essentially politicize structure. In much of the post second world war period, most countries entrusted service delivery to state-owned monopolies. But in developing countries, particularly, where the quality of institutions overseeing these monopolies were poor, the results were disappointing¹.

The inability of public utilities to meet the demand of basic utilities and services, together with the global financial crisis of 2008, brought about renewed interest in PPP in both developed and developing countries. The governments at different times are increasingly turning to the private sector as an alternative and/or additional source of finance to meet the funding gap. However, this comes with certain risks most especially in the implementation of public-private partnership. Therefore, this article exposes the legal and institutional regimes of public -private partnership (P3) of the Kano State with a view to understanding how P3 is being initiated, developed and procured; and the risk involved. In- build in the article are some findings and recommendations for enhancing P3 procurement and institutional responsibilities in Kano State.

1.2 Public-Private Partnership Contractual Framework

Given the complex technical nature of public–private partnership (P3), it is inevitable that, they are subject to heavy political debate. Unless there is a strong political-will from the public sector and the ability to communicate the case for pursuing PPPs to the public clearly and fairly, political winds can easily blow the process off course and a PPP programme will struggle for success.² Hence, any effort at implementing PPP without a good framework or using traditional

¹ Wells, Louis, *Private Foreign Investment in Infrastructure: Managing Non-Commercial Risk*, (New York: Oxford press, 2020) p.8.

² Ibid, p. 27

public procurement method, without considering reform for PPP specific concerns is usually a recipe for disaster.³

A PPP framework is best understood as the established procedures, rules and institutional responsibilities that determine how the government selects, implements and manages PPP projects.⁴ By setting procedures and rules, good PPP practice can be established within the government. This has the effect of limiting and managing government risk and ensuring consistency. By defining institutional responsibilities a PPP framework makes institutions accountable for their role in the PPP process; and lets the market know how PPP projects will be developed and how bids will be assessed, which may ultimately lead to more competitive procurement and better value.⁵

Basically, it can safely be assumed that, the more extensive the private involvement and private financing mobilized, the more supportive the investment climate needs to be. Most countries adopting PPP have learned this lesson the hard way, hence many of their sectors are littered with the corpses of failed or badly designed projects that end up costing the government and the private sector huge amounts of time and money.⁶

A common example is the project involving the leasing of Dar es Salaam's Water and Sewerage Authority (DAWASA), in Tanzania, for water distribution to a private consortium. The private company was responsible for billing and revenue collection from the customers, making new connections and performing routine maintenance. Ownership of the infrastructure remained with DAWASA for a period of ten years, commencing 1st August, 2003. However, it was terminated within two years of the start of operations. Part of the reasons for the failure of the project were lack of an enabling concession law and an adequate project preparation, as there was non-competitive bidding for the project, only one company BI-WATER submitted a proposal, and

³ Delmon, J., *Public-Private Partnership Projects in Infrastructure*, (Cambridge University Press, 2011) New York p. 2

⁴ World Bank (2020), *Guidelines for the Development of a Policy for Managing Unsolicited Proposals in Infrastructure Projects*, World Bank Publications, Washington DC, available at: <http://pubdocs.worldbank.org/en/976121488983070966/guidelinesfor-a-usp-policy-pdf> (accessed 7 December, 2020) at 22:00 hours

⁵ Ibid, p. 8

⁶ Ibid, p. 27

the company did not have experienced project team, capable of running a huge management operation.⁷

Therefore, sustaining public-private partnership requires the creation of a robust PPP legal framework, driven from the following key fronts:⁸

- i. Laws that support the process (regulatory mechanism) - the rules of the game need to enable the governments' entities to enter into PPP contracts, and the private sector to charge fees and to recover their investment without overly constraining the project development in an open competitive and transparent process;
- ii. People to drive and implement the process (Institutional mechanism) - the staff with the right political support and training and with access to sufficient funding, located in the right government department, to drive the project development and implementation process;
- iii. Government support and risk management (Fiscal mechanism) – for project development and implementation particularly those to be financed by the private sector, government support is a key to commercial viability. Also PPP projects sometimes involve government liabilities (often referred to as “fiscal risks”), and often contingent – as the liability is only crystallizing in certain events.⁹

