



A COMPARATIVE ANALYSIS OF THE USE OF UNSOLICITED PROPOSAL FOR THE DELIVERY OF PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN AFRICA

George Nwangwu*

ABSTRACT

As countries across Africa continue to look for ways to develop their infrastructure, the use of Unsolicited Proposals (USPs) in the procurement of Public-Private Partnership (PPP) projects have become very popular across the continent. This is despite the widely held view that this procurement model should be used with caution since it stifles competition, is susceptible to abuse and, therefore, likely to lead to the delivery of projects that do not deliver value for money. However, apart from a few studies and despite the very pervasive use of USPs across the continent, there has been very minimal academic inquiry on the use of this procurement approach in Africa. This article, therefore, contributes to this very important area by first distilling a best practice framework as a guide for countries to use in procuring USPs. Secondly, the paper evaluates the experiences of four different African countries in the use of USPs, using the framework as a guide. The lessons learnt are then used to make recommendations for improvement in the procurement of USPs across Africa.

Keywords: Public-Private Partnerships; Unsolicited Proposals; Procurement; Infrastructure; Project Financing; Sustainable Development.

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* Dr George Nwangwu, Research Fellow, African Procurement Law Unit, Department of Mercantile Law, Stellenbosch University, South Africa. gnwangwu@gmail.com

1. INTRODUCTION

The positive correlation between investment in infrastructure and economic growth is well noted in the literature.¹ Infrastructure not only improves the quality of life of citizens but also has a multiplier effect on employment, and therefore productivity.² Essentially, it plays a significant role in poverty reduction and the attainment of the Sustainable Development Goals (SDGs).³ However, the quantity and quality of infrastructure in Africa is exceedingly low, mainly due to low levels of investment over the years and a poor maintenance culture.⁴ This has significantly hindered the continent's economic growth. According to the African Development Bank, despite being responsible for transporting 80 to 90 per cent of goods and services, 53 per cent of the roads in Africa remain unpaved. Africa can only boast of about a total of just 84,000 kilometres of rail track for a surface of about 30 million square kilometres. In the ports sector, Africa operates about 64 ports, many of which are outdated and poorly equipped. Handling costs average at about 50 per cent more in Africa than in any other part of the world.⁵ The lack of investment in infrastructure is invariably constraining economic growth in Africa. For instance, the National Infrastructure Master Plan of Nigeria, Africa's biggest economy, states that the country's current infrastructure stock ranges from 20 per cent to 25 per cent of GDP, this is way below the international benchmark of about 70 per cent.⁶

African governments desperate for growth realize this correlation between investment in infrastructure and economic growth and are thus

1 H. Esfahani and M. Ramirez, "Institutions, Infrastructure and Economic Growth" 70 (2003) *Journal of Development Economics* 443-477; D. Aschauer, "is Public Expenditure Productive" (1989) 24 *Journal of Monetary Economics* 171-188; W Easterly and S Rebelo "Fiscal Policy and Economic Growth: An Empirical Investigation", (1993) 32 *Journal of Monetary Economics* 417-458.

2 *ibid.*

3 Bhattacharya and others, "Driving Sustainable Development Through Better Infrastructure: Key Elements of a Transformation Program" (July, 2015) <<https://g24.org/wp-content/uploads/2016/02/Driving-Sustainable-Development-Through-Better-Infrastructure-Key-Elements-of-a-Transformation-Program-Bhattacharya-Oppenheim-Stern-July-2015.pdf>> accessed 7 May 2019.

4 Damilola Olawuyi, *Extractives Industry Law in Africa* (Springer, 2018) 55-80.

5 African Development Bank Group "Infrastructure Development" (AFDBG, 2019) <<https://www.afdb.org/en/knowledge/publications/tracking-africa's-progress-in-figures/infrastructure-development/>> accessed 9 May 2019.

6 National Planning Commission "National Integrated Infrastructure Master Plan" 2015.

anxious to invest in infrastructure. However, majority of these countries are constrained by paucity of funds, thereby turning to the private sector for investment. This investment drive is usually through the instrumentality of Public-Private Partnership (PPPs), which allows the public and private sectors to partner towards the delivery of public infrastructure.⁷

It is not uncommon for governments to send out Requests for Proposals (RFPs) soliciting qualified private sector investors to bid for the delivery of infrastructure projects or services. In this case, the potential private sector investor would be merely responding to the invitation to provide specific infrastructure or service according to specification and most times in line with the country's infrastructure plans. However, an increasing large number of these proposals are unsolicited.⁸ In most cases, therefore, the private sector party approaches the government on its own volition, offering to provide certain infrastructure, which it anticipates that the government requires. It is said that this allows the government access to private sector finance, innovation, skill and intellectual property, which would not necessarily have been available to it under a solicited proposal procurement model.⁹

