

The Practice of Cooperation with Build, Operate & Transfer (BOT) Model in Indonesia

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Abstract

Build, Operate and Transfer (BOT) is the Utilization of State/ Regional Property in the form of land by another party by constructing a building and/or infrastructure including its facilities, then it is utilized by the other parties within a certain period of time that has been agreed, further the building and/or infrastructure together with its facilities are returned upon the expiry of the period. BOT Agreement encompassing cooperation, provisions, arrangements of rights and division of obligations between the parties on the utilization and management of land and building together. Cooperation with BOT model is not only undertaken between government and private only can be made with granting rights to the land without giving the right to the land as an option or option of the parties BOT agreement in principle is the same as Lease Agreement while it is not a financing cooperation agreement.

Keywords: Build, Operate and Transfer (BOT), form of land

1. Introduction

Definition and Legal Grounds of BOT

BOT is *Build, Operate and Transfer*, which in Indonesian is translated as “Bangun Guna Serah”. The definition of BOT is also available in various regulations (positive law), inter alia :

- Government Regulation number 6 of 2006 as amended by Government Regulation number 38 of 2008 and last amended by Government Regulation number 27 of 2014 on State/ Regional Property Management (State Gazette of the Republic of Indonesia of 2014 number 92, Supplement to the State Gazette of the Republic of Indonesia number 5533).

Government Regulation number 27 of 2014 is one of the implementing regulations of Law number 1 of 2004 on State Treasury, as it is related with the utilization and management of state or regional property.

- Regulation of Minister of Finance number 96/PMK.07/2007 on Procedure for the Implementation of Use, Utilization, Write Off and Transfer of State Property.
- Decision of Minister of Finance of the Republic of Indonesia dated 2 June 1995 number 248/KMK.04/1995 on the Treatment of Income Tax to the Parties Entering into a Cooperation in the Form of Build Operate and Transfer (BOT) Agreement.
- Instruction of Minister of Home Affairs number 21 of 1996.

Article 1 clause (14) Government Regulation number 27 of 2014, states that :

“Build Operate and Transfer is the Utilization of State/ Regional Property in the form of land by another party by constructing a building and/or infrastructure including its facilities, then it is utilized by the other parties within a certain period of time that has been agreed, further the building and/or infrastructure together with its facilities are returned upon the expiry of the period”.

While in the Regulation of Minister of Finance number 96/PMK.07/2007 on Procedure for the Implementation of Use, Utilization, Write-off and Transfer of State Property, BOT is translated Bangun, Guna, Serah, namely :

“The utilization of land of central government property by another party by constructing a building and/or infrastructure including its facilities, and subsequently utilized by the other party within a certain period of time that has been agreed, further the land together with the building and/or infrastructure including its facilities are returned to the Property Management upon the expiry of the period.”

Further in the Decision of Minister of Finance of the Republic of Indonesia dated 2 June 1995 number 248/KMK.04/1995 it is mentioned that BOT is :

“a form of cooperation agreement entered into by the holder of the right to the land with an investor, stating that the holder of the right to the land has conferred the right to the investor to construct a building during the term of the agreement by build operate transfer (BOT), and transfer the ownership of the building to the holder of the right to land after the BOT period has expired”

Further as regulated in the Instruction of Minister of Home Affairs number 21 of 1996 it is stated that BOT is a form of cooperation i.e. the partner of private party shall be responsible to build infrastructure project, including its financing, and further continued by its operation and maintenance, for a certain period of time.

While according to the Draft Law (RUU) on BOT Agreement drawn up by the Academic Paper formulating team, BOT means: ¹

¹ Final Report of Academic Paper Drafting Team for Laws and Regulations on BOT (Build, Operate And Transfer) Agreement. Agency for

“Utilization of property/ wealth of the State or natural person or legal person in the form of land by another party, where the other party builds a construction and/or other infrastructure including its facilities on the land, and utilize it for a certain period of time, and subsequently return the land, building and or other infrastructure including its facilities and its productive use to the Department/Agency concerned after the agreed time period”.