Taking note from the above key fronts; government especially of common law tradition (particularly United Kingdom and Australia) treated public-private partnerships as variety of government procurement for which no specific PPP laws is needed in the presence of standard form PPP contracts which are supplemented by PPP policy statement and administrative documents. The obvious reason is that under common law government has the power of a natural person to make any contract (PPP inclusive).¹⁰ Whereas, civil law countries like

⁷ Yong, H., “*Public-Private Partnership Policy and Practice: A Reference Guide*”. (Commonwealth Publication, Marlborough House, 2014) London, United Kingdom, p. 168

⁸ Ibid, p. 29

⁹ Irwin, T., *Government Guarantees: Allocation and Valuing Risk in Privately Financed Infrastructure Projects*. (World Bank, (2017), p. 31

¹⁰ Nisar, T. M; “Implementation Constraints in Social Enterprises and Community Public-Private Partnerships” *Int. J. Project Manage*; 31(4), (2015) 638 – 651, p. 639

France tend to embody their PPP frameworks in laws. This follows from civil law tradition that government agencies may only do what they are explicitly authorized to do, as well as the tradition of limiting government discretion with tightly defined rules.¹¹

The above notwithstanding, many developing countries with common law tradition or system have passed specific PPP laws; these countries include Kenya, India and Nigeria. Some States in Nigeria also have passed PPP legislation to promote private sector participation in infrastructure projects across sectors. States like Akwa-Ibom, Cross-River, Ekiti, Kogi, Lagos, Niger and Rivers have developed specific laws and institutions for PPP projects procurement and implementation. The obvious reason is to provide greater stability, transparency and accountability.¹²

Kano State which is the focal point in this research is promoting PPP through contracts like many countries or sub-national governments following common law tradition or system. The PPP contracts themselves are almost always normal private law contracts, given their force through ordinary contract law. Adjudication and enforcement of the contracts are also a matter of private law, handled through the regular courts (or by arbitration if the parties opt into arbitration through the contract).¹³

In addition, various national and sub-national laws that are not P3 specific, also complement the framework. These laws regulate issues related to environmental protection, licensing requirements, (particularly for international investors), taxation, accounting standards, employment, debt and borrowing (local or external), land acquisition and ownership, permits and building standards. Also PPPs are often implemented in sectors that are already governed by sector specific laws and regulations, like, electricity generation or distribution, therefore, Kano State and private sector consider these

¹¹ Ibid, p. 648

¹² Onuobia, F. Okechukwu, J, et al, Nigeria, In: Werneck, B. and Sa'adi, M; "*The Public-Private Partnership Law Review*"; (2017) Law Business Research Ltd, London, UK, p. 157

¹³ Ibid, p. 59

laws and the role of regulatory agencies, and how they interact with the terms of their P3 contract.¹⁴

Remarkable to note here is the fact that Kano State is following common law countries' tradition in promoting PPP through contracts. The State is yet to enact a specific law or policy document to establish procedures, rules or institutions that determine how government selects, implements or manages PPP projects. This is an open deviation from an international best practice being adopted by countries world over.¹⁵

Many common law countries, particularly Australia and Britain (two of the world's most experienced P3 jurisdictions) do not have P3 specific laws, but they are using standards form contract supported with policy statement and/or administrative documents as the best approach. However, some common law jurisdictions like Kenya, India, Nigeria at federal level and some of its component States have enacted P3 laws. This is often to override some existing laws that would otherwise restrict or delay PPP projects. Another reason for putting the framework into a statute by these countries is to provide greater force, stability, transparency and accountability.¹⁶

1.3 Public-Private Partnership's Institutional Responsibilities across Government in Kano State

Institutional arrangements and responsibilities for public-private partnership differ widely from place to place. This depends on the particular needs of the P3 programme and the pre-existing institutional roles and capacity, (it is the institutional framework that defines which entity will play what role at each step of the P3 programme).¹⁷ However, the general principles to guide institutional arrangements for P3 include the following:

¹⁴ Ejore, B; and Klein, C., Interaction or Integration of National and Sub-national Law in Infrastructure Sector in Nigeria, *Journal of Modern Law and Contemporary Issues (JMLCI)* (2021), Vol. 2(33) 20-39, p. 32

¹⁵ Ibid, p. 34

¹⁶ Reese, B., *Courts and Political Institutions*, (Cambridge University Press, 2018) p. 180