USPs are however very problematic. Given that a single bidder puts forward the proposal, the procurement process often lacks transparency and competition. These two limitations create the additional likelihood of corruption, collusion and lack of value for money. These, in turn, usually exacerbates citizen's scepticism regarding the sanctity of the PPP projects. This is bearing in mind that privately financed projects are by their nature already susceptible to a lot of suspicion from a cross-section

7 See Damilola Olawuyi, "Financing Low-Emission and Climate-Resilient Infrastructure in the Arab Region: Potentials and Limitations of Public-Private Partnership Contracts" in Walter Leal Filho, Amr Abdel Meguid, *Climate Change Adaptation in the Arab Region: Case Studies and Best Practice* (Springer, 2017).

8 A 2014 study by the Public-Private Infrastructure Advisory Facility (PPIAF) revealed that there was a remarkable global growth in the use of USPs and that African countries accounted for majority of this growth. See: PPIAF, "Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned" (World Bank, 2014) <<http://documents.worldbank.org/curated/en/713001468331863238/pdf/913040BROSecM20nsolicited0Proposals.pdf>> accessed 10 May 2019.

9 PPP Knowledge Lab, "Dealing with Unsolicited Proposals" (World Bank Group, 2018) <<https://ppp.worldbank.org/public-private-partnership/library/policy-south-african-national-roads-agency-respect-unsolicited-proposals>> accessed 10 May 2019.

of the public who view the granting of public concessions to private entities as akin to giving away “family jewels” to privileged private actors. This inherent cynicism always increases where these public rights are granted to private actors without a transparent or competitive procurement process. Basically, the challenge faced by the majority of countries in dealing with USPs centres on how to increase transparency, competition and value for money whilst courting private sector finance and innovation.¹⁰ In practice, this appears difficult to attain as governments are usually focused on getting much needed infrastructure at any price. Consequently countries end up with very bad projects with potential contingent liabilities to be paid by future generations.

Despite the shortcomings in this procurement model, the use of USPs for the delivery of infrastructure projects have continued to increase across the continent as countries scramble for investment in infrastructure.¹¹ Yet, there has been very minimal academic inquiry on the use of this procurement approach in Africa. The reason appears to be a result of the constraints from availability of data in majority of the countries within the continent.

This article aims to fill the gap by evaluating the experiences of four different African countries, Nigeria, Ghana, Tanzania and South Africa in the use of USPs. A simple framework is constructed and used as a guide to make the assessments. The lessons learnt are then used to make recommendations for the improvement in the use of USPs across Africa. The idea is also to lay the groundwork for future academic research in this area.

The rest of the article is structured as follows: section 2 examines the different approaches that have been adopted to manage USPs in different jurisdictions. Section 3 examines the framework and guiding principles for managing USPs. Section 4 explores ways of managing USPs in different countries, while section 5 looks at legal and policy recommendations that can be employed to reform the use of USPs. Section 6 concludes the article.

10 John Hodges, Dellacha Georgina, “*Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency (English)*” (2007). Public-Private Infrastructure Advisory Facility (PPIAF) working paper series. Washington, DC: World Bank. projects or services of public infrastructure. instrumentality of PPPs, which issues of competition and transparency. ight

11 PPIAF (n 8).

2. DIFFERENT APPROACHES TO MANAGING USPS

The key problem with USPs has always been that it denies projects the benefit of a competitive procurement process. Apart from the moral argument of providing a level playing field to all the parties desiring to be involved in the bidding process, competition provides some other benefits. In a public auction for privately financed infrastructure, competition helps in price discovery, thereby ensuring that the public sector entity gets the best possible offer in terms price and quality. Furthermore, a competitive procurement process helps reduce the incidence of corruption. According to Rose Ackerman, “in general, any reform that increases the competitiveness of the economy, helps reduce corrupt incentives”¹² Generally, it is agreed that competition in a project helps boost value for money for the project by ensuring that the citizens are not short changed. Another advantage of a competitive process is that it provides the government with policy flexibility in the sense that where there are two or more bidders, governments go into negotiations with a preferred bidder safe in the knowledge that if negotiations break down that it could call upon the reserve bidder. This saves the government the stress and costs associated with going through a long drawn out procurement process all over again or being held hostage to the dictates of a single bidder.