A number of regulations that formulate the definition of BOT mentioned above, have given an understanding that a cooperation with BOT model is carried out to assets specifically the land belongs to the central government or Regional Government (Pemda). Therefore the land belongs to the central government or Pemda is under the classification of State or regional property, hence the mechanism for the implementation of BOT cooperation shall be subject to the government regulations or policies related to the utilization of State or regional property.

BOT is a form of cooperation between investor and owner or provider of asset in the form of land (generally government), where the owner of the capital provides financing for the project for the development of the construction and buildings together with its new facilities on the land provided, and further it is managed, and later at the end of management will be returned to the provider/ owner of land.

A cooperation with BOT model was initiated when there were lacking or even unavailability of funds or financing to build facilities or infrastructures. This is in line with Government Regulation number 27 of 2014 particularly Article 33 clause (1) letter a that states :

“Cooperation for the Utilization of State/ Regional Property is entered into with the provision :

a. there is unavailable or insufficient funds in the State/ Regional budget to cover operating maintenance and/or repair costs required by State/ Regional Property.

Further in Article 34 clause (1) letter b, reads :

Build Operate Transfer or Build Operate Transfer of State/ Regional Property is carried out with the following considerations :

a. user of Goods need buildings and facilities for the administration of central and regional government for the interest of public service for carrying out the duties and function; and

b. there is unavailable or insufficient funds in the State/ Regional budget for the provision of buildings and facilities”.

Therefore with the limited funding or financing, the owner of land invites other parties as investors to finance the development of infrastructures, where at a later date investor shall be given the right and opportunity to manage and at the same time obtain the result from the management of infrastructure and facilities for a certain period of time as a form of return of investment capital.

2. Research Methods

In writing about this BOT cooperation, the writer is using a normative approach (*statute approach*) i.e. by making an inventory or collect a number of laws and regulations (positive law) and literatures (reading materials) related to BOT cooperation, the basic concept (core) of the agreement and a number of regulations related to land (agraria) as BOT cooperation object, all of which is utilized as the primary study materials in preparing this paper.

From a number of regulations (positive law) that have been collected, identification is made on the laws and regulations and literatures (reading materials), i.e. by selecting and screening or grouping the positive law norms and relating or linking between one regulation to the other regulation so that the main issue (legal issue) for the discussion and analysis in writing this paper becomes clear. After the main issue (legal issue) is found, the next step is to conduct an analysis on the legal issue by guided by the laws and regulations (positive law) through an interpreting method (interpretation) based on legal logics. Therefore, by analyzing the main issues and laws and regulations it is expected that a description or a picture and clear answer to the current issues can be obtained particularly concerning BOT cooperation for which finally a conclusion can be reached.

3. Result and Discussion

BOT Cooperation Object

Cooperation with BOT model is a cooperation in the utilization and management of land, where investor as BOT Holder given the right and opportunity to build, manage and utilize the buildings and all its facilities. Therefore, related to the cooperation in the utilization and management of the land or land and buildings, the land and building together with its facilities are the primary object in a cooperation with BOT model. Cooperation mechanism, various provisions or guidelines, arrangement of rights and division of obligations between the parties and other requirements agreed upon in the scope of cooperation either for the utilization or for the management of land and building becomes the principal materials in a BOT agreement.

In respect of this BOT cooperation object, it is generally conducted on the land, which becomes government asset, either central government or Regional government (Pemda).

From the perspective of Agrarian law, the land under the control of central government or regional government usually having the status of Right to Use and some have the status of Right to Manage (Hak Pengelolaan {HPL}).

Cooperation in the utilization and management of land may also happen on the land having the status of Freehold Title (Hak Milik) or Right to Use Building (Hak Guna Bangunan {HGB}). BOT cooperation on the land with the status of Freehold Title may occur, if the landowner is a natural person of Indonesian Citizen¹. While BOT cooperation on the land with HGB status may occur if the land is owned by a natural person of Indonesian Citizen or legal person incorporated under Indonesian laws and domiciled in Indonesia².