¹⁷ Osei – Kyei, R. and Chan, A. P. C, “Factors Attracting Private Sector Investments in Public-Private Partnerships in Developing Countries: A Survey of International Experts”, *Journal of Financial Management of Property and Construction*, Vol. 22, No. 1, (2017) p. 92

- i) Building on existing institutional responsibilities and processes;
- ii) Designing an institutional architecture appropriate to the likely scale of the P3 task; and
- iii) Assigning responsibilities to agencies that have the incentive, information, and competence to discharge the responsibilities and clearly define any institutional relationships.¹⁸

The point about building on existing responsibilities and processes which Kano State government is being practicing is particularly important. There are already public sector agencies with responsibilities for planning and developing infrastructure projects. These public bodies may add to their roles, the delivery of public-private partnership projects even though they are not specifically established for that purpose and they are as follows:

(1) Resident Due Process Team (RDPT): this is the team established by administrative document for the Ministries, Departments or Agencies (MDAs) in Kano State, to review and make recommendations to the Ministerial/Special Tenders Board on contracts, works and services that fall within the spending limits of the ministry, department or agency.¹⁹

(2) Tender Board: In Kano state there exist two different tender boards established by an administrative document, these are: ministerial tender board and special tender board. The ministerial tender board is constituted in every ministry of the State, where as special tender board is established in the Ministries of: works and housing, transport and tourism, education, agriculture, health, and water resources.²⁰ The major preoccupation of tender boards (ministerial or special) is to carefully evaluate the project concepts and submissions of the prospective bidders to determine their appropriateness/compliance with the standard technical and financial requirements of the tender documents; and to select winners for an award of contract, service or work.²¹

(3) Project Monitoring Bureau (PMB): this is the unit established under the Directorate for Project Monitoring and Due Process, with secretariat and staff to monitor tender and bidding process in all Kano State's Ministries, Departments and Agencies (MDAs), with a view to

¹⁸ Ibid, p. 94

¹⁹ Article 1.3, Contract Due Process Policy, KNSG Notice No. 2 of 2006

²⁰ Circular No: *SOG/AGS/S/SR/46/T.1/70* dated 29th December 2004, which is extant

²¹ Article 2.3, Contract Due Process Policy (2006) opcit,

issuing due process certificate for award of contract for works, service or supply of goods, after due process compliance review.²²

(4) Ministry of Finance: is established by statute in Kano State, to execute fiscal policies and approve payment of contracts and liabilities among others.

(5) Planning Authorities: there are many in Kano State, but, the most notable is Kano Urban Development Authority (KNUPDA), which is responsible for granting building/development approval for any project. KNUPDA works hand in hand with Kano Geographical Information System (KANGIS) that issues land receipts and certificates for the purpose of processing building permit.²³

(6) Kano State Executive Council: this is the highest decision making entity in Kano State, and is responsible for the approval of Strategic Outline Case (SOC); Outline Business Case (OBC) and Final Business Case (FBC) for any project above 10 million naira, to be procured by any ministry, department or agency of the State.²⁴

As pointed out at the beginning, the authorities listed are not meant to play roles in PPP procurement and development at the onset, therefore, the existing public sector procurement's rules and public financial management's rules, must be tailored to provide the background framework that will facilitate and support the development of public-private-partnership. Otherwise, a new institutional framework may be design or developed to create an institution with the following major responsibilities:

- i) Identifying, procuring, appraising and structuring P3 project;
- ii) Coordinating government entities by making sure correct processes are followed while analyzing the proposed PPP project; and that all agencies that need to comment or approve a project do so after getting all necessary information;
- iii) Making prudent financial management by making sure that there is sufficient fiscal space to fund direct liabilities and also deal with situation where risk allocated to the public sector crystalize into fiscal expenditure; and

²² Kano State Government Instrument No: *SSG/AGS/S/46/X/1174* of 11th March, 2004

²³ Section 8, Kano State Land Use Charge (Amendment) Law, Law No. 6 (2017), Kano State of Nigeria Gazette No. 7 Vol. 49, Kano – dated 19th October, 2017 pp. A103 – A127

²⁴ Article 3.7, Contract Due Process Policy (2006)

- iv) Approving project where needed at several stages of project development or during contract implementation; this approval must be given at a right time and diligently.²⁵