It follows that in sectors that are already competitive or even though a monopoly but where there is an economic regulator that fixes tariff, that the need for competition is reduced but not entirely eliminated. For instance, an independent power producer may obtain requisite approvals and build a power plant to sell power to the government or any other user at a tariff that is fixed by an independent economic regulator. In this case, there appears to be no overwhelming need for a competitive process since the tariff is fixed. However, a very efficient operator is also able to increase its profit beyond even the limits contemplated by the independent regulator or even due to factors like information asymmetry. It is worth mentioning that these additional profits by such an efficient operator would have been shared with the user public if the project had gone through a competitive process.

A policy option open to governments is to completely refuse to

12 Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences and Reform* (2nd edition, Cambridge University Press 2016) 3-11.

entertain USPs. In this case, the legal framework may explicitly prohibit USPs, opting instead for a competitive process for all forms of procurements. However, it is not surprising that this has not been a very popular option as it denies the country access to much desired private sector funds, ingenuity and innovation and, therefore, might end up being counterproductive. Another option might be to accept the USPs but offer to reimburse the project proponents the cost of developing the project or where there is intellectual property involved, to buy off the intellectual property. This allows the government to then advertise the project for competitive bidding.

This policy option attempts to reward innovation and promote competition. However, it is difficult to see how this option would work in Africa, since most of the countries are already cash-strapped and are unlikely to afford the purchase of very expensive intellectual property rights or even fund preliminary studies. Even where a decision is taken by countries to purchase these rights, the process may still be susceptible to abuse and corruption, since it is not easy to value these types of rights. The option of limiting reimbursement to audited costs can also be unfair to the project developer as it ignores other economic costs like opportunity costs. Another prevalent policy is to require the eventual winner of the competitive bid round to reimburse the original USP proponent of the cost expended in developing the project. There is sense in this approach as it helps even out the commercial bids that would eventually be put in by all the bidders during the competitive round, as all the bidders would then have to account for development costs. However, it is worth mentioning that these costs are finally transferred to the user public, being factored into the eventual user tariff.

Owing to difficulties that arise outright in their prohibition, most countries accept USPs. The key policy questions before countries, therefore, is how to incentivize the unsolicited project proponent to promote innovation while ensuring transparency and competitive tension in the delivery of PPP projects simultaneously. There are different methods that have been adopted across the world in trying to balance these often competing policy choices. The three most popular are (i) The bonus system; (ii) The Swiss challenge; and (iii) The automatic shortlisting.¹³

13 For further discussions on this, see for instance PPIAF, "Policy Guideline for Managing Unsolicited Proposals in Infrastructure Projects" Vol. 1: Main Findings and Recommendations. World Bank Group. Washington DC (2014) <<https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/>

The bonus system is used by countries like Korea and Chile. Under this system, the government basically grants an advantage to the original project proponent in the form of a premium used in the bidding procedure. As long as the awarded bonus is relatively small, this system continues to promote competitive tension. The bonus is typically between 5 to 10 per cent. *The Swiss challenge* is a system that is favoured in a number of Indian states, Philippines, Taiwan and Nigeria. Under this system, the USP proponent is granted the right to counter match the best offer from the competitive process and if they manage to do this, they are awarded the contract. This system appears to be the least likely to generate competitive tension and is likely to discourage other bidders from turning in bids when they realize that all the original USP proponent needs to do to win is to match their bid after the conclusion of the competitive process.

The automatic shortlisting approach is used in South Africa. Under this system, the USP proponent is only granted an advantage of automatically competing in the final tendering round. This generates the most competitive tension of all the discussed procedures but is also most unlikely to encourage innovation. The discussion of the systems above shows that the more incentive that is granted the USP proponent under a particular system, the less the process is likely to generate competitive tension, and vice versa.

3. DESIGNING A FRAMEWORK

The framework for managing USPs in most jurisdictions would typically follow a five-stage cycle: (i) Submission of the USP proposal by the private sector party; (ii) Evaluation of the USP by a public sector agency; (iii) Development of studies for the USP project by the private sector party and its approval by the public sector agency; (iv) Procurement of the USP project; and (v) The project execution stage (construction, operations and maintenance of the project).¹⁴ The framework used in this article to evaluate USPs management in the selected countries follows this cycle and focuses on how the different countries have been able to manage the twin issues of competitiveness and transparency while promoting

documents/UnsolicitedProposals_Volume1_MainFindings_WEB%20%281%29.pdf> accessed 10 May 2019.