Legal subject of BOT Cooperation

Cooperation with BOT model is undertaken by 2 (two) parties, namely the landowner and capital owner or investor. Generally, cooperation in any form including BOT is initiated by agreements that are to be reached by the parties. The content of BOT cooperation agreement is contained in a legal format of what is called BOT Agreement. BOT Agreement provides the mechanism of cooperation, various provisions or guidelines, arrangements of rights and division of obligations between the parties in a fair and balanced manner (proportionally). The main purpose of BOT Agreement is to provide protection and legal certainty among the parties of the rights obtained and obligations that have to be performed in the cooperation, so that it is hoped that in the implementation of cooperation a harmonious relationship between the parties could be created.

Therefore, who could become the subject in the BOT Agreement? If we read the Regulation of Minister of Finance number 96/PMK.07/2007, where BOT is interpreted as “utilization of property of central government by another party.....”, the Regulation of Minister of Finance number 96/PMK.07/2007 gives an impression that as if BOT cooperation could only be undertaken between government and private sector.

Cooperation with government as landowner can also be undertaken through a business entity which majority of the capital is owned by the government, either State Owned Enterprises (SOE) or Regional Owned Enterprises (ROE).

If BOT cooperation is undertaken between private parties, then it will raise a question whether a private party may or is allowed to enter into a BOT Agreement with another private party? As BOT Agreement is a form of agreement in general, then by referring to Articles 1320 and 1338 of Indonesian Civil Code (KUHPdata) which specifically governs the Agreements. Article 1338 of KUHPdata, reads as follows :

“All agreements apply to those who have concluded it as a law”.

Therefore the content of article 1338 of Indonesian Civil Code is the logic consequence of the provisions of Article 1233 of Indonesian Civil Code, states that every contract may be created from a Law or an agreement³.

From the theoretical aspect point of view, Article 1338 of Indonesian Civil Code as mentioned above is based on 2 (two) principles, i.e. the principle of freedom to contract and the principle of *Pacta Sunt Servanda*. The principle of freedom to contract provides an understanding that every person, either natural person or legal person may enter into an agreement freely with another party to the extent the agreement is lawfully made.

With the principle of freedom to contract, the parties that make and enter into the agreement is allowed to prepare and make a covenant or agreement that creates any obligations, provided and to the extent the obligations that need to be performed are not something prohibited⁴.

Parameter of the validity of an agreement is guided by Article 1320 of Indonesian Civil Code regarding the condition of the validity of an agreement, i.e. it is based on 4 (four) elements :

1. there must be consent between the parties;
2. there must be capacity to enter into an agreement;
3. there must be a specific subject matter;
4. there must be a permitted cause (not contrary to the laws and regulations and the reasonableness applicable in the society).

While the principle of *Pacta Sunt Servanda* provides an understanding that every agreement made has a binding force which is the same as a force binding a law for those making the agreement. Therefore as it has a binding force the same as a law, the content of the agreement (including BOT agreement) is mandatory and therefore should be adhered to or fulfilled by the parties.

Departing from the provision of article 1338 of Indonesian Civil Code regarding the principle of

¹ Article 21 clause (1) of UUPA (Agrarian Basic Law)

² Article 36 clause (1) of UUPA (Agrarian Basic Law) in conjunction with Article 19 of Government Regulation No. 40/1996

³ Kartini Muljadi, Gunawan Widjaja, Seri Hukum Perikatan (Series of Law of Obligation) Perikatan Yang Lahir Dari Perjanjian (Obligations Created from Agreement), Rajawali Press, Jakarta, 2003, page 59

⁴ *Ibid.*,h.45

freedom to contract and article 1320 of Indonesian Civil Code regarding the condition for