1.4 Public-Private Partnership Procurement

In practice, infrastructure projects can be initiated through two main approaches: solicited and unsolicited.²⁶ The solicited approach is where the public entity or authority identifies a project and invites private investors to submit their proposals. As a matter of fact, solicited infrastructure projects are procured through a well-structured procurement system, which requires transparent and competitive tendering process; and sometimes the projects are part of the country's or state's infrastructure master plan or list of priority projects.²⁷

The unsolicited approach or unsolicited proposals (USPs) is where a private investor identifies and submits a project idea or concept to a public entity or authority without any explicit request or invitation. Unlike solicited approach, unsolicited proposal can be subjected to an open tendering process or directly negotiated with the original proponent. But the later method is most adopted by many governments. Unsolicited proposal provides technical and financial solution to public sector's infrastructure needs through innovative technology and private finance, but it is not without challenges, because USP if not properly manage leads to poor value for money, corruption and public agitation or opposition.²⁸

Kano State does not have specific legislation or policy statement of public-private partnership's procurement. In practice, procurement of PPP projects if solicited by public entity is not different with procurement of public works, goods or services which are governed by

²⁵ Alfen, W. H., "Identifying Macro-Environmental Critical Success Factors and Key Areas for Improvement to promote public-private-partnership in Infrastructure: Developing Countries Perspective", *ECAM Journal* Vol. 21, No. 4, PP. 383-402 (2015) at p. 401

²⁶ Oseyi-Kyei, R. Chan, A. P. C. "Factors Attracting Private Sector Investments in Public-Private Partnerships in Developing Countries: A survey of International Experts", *Journal of Financial Management of Property and Consecution*, Vol. 22, No. 1, (2017) p. 94

²⁷ Ibid, p. 96

²⁸ Zhang, X. Q. "Critical Success Factors for Public-Private Partnerships in Infrastructure Development", *Journal of Construction Engineering and Management*, Vol. 131, No. 1, (2015) p. 14

contract Due Process Policy (2006).²⁹ The policy requires the adoption of open, competitive and transparent activities that starts from expression of interest to award of contract with a view to ensuring competition, transparency, good governance, accountability and efficient management of public funds and assets.³⁰

On the other hand, the procurement of public-private partnerships that are privately initiated (unsolicited approach) is done through direct negotiation between government's agencies and project proponents. This is for the fact that, Kano State does not have established rules, procedures or institutional responsibilities that determine how unsolicited proposals will be selected, approved or managed. Therefore, Kano state often negotiate directly with project proponents.

1.4.1 Expression of interest

Expression of interest is the first procurement activity for contract award in Kano State, a procuring entity depending on the scope of work and the approved expenditure limit, do advertise to prospective bidders (contractors or suppliers) to submit pre-qualification bids. The advertisement shall be in two categories: (i) Contracts in the range of ₦250,001.00 – ₦10 million, this category of contract must be advertised through the medium of internal memo (notice) which shall be posted conspicuously on the procuring entity's notice board, and in the state's official gazette; (ii) Contracts above ₦10 million, for this category of contract, the advertisement calling for pre-qualification of contractors shall be made in at least two dailies and the official gazette of Kano State.

The advertisement must contain the name and address of the procuring entity, brief description of the object of the procurement, including the time for completion, scope of work, summary of the qualifications criteria, place and deadline for the submission of the application for pre-qualification, and date of availability of the pre-qualification documents.³¹

1.4.2 Prequalification Evaluation

²⁹ KNSG - Notice No. 2 of 2006 – Kano State of Nigeria Gazette No. 8 – Kano – 14th December, 2006, Vol. 38, pp. 1 - 21

³⁰ Ibid, p. 2

³¹ Manual for Contract Due Process, Art, 3.1, opcit, p. 12

This is a process through which pre-qualified bidders are selected. Essentially the pre-qualification evaluation should assess not only the financial and technical standing of the bidders, but other criteria, that are assigned zero score, but are considered mandatory and the absence of any automatically disqualifies an applicant,³² and they are: evidence of incorporation or registration of business name: 0%; registration with State's works Registration Board in relevant category: 0%; company's audited account for three years: 0%; evidence of tax clearance certificate for three years: 0%; evidence of financial capability and/or banking support: 15%; experience and technical qualification of key personnel: 20%; record of Previous Projects executed and evidence of knowledge of the industry: 20%; equipment, plants and technology capacity: 20%; annual turnover: 5%; evidence of settlement of PAYE and other withholding taxes due to the State: 5%; VAT Registration and evidence of past VAT remittances: 5%; local resource utilization: 5%, and community and social responsibility support: 5%³³.