14 PPIAF Policy Guidelines (n 13).

innovation and other relevant policy considerations under different stages of the cycle. This framework was developed from extant literature dealing with the management of unsolicited proposals.¹⁵

Stage 1. Submission of the Proposal: The evaluation criteria used in assessing how the different countries manage their USP projects at this stage is whether the countries have a legal framework that permits the submission of USPs. The criteria also extend to whether the suggested manner, content and format of presenting the USP proposal allows for a proper consideration and analysis of the proposals.

Stage 2. Evaluation: This concerns whether there is a rigorous process for evaluating the USP in light of the respective government's policy criteria regarding USPs. The typical policy criteria across several countries include whether the USP promotes innovation, represents value for money, is affordable, is properly priced, is in the public interest, and is line with the country's infrastructural development plan or strategy.

Stage 3. Development of studies: The country assessments, at this stage, is to find out the party that funds the studies and what options are open to the government in the event that it decides not to continue with the USP proponent. It also relates to whether the required contents of the studies incorporate the key motivations for the country in entertaining USPs.

Stage 4. Procurement Stage: This deals with whether the legal framework and the procurement environment is transparent and allows for a competitive tender process. Also evaluated is how competition plays out in practice. Other criteria for determining competitiveness are the frequency with which competing bidders win the contract and whether there is any corruption allegations or legal challenges of the procurement process.

Stage 5. Project execution: This deals generally with whether the project is delivered within time and budget framework and whether the project provides value for money. In summary, it deals with whether the use of USP to deliver the project has overall justification.

15 For example, See the following: The United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Privately Funded Infrastructure Projects – Paragraphs 96-117; The Model Legislative Provisions on Privately Financed Infrastructure Projects – from Provisions 20-23; World Bank PPP LRC “Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects” August 2018 (n 13).

4. COUNTRY ANALYSIS

The four countries selected are Nigeria, Ghana, Tanzania and South Africa. These countries were chosen based on their geographical location and their experiences with PPPs, especially USPs. Another criterion in their favour is the availability of data and other relevant information. The fact that the different countries also used different systems in channelling the USP into a competitive process is also a major determining factor.

4.1 Nigeria

The rules guiding USPs in Nigeria are aligned with the recommendations in the United Nations Commission on International Trade Law (UNCITRAL), as well as the Legislative Guide on Privately Financed Infrastructure Projects.¹⁶ The sectors where most of the USPs have been received by the Nigerian government are mostly in the electric power and services sectors. A large number of PPP projects currently under development in Nigeria are USPs, thus reinforcing the need for the country to get right the policies and rules regulating them.¹⁷

The National Policy on Public Private Partnership makes a distinction between where a USP relates to sectors with established economic regulatory frameworks and sectors where such a framework is non-existent.¹⁸ In the former case, the project proponent may apply to such regulators for the relevant licenses in the prescribed manner and start the development of the project without recourse to the Infrastructure Concession Regulatory Commission (ICRC). In this case, there is no need to move the USP into a formal competitive tender process. The justification is that since the economic regulator would have fixed or benchmarked tariff for delivering services in the sector, there is no need for price discovery, which is one of the fundamental objectives for competition. However, where such an unsolicited proposal would confer monopoly rights, in the absence of an economic regulatory framework, then such

16 The Infrastructure Concession Regulatory Commission (ICRC), National PPP Policy.

17 See ICRC, "Published PPP Projects Pipeline" (ICRC, 2018) <<http://www.icrc.gov.ng/projects/ppp-projects-pipeline/>> accessed 8 May 2019.

18 ICRC, National Policy on PPPs (n 16).

proposals should go through the prescribed procurement process dealing with USPs.¹⁹

ICRC has issued further guidance on the process of submitting and evaluating USPs in its Guidance on USPs Document (“the Guide”).²⁰ According to the Guide, the overarching principle in dealing with USPs is that all USPs should be channelled into a transparent, competitive process where challengers have a fair chance of winning a tender. In furtherance of this objective, the Swiss Challenge method is the favoured system for evaluating USPs in Nigeria. USPs are submitted to the Ministries, Departments or Agencies (MDA) of government in charge of the project. The proposal is usually presented in the form of an Outline Business Case (OBC), funded by the project proponent. The OBC should evaluate the legal, regulatory, technical, economic, financial, and environmental parameters of the project.²¹ Once the responsible MDA receives the OBC, it must assess the project to find out:

- i. Whether the project serves a credible public interest;
- ii. Whether the project is in line with the national development goals of the relevant MDA;
- iii. Whether the project falls within the category of critical infrastructure;
- iv. Whether the project is viable without the need for viability gap funding (VGF); and
- v. Whether the project proponent possesses the requisite competence and profile to implement the project.²²

From the foregoing, it is apparent that the suggested manner and format for submitting the USP proposal, including the format for its presentation, allows for a proper consideration and analysis of the USP. The stated criteria for the evaluation of the USP proposals are also tailored to ensure value for money. Curiously though, there is no express requirement for the USP to be innovative. However, it is submitted that

19 ICRC National Policy on PPPs (n 16) 41.

20 See Infrastructure Concession Regulatory Commission, “A Guide for Implementing USPs for PPPs in Nigeria” (ICRC, 2018) <<https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Guide%20for%20Implementing%20Unsolicited%20Proposals.pdf>> accessed 7 May 2019.