It is worth noting that, there are other grounds for mandatory or discretionary disqualification of a pre-qualified bidder not provided under the Contract Due process Policy (2006), but covered by administrative law provisions, such grounds are; criminal conviction of a corporation, professional misconduct, poor performance on previous contract and host of others.³⁴

1.4.3 Request for Proposals and unsolicited bids

Once pre-qualified bidders have been selected, the procuring entity will issue them with an invitation to tender (IT), together with supporting document (including a proposed contract). The invitation to tender will contain detailed instructions on the bid process, content and format of bids and a submission deadline, which is usually six (6) weeks from the date of issue.³⁵

Award based on unsolicited proposal or an invitation to negotiate a contract is generally not consistent with Contract Due Process Policy as noted previously. However, in practice, most PPP projects in Kano State are awarded through an unsolicited proposal/invitation to

³² Paragraph 3.1, Ibid, p.4

³³ Paragraph 3.2, Ibid, p. 4

³⁴ Paragraph 3.3, Ibid, p. 5

³⁵ Ibid, paragraph 3.3, p. 5

negotiate; this practice is recommended as it helps to minimize issues of delays and misconceptions of the contract detail at the time of bid submission. But it would have been a best practice, if procuring entities who wish to procure a PPP contract through an unsolicited bid will run an advertise competitive tender and make sure that the proposal is in line with the entity's development goal, and the project to be procured is a priority project.³⁶

1.4.4 Evaluation of Tender and Award of Contract

The evaluation of tenders/bids should take place immediately after the closing period of request for proposal and, must be conducted openly in the presence of all stakeholders and interested members of public.³⁷ The procuring entity while evaluating the bids is required to identify the lowest bidder and adjudge it a winner, contrary to the current global best practice, that emphasizes value for money (vfm).³⁸

Once a procuring entity, has taken a decision to award a contract, it must inform all bidders of its decision with reasons, and prepare a comprehensive report on the evaluation exercise, specifying the winner and transmit the outcome to the Project Monitoring Bureau for due process compliance review (DPCR), which is a pre-requisite to the actual award of the contract.³⁹

The due process compliance review is essentially to establish compliance with Due Process Procedure and serves as an insurance cover designed to enhance the level of transparency required of a procurement process. At the stage of the review, the Technical Advisory Unit of the Projects Monitoring Bureau will carry out a revalidation exercise to establish compliance of contract award

³⁶ This is the global best practice, and also the requirement of paragraph 3.2.1 of Infrastructure Concession Regulatory Commission's Guidance Notes on Unsolicited Proposals, applicable to Federal Government of Nigeria's PPP Projects. The notes is available online, at www.icrc.gov.ng, last accessed on 2nd Aug, 2020 at 16:00 hours

³⁷ Contracts Due Process Policy, Op cit, p. 6

³⁸ Werneck, B. and Saad, M. *The Public-Private Partnership Law Review*, (Encompass Print Solution, 2017) United Kingdom, p. 19.

³⁹ Paragraph 3.6, Manual on the Contract Due Process Policy, op cit, p.6

process; the Process of selection and recommending winner; and the cost of the contract.⁴⁰

There are three possible outcomes at the end of the review exercise as follows (i) Outcome A: If at the end of the review, the findings indicate that all the defined rules of public contracting were duly complied with, the Project Monitoring Bureau would recommend the issuance of a Due Process Certificate (DPC), to pave way for the award of the contract; (ii) Outcome B: If the due process review exercise indicates non-compliance, the Project Monitoring Bureau, shall withhold the Due Process Certification and advise the procuring entity to review its processes; iii) Outcome C: Where the cost of contract quoted by an emerging winner (usually a lowest bidder) is higher than the fair market cost, the issuance of a Due Process Certificate for Award shall be made conditional upon alignment of the cost. In such circumstance the adjudged winner shall be advised through the procuring entity, to realign the cost of offer to the compliance review estimated cost.⁴¹

One conspicuous weak point of the Contract Due Process Policy (2006) of Kano State is its failure to allow a “standstill period” of at least two to three weeks, between selection of winner and award of contract. This is expected to be a window for a bidder who is dissatisfied with the process to challenge the award of a contract on the ground that the process has been defective, or on other justifiable reason.