21 *ibid.*

22 *ibid.*

innovation should be the core reason why any country should entertain USPs in the first place and, therefore, ought to be considered as part of the proposal requirements.

Following a successful review, the USP is then forwarded to ICRC for its own review and issuance of a “no objection” certificate. This is granted if the proposal passes the Commission’s financial and technical due diligence. Where the project obtains a no objection, a ministerial-level approval is then sought, obtained and the project proponent issued with a formal acknowledgement as the project author. Following this, the project then proceeds to a competitive bidding stage, which would produce a preferred bidder. In line with the Swiss Challenge procedure, the project proponent is then invited to submit a best and final offer that at least matches the offer by the preferred bidder in terms of economic and financial viability.²³ If the original project proponent is able to do this, it is declared as the preferred bidder.

Note that there are other policy options open to the government, which is allowed in some instances where the proposal includes the intellectual property rights of the proponent. In this case for instance, the government may acquire the intellectual property rights before commencing with the procurement process. The government may also, at its sole discretion, reimburse the project proponent its project development costs. However, this does not extend to the cost of preparing the feasibility studies or the OBC since the documents are likely to require substantial further development and due-diligence in order to comply with the ICRC’s approval processes.²⁴ There has been no reported incident yet where a USP proponent has been refunded its development costs or have its intellectual property rights acquired.

4.1.1 Case Study: Ikere Gorge Dam

Ikere Gorge Dam is an earth-filled dam built in 1983 in Oyo State Nigeria. The civil works and the mechanical and electrical components of the dam project had been relatively completed before the government abandoned the project for no disclosed reason. In 2017, the Federal Government of Nigeria received an unsolicited proposal from a private investor to complete the dam, operationalize it and generate 6MW of

23 *ibid.*

24 *ibid.*

electricity from it. Following the receipt of the USPs, Ikere Gorge was advertised for Expression of Interest (EOI) from interested bidders. The advert requesting expression of interests from bidders carried the following caveat:

An interested concessionaire/investor already submitted an unsolicited proposal and detailed investment study for Ikere Gorge. In order to ensure transparency, competition and value for money whilst recognizing the value of the proposal and the detailed pre-investment studies, the concessionaire/investor for Ikere Gorge would be using a Swiss Challenge procurement method, which requires that if the original project proponent is not the most responsive bid, it will be given the right of first refusal to match the most responsive bid and win the concession. However, if it is unable or unwilling to match the most responsive bid, the most responsive bidder would become the preferred concessionaire/investor.

At the conclusion of the bid process, Ikere Gorge was awarded to the USP proponent. The analysis of this case reveals that even though the USP proponent did not propose any innovation or ingenuity in delivering the project, apart from completing the civil and electromechanical works on an abandoned project, the project was still procured as a USP and the USP proponent given undue advantage over other potential bidders. This is symptomatic of the way most USP proposals have been procured in the country. The principles and policies that are stated in the policy documents, including the Guide for managing USPs, are hardly adhered to when proposing or evaluating USPs. Also, there is usually limited transparency in the process and the Swiss Challenge method that is adopted in the country barely guarantees any form of competition.

4.2 Ghana

PPPs in Ghana are regulated by the National Policy on Public Private Partnerships.²⁵ There is also a PPP Bill that has been before parliament since 2013. This Bill deals in detail with the management of USPs,²⁶ but it has not passed. In 2012, Ghana's Public Investment Division of the

25 Government of Ghana, Ministry of Economic Planning, "National Policy on Private Partnerships (PPP)", June 2011.

26 Sections 63-73 of National Policy on Public Private Partnerships (n 16).

Ministry of Finance prepared the Public-Private Partnership Tool Kit for USPs. The Toolkit outlines a competitive five-step process for PPPs to undergo, including the original proponent of the USP.²⁷