1.5 Contract Management

Managing infrastructure contract starts from the inception phase of the project cycle with designing appropriate solutions and managing input from different advisers. It continues through the selection of the investors and then during implementation of the project. After procurement, the government must manage the development phase, transitioning the project toward delivery of services by carefully managing certain contractual issues with dimensional implications throughout a life cycle of infrastructure project, such issues are: funding, state guaranties, financing, renegotiation, risks and mitigation,

⁴⁰ Ibid, Paragraph 4.2, p.7

⁴¹ Ibid, Schedule I, p. 20

financing, dispute resolution, ownership of assets and termination of contract.⁴²

1.5.1 Funding

Payment to private investors for services provided in Kano State usually depends on the type of asset that is being built or leased to the private sector. Economic infrastructure, such as light rail, power generation and toll roads, have traditionally utilized a ‘user-pay’ system, whereby the end-user of the asset, example, rail passengers or motorist pays tolls, fares or other similar charges for the use of the asset. These charges are calculated to cover all costs for the project, including construction, operating and maintenance costs, and repayment of debt, as well as provide a return to investors.⁴³ At the same time, the private sector assumes the market risk. The willingness of the private sector to accept such risk will depend upon its analysis of market forecast.⁴⁴

Social infrastructure such as schools, hospitals, and office facilities including courtrooms, typically operates on an ‘availability-based payment’ which is a system that is reliant on payment directly from the government (procuring entity), and the payment depends on the contract achieving certain key performance indicators.⁴⁵ In this system, the public sector authority only pays for the services or output provided; and the payment is subject to deductions for unavailability or poor performance in accordance with the pre-set formula. Thus, the private sector partner takes risk in the construction and ongoing operation of the infrastructure asset, but does not take volume or usage risk.⁴⁶

1.5.2 State Guarantees

⁴² Delmon, J., *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers*, (Cambridge University Press, 2011) U.K. p. 156

⁴³ Werneck, B; and Saad, M; *The Public-Private Partnership Law Review*, (Opcit, 2017) p. 219.

⁴⁴ Ibid, p. 219

⁴⁵ Ibid, p. 220

⁴⁶ Yescombe, E. R. *Public-Private Partnerships in Sub-Saharan Africa Case Studies for Policy Makers*, (Mkuki na Nytoa Publishers, 2017) Dar es Salam, Tanzania, p. 31

Kano State Government does not generally provide guarantees for PPP projects, although private investors and their financiers may wish to seek some certainty and avoid taking the credit risk of the procuring entity, especially where it is likely that the industry or sector in which the investor operates is likely to be restructured which can impact projected revenue streams. Where a procuring entity decides not to provide a guarantee, there are additional means by which the private investors or its financiers (lenders) can receive some assurance like, in form of letter of comfort or undertaking from procuring entity.⁴⁷

Therefore, there is need for a framework (legal or policy) that can showcase the ability of the State to guarantee the contractual obligations of a procuring authority (Ministry, Department or Agency), should this authority not have sufficient credit worthiness on a standalone basis.⁴⁸

1.5.3 Financing

Kano State P3 projects are typically financed through project finance and/or a combination of corporate loans and shareholders equities. Some projects typically get a monetary or kind support from Kano State Government during the development phase, in form of land or waiver of payment of permits and land charges. However, it's being speculative to use institutional and bond financing for the development and operation of public -private partnership; and this has not yet featured prominently in Kano State.⁴⁹

1.5.4 Risk Allocation and Mitigation

There is no specific guidance on optimal risk allocation and mitigation in the lifespan of P3 in Kano State. This means that allocation of risks depend on what is agreed by the parties to a particular project, hence, private investors would hardly understand the position of government on risk distribution. However, in practice, risk is ideally allocated in such a way that the party best able to manage a risk bears that risk, as

⁴⁷ KNSG, *Kano State Investor's Handbook*, (Kano Printing Press, 2020) p. 19

⁴⁸ Arimoro, A. E. 'An Appraisal of the Framework for Public-Private Partnerships' *European Journal for Procurement and Public-Private Partnership Law Review*, (2018) 13(3)1