The Ghanaian PPP policy provides generally that the procurement procedure for PPPs must be fair, transparent, competitive, and cost effective. It must also encourage maximum use of local content and technology transfer. Finally, it must be in accordance with the country's Procurement Act. For an unsolicited proposal to be favourably considered, it must be affordable, give value for money and deliver substantial technical, operational and financial capacity. In addition, it must demonstrate efficient risk allocation. The USPs are also required to be consistent with the national development agenda and serve the public interest and the needs and priorities of the public sector. All USPs are, therefore, subject to a value for money, technical, financial and economic assessment before they are accepted.²⁸

In Ghana, most of the USPs that have been submitted are in the energy, transport and roads sectors. It has been reported that majority of the PPP projects in the pipeline are unsolicited projects.²⁹

4.2.1 Case Study: The Accra-Kumasi Highway

The Accra-Kumasi Highway project was Ghana's first PPP, which will link two major commercial centres in Ghana when completed. The project includes the construction of 141km of dual carriageway, which would also provide access to the northern part of the country as well as an international transit route for Burkina Faso and Niger, Ghana's landlocked neighbours. The idea is to reduce travel times from 5.5 hours to 2.5 hours between Accra and Kumasi. The estimated construction cost in 2011 was US\$400m, to be undertaken in four years and for a concession period of 30 years. The project was originally one of those assessed by PPIAF for possible PPP procurement in the early 2000s and which received an RFP in 2004 from the Ministry of Roads and Highways. However, it was understood that the preferred bidder was rejected after failing the World Bank due diligence.³⁰ An unsolicited bid was submitted by Arterial

27 There is, however, a lack of clarity over the legal status of the toolkit and this has resulted in various government agencies questioning its binding nature.

28 National Policy on Public Private Partnerships (n 25).

29 See PPIAF Policy Guidelines (n 13).

30 DFID "Mobilizing Finance for Infrastructure: Ghana Country Case Study 2015".

Toll Roads Company Limited, a joint venture between US, Canadian and Egyptian companies, and was awarded the concession for 30 years in 2005. Construction was supposed to be for a period of four years. However, the project stalled for several years due largely to political and institutional shortcomings.³¹

The major failing of this project was that it was procured in the absence of any PPP policy or guidance and, therefore, lacked any form of transparency or even process. The public sector officials basically neither had any capacity nor were they given any direction on how to proceed with the USP and these factors contributed to the unending delays bedevilling the project. It is unfortunate that this shortcoming is still affecting the project even today. Apart from the non-binding toolkit discussed above, Ghana is yet to pass the relevant laws that would regulate these types of transactions. Also, there was no procedure in place to subject the project to any sort of evaluation to find out if it provides value for money or even to subject the procurement process to any form of competition.

4.3 Tanzania

According to the Public-Private Partnership (Amendment) Act 2018, and the Public Private Regulations, as a general rule, all PPP projects are to be prepared through an open and competitive process. However, USPs are exempted from this requirement by the Minister of Finance, if they have met the following criteria:

- i. The project is a priority of the government at the particular time and broadly consistent with the government's strategic objectives;
- ii. The private party does not require government guarantee or any form of financial support from the government;
- iii. The project shall have unique attributes to justify departing from a competitive tender process;
- iv. The project is of significant size, scope and requires substantial financing.

31 Peter Brockleback "Private Sector Involvement in Road Financing' Working Paper No. 102, (World Bank Group, 2014) <<http://documents.worldbank.org/curated/en/776191468338369513/text/937780NWP00PUB0aper00SSATPWP1020PPPtxt>> accessed 7 May 2019.

- v. The project demonstrates value for money, affordability and transfers significant risks to the private sector proponent;
- vi. The project has wide social and economic benefits, including improved services, employment and taxation; and
- vii. The private sector proponent commits to bear the cost of undertaking the feasibility studies.³²

A private party USP project proponent is required to make an application by submitting a concept note to the proposed contracting party. This may then be forwarded to the PPP Centre for review. Upon approval of the project concept, the private sector project proponent shall make a commitment to undertake the project by making a refundable deposit of an amount not exceeding 3 per cent of the estimated cost of the project. The projects eligible for procurement through the USP procedure may not be less than US\$10 million.³³ The government reserves the right to suspend the USP process before the signing of the contract without incurring any liabilities where the private sector party submits a project concept or feasibility study that does not comply with the provisions of the Act.³⁴ Where another bid defeats the USP bid, the winning bidder is mandated to reimburse the original proponent of audited and verified cost incurred in undertaking the feasibility studies. Tanzania favours the use of the bonus system in selecting the preferred bidder.³⁵

The Tanzanian policy requirements for the submission and consideration of USPs appear to be the most comprehensive of all the countries considered in this article. However, the enabling legal framework is still relatively new and, therefore, it is still very early to make a definitive judgment on how it would operate in practice.

4.3.1 Case Study: Independent Power Tanzania Limited

In 1995 Tanesco, the Tanzanian State Electricity Company entered into a Power Purchase Agreement (PPA) with an IPP, Independent Power Tanzania Limited (IPTL), for the purchase of 100MW of power from the diesel-fuelled Tegeta Plant in Dar es Salaam. However, in 1988, even before the plant had delivered any power, Tanesco took IPTL to the Internal

32 S.15 of the ACT and S. 56(1) of the Regulations.

33 S.56(1) (f) of the Regulations.

34 S.56(6) of the Regulations.

35 S.61(1) of the Regulation.

Centre for the Settlement of Investment Disputes (ICSID), for arbitration. Tenesco asserted that it was entitled to terminate the contract or, in the alternative, obtain a material reduction in tariff on the grounds that the PPA had been improperly entered into between the private sector investors and Tanesco, outside of proper regulatory procedures. While the claim for termination of contract failed, Tanesco was however given some respite in the form of a reduction in tariff. Electricity production in the plant finally commenced in 2002, leading to Tanesco incurring a debt of up to US\$40 million in capacity charges alone with an additional, statutory monthly costs of US\$3 million, while the plant functioned at less than 10 per cent capacity. This situation put Tanesco under severe debt with a concomitant rise in the price of electricity to citizens.

Even though this project was delivered before the enactment of the new PPP Act and, therefore, long before the rules dealing with the management of USPs, it was apparent from the case that this USP did not undergo any form of pre-procurement evaluation. There was certainly no innovation in producing power using an expensive and environmentally unfriendly technology like diesel generators, yet the USP was approved. The project was definitely unaffordable and did not provide any value for money for the people of Tanzania. This USP project had severe consequences for the Tanzanian economy.

4.4 South Africa

Section 217 of the South African Constitution mandates any organ of the State contracting for goods and services to make use of a system that is fair, equitable, transparent, competitive and cost effective.³⁶ It is obvious from this provision that if a USP is procured without considering alternative bids that it would be unconstitutional. The primary legal framework for PPPs in South Africa, Regulation 16,³⁷ makes no provision for USPs. Indeed, USPs are expressly discouraged.³⁸ However, the Regulation encourages state institutions to listen to innovative ideas from the private sector. However, in doing so, they may neither acquire associated intellectual property rights nor make any commitments that will undermine competitive procurement.

³⁶ South African Constitution of 1996.

³⁷ Issued pursuant to the public Finance Management Act 1999.

³⁸ Public Finance Management Act, 1999, Regulation 16.

Despite these legal restrictions, in practice, South Africa considers USPs. The National Treasury Practice Note No. 11 of 2008/2009 defines USP as a submission that must be innovative, unique, and provided by a sole supplier.³⁹ Note, however, that state institutions are not obliged to consider USPs. They only reserve the discretion to consider them if they meet the following requirements:

- i. A comprehensive and relevant project feasibility study has established a clear business case; and
- ii. The product or service involves an innovative design; or
- iii. The product or service involves an innovative approach to project development and management; or
- iv. The product or service presents new and cost-effective methods of service delivery

South Africa has detailed procedures for evaluating USPs. Upon the receipt of a USP, state officials evaluate the proposal according to the stipulated guidelines and reject it if, among other things, it relates to known institutional requirements that can within reasonable and practical limits be acquired by conventional competitive methods or it relates to products or services, which are generally available. If the authority decides to reject the USP, it must notify the project proponent in writing. Where it decides to proceed with the proposal, it must negotiate a USP agreement with the project proponent to establish a methodology for determining any costs to be reimbursed to the project proponent should the procurement process result in an award for a party other than the proponent and the purchase of any intellectual property rights. After signing the agreement, the government can then prepare and issue requests for qualification (RFQ) to test the market for the existence of other private entities that are capable of providing the product or service. Where there is one or more adequate response to the RFQ, the government prepares a request for proposal (RFP) with a draft contract and then conducts a competitive bid process. At the conclusion of the bid process, the project proponent is refunded its audited cost should the proponent not be awarded the contract for the provision of the product or service.

The South African rules on unsolicited proposals are very stringent, therefore, while it engenders competition, it inhibits innovation. The rules barely allow for the submission and consideration of USPs.

39 National Treasury Practice Note, No.11 of 2008/2009.

4.4.1 Case Study: Winelands Toll Road

The Winelands Toll Road project consists of an upgrade of the N1 and N2 National roads spanning 170km in the Western Cape of South Africa. This project was tendered under the South African National Roads Agency Limited (SANRAL) Unsolicited Proposal Policy. But the project has not taken off. Instead, it has been met with suits by the City of Cape Town, which contested that the project would adversely affect the poor. The Supreme Court of Appeal upheld the position of the City of Cape Town on the grounds that the SANRAL never followed appropriate procedure in declaring the toll roads. This case illustrates how difficult it is to push through USPs projects in South Africa.

5. RECOMMENDATIONS FOR PROMOTING EFFICIENCY IN USPS MANAGEMENT

Despite the caution about the potential pitfalls inherent in the use of USPs, their usage has continued to grow. In fact, in some countries the number of projects that have originated as USPs outnumber solicited projects. However most of the African countries evaluated above have paid little attention to developing the rules that regulate this very important area. This is evident from the scant nature of USP regulations in these countries. Therefore, it is suggested that these countries re-evaluate and update their legal and regulatory frameworks for managing USPs to accord these types of transactions the attention they rightfully deserve.

It can be seen from the cases discussed above that even where some of these countries have rules that regulate USPs, they hardly ever comply with them in practice. Also, the fact that USP proponents are the ones that fund most of the studies, creates a sense of entitlement resulting from the idea that they already own the projects. This sense of entitlement unfortunately is also bought into by public sector officials who, in some cases, are even known to reassure USP investors that they are most likely to win the projects. Therefore, where USP projects finally go through a competitive procurement process, there appears to be a pervasive lack of confidence amongst bidders in the procurement process in most of the countries examined. This may be traced to the assumption that there has already been a predetermined winner of the bid. This assumption is reinforced by the fact that very little attention is paid to the twin issues of competition and transparency in the procurement of USPs. When

considered against the background that tenders for large infrastructure projects are usually very expensive to put together, there is a greater likelihood that potential bidders would avoid the process.

These potential bidders might not contemplate taking chances in a process that is institutionally rigged from the outset in favour of the USP proponent. There is, therefore, also a need to encourage adherence to the rules where they exist. The rules also need to support and promote the independence of public sector officials so that they remain unbiased umpires throughout the bid process.

Also, a recurrent theme from the case studies above is the difficulty in balancing the need to incentivize innovation, on the one hand, and promote transparency and competition, on the other. Results from different jurisdictions seem to suggest that these two objectives appear to be nearly mutually exclusive. The key however is to find a balance that accommodates these competing objectives as much as possible. It is the position of this article that the current systems that are used in evaluating USPs do not support an approach of finding a balance. The Swiss Challenge and Bonus System, as currently applied, swing too much in favour of the USP proponent, thereby blunting competition, while the Automatic Listing System discourages innovation.

After reviewing these three systems, it is suggested that a modification of the Bonus System might be the best approach in finding the required balance. Under this proposed system, referred to in this article as the *materiality approach*, the bonuses that are awarded the USP innovator should be based on the materiality of the USP proponent's proposal. In other words, an initial evaluation of the USP is first carried out considering several policy factors that are important to the particular country. This will, among other criteria, include the novelty of the proposal, ingenuity of the ideas, value for money, and generally, the potential contribution of the innovation to the sector or industry. Scores will be awarded to the USP according to these factors with a maximum of 10 points awarded to exceptionally innovative ideas and a smaller amount of points to lesser material proposals. In other words, under this system, USP proponents are not automatically awarded maximum points as in the case under the present bonus system. However, their final points tally that is added to that scored during the competitive bid round is determined and justified by the quality of their proposals. It is believed that this system provides a better balance between the two competing policy objectives of innovation and competition.

6. CONCLUSION

Even though the use of USPs are on the rise across Africa, these projects have, however, been poorly delivered. This is because countries were not paying attention to important policy criteria in their legislations and other policy instruments in qualifying projects for USPs. Secondly, this article also noted that all the procurement systems employed by the different countries for the delivery of USPs were not producing the required competitive tension and transparency to deliver value for money from USP projects. This article then proposed a materiality test to help provide a balance between meeting the different policy objectives of most countries and providing competitive tension in USP bids.

There is a need for further research in this area. The scope of this article is limited because it focuses on a few African countries and relies only on data obtained primarily from desk study research. Therefore, it is expected that any future study will be expanded to include other countries in Africa and other empirical methods of gathering data like questionnaires and semi-structured interviews. This will definitely enrich future study and allow for testing the suitability of the Materiality Test for USPs across different African countries.