⁴⁹ Report of the Second Kano Economic and Investment Summit (2017) Opcit, p. 33

it has opportunity to reduce the likelihood of occurrence and deal with the consequences. To this end, there are three common risks associated with infrastructure projects and their common mechanisms of distribution and mitigation.⁵⁰

(a) Project Delays, the risk of delay is eminent in all stages of an infrastructure project, right from conception to financial close up to the completion of the project. However, the risk of delays in construction is the most common and lofty, it is mostly borne by the private investor, except where explicitly agreed otherwise. In some circumstances, a procuring entity may be required to grant an extension of time and pay delay or prolongation cost under certain circumstances that includes delays caused by government in granting environmental and planning approvals.⁵¹

b) Risk outside the Control of Parties, these are risks arising outside of the parties' control that will entitle parties to reliefs from default, termination or extension of time for performance in some circumstances. However, where relief events materially impede performance for significant period of time, the parties ordinarily have the right to terminate the project contract.⁵² Following this principle, most public-private partnership projects in Kano State defined a narrow category of events beyond the private investor's control (ordinarily matters within the control of the government party), the occurrence of which will entitle the private party to relief from performance, extension of time for performance and compensation. These events are: war, insurgency and change of law.⁵³

c) Political, Legal and Macroeconomic Risks, political and legal risks are many and their implications are different, the most common of such risks are: change in law, regulatory capture, authority voluntary termination and expropriation. Macroeconomic risk on the other hand, is dealing with issues such as, variation of price and service charges as

⁵⁰ Martimort, D., and Straub, S. "*The Political Economy of Private Participation, Social Discontent and Regulatory Governance*". (Inter-American Development Bank, 2005) Washington, D.C, p. 68

⁵¹ Ibid, p. 79

⁵² Ibid, p. 89

⁵³ See for instance, Article 16.2 General Conditions of Contract for the Design and Construction of 2X3 MW Challawa Hydro Power Project, Kano. Available online at www.kanostate.gov.ng, last visited on 8th Nov. 2020 at 18:30 hours.

a result of inflation, dominance of market by few or single service provider; or for monetary and interest rate volatility.⁵⁴ Political and legal risks are the most common in Kano State for lack of specific legislation enabling private participation in infrastructure; as a result a government may at will terminate or abandon any PPP project started by previous government.

For macroeconomic risk, like domestic inflation on the cost element of delivering assets or services during construction or operation; Kano State Government may likely bear the risk which can be mitigated through contract variations, since bidders and investors see this risk outside their control, being primarily a macroeconomic of policy-determined variable. Also, where PPP project is financed predominantly in foreign currency, procuring entity may absorb the exchange rate risk. This is mainly due to the difficulty for the private sector to hedge this risk in the financial market at reasonable price. However, otherwise, interest rate risk can be transferred to the private party.⁵⁵

1.5.5 Insurance

In most public-private partnership projects in Kano State, the investor (private party) is ordinarily required to obtain project-specific insurance that cover the private party and the government party of certain risks. The insurances that are typically required for P3 project in Kano State are: contract works insurance; equipment insurance; property and material damage insurance, and workers' compensation insurance. A private party must typically demonstrate the evidence of these insurance for the life of the project, the government may also effect and maintain insurance where the private party fails to do so and deduct premiums from amounts owing to the private party under the PPP agreement. Insurance proceeds are usually required to be used to rectify insured damage to the project before a claim can be made upon the government.⁵⁶

⁵⁴ Newbery, D. M., *Privatization, Restructuring, and Regulation of Network Utilities*; (Cambridge, MIT Press, 2000) p. 142

⁵⁵ Yescome, E. R., *Public-Private Partnerships in Sub-Saharan Africa, Case Studies for Policy Makers*, (Mkuki na Nyota Publishers, 2007) Dar es Salam, Tanzania, p. 38

⁵⁶ This is for instance a clear requirement of Article 18.2 and 3 of the contract for the Design, Finance and Construction of 2X3 Megawatt, Challawa Hydro Power Project of Kano State.

1.5.6 Dispute Resolution

Almost all the public-private partnerships contracts in Kano State contained provisions regarding dispute settlement; and the provisions are mostly identical as they always require the parties, to use their best endeavours to settle any dispute or difference of opinion between them arising from or in connection with the agreement, amicably through mutual discussion, conciliation or at last arbitration. In practice, the government of Kano State mostly overlooked the dispute settlement mechanism.

1.5.7 Renegotiation, Adjustment and Revision

It is usual for PPP contracts to have an inbuilt change or modification regime to deal with variations to the contract's technical scope or commercial terms throughout the operational period. The change or variation mechanism usually contains a methodology for calculating the financial implications of the change, as well as the impact of the change upon performance and other requirements under the contract. For that reason, in countries with matured PPP markets like United Kingdom, South Africa and Australia, service charges can be varied independently of a specific change to the service contract, for the fact that there will often be a regime in place to vary the service charge in response to inflation, usually through a pre-agreed indexation regime; or a contract may employ a cost benchmarking regime throughout its term, to ensure the government entity is not paying in excess of market rates over time. However, in almost all the P3 projects in Kano State, there is no pre-agreed indexation or benchmarking regimes.⁵⁷

1.5.8 Ownership of Underlying Asset

The underlying asset for P3 projects, like school, road, hospital in Kano State is owned by the public party, typically an SPV (special purpose vehicle) in which the actual private investors are the shareholders; are in most cases managing a concessions on behalf of a procuring entity. Here, for instance, in a concession contract land, building or property

⁵⁷ Werneck, B. and Saadi, M. *The Public-Private Partnership Law Review*, (2017) Op cit, p. 15

is included in the project, the contract usually contained an agreed terms for the transfer of assets to government at the expiry of the contract term. In infrastructure PPP with public financing, it is the private party constructing the asset on its account and risk, but the asset is transferred to the government upon a commencement of the asset's entry into service (the operational phase) in consideration of payment from the government for the capital investment in whole or through amortization.⁵⁸

1.5.9 Early Termination and Compensation

Termination rights under public-private partnerships are usually limited to those expressly stated in the terms of the contract. The commonest rights that allow for termination are: a fundamental breach of the PPP agreement or; where there is an event outside of the parties' control that materially disrupts the project (a force majeure event) or; where a private party becomes insolvent.⁵⁹ In some circumstances, government terminates PPP agreement for convenience without default from a private party; such termination requires the payment of compensation to the private party. This is effectively a compromise that allows the government to terminate for reasons beyond default, insolvency, or force majeure event.⁶⁰

In some PPP markets with legislative framework, it is extremely rare for the government to terminate a PPP for convenience. In Nigeria, at federal level, for example, the Infrastructure Concessions and Regulatory Commission Act, provides that, 'No agreement reached in respect of this Act shall be arbitrarily suspended, stopped, cancelled or change except in accordance with the provisions of this Act'.⁶¹ However, that is not always the case with Kano's public-private partnership projects.⁶²

⁵⁸ This is the payment provisions of Tiga and Challawa Hydro-Power Project in Kano State.

⁵⁹ Newbery, D. M. *Privatization, Restructuring, and Regulation of Network Utilities*; (Cambridge, MIT Press, 2000) p. 142

⁶⁰ Ibid, p. 144

⁶¹ ICRC Act, Cap I14 LFN, 2004

⁶² KNSG, Kano State Investment & Properties, *Manual for Project Development*, (Government Printing Press, 2020) Kano, Nigeria, p. 11

1.6 Conclusion

From the analysis made in this article, it can safely be argued that, private sector participation in the development of infrastructure is a global practice; widely recognized by both developed and developing countries. Kano State government not an exception, is also utilizing private sector for the development of its infrastructure, using various forms of P3, like, concessions and franchise.

However, it is found that, there is no specific PPP law in Kano state that defines the procedure, decision's criteria and institutional responsibilities for the development, Procurement and implementation of PPP projects. At the same time, the State is not using standards P3 contract model, supplemented with policy statement or administrative document, like many common law countries. This brings about over reliance on unsolicited proposal and inchoate P3 contracts.

Therefore, Kano state shall take steps to provide specific PPP law that can establish procedures, rules and institutional responsibilities across government for the selection, development and implementation of PPP projects. The law shall be embedded in regulations that can foster transparency, competition and openness of Procurement.

The state must embrace the use of standard P3 model contracts that are readily available for all typologies and P3 settings. This can shortened drafting's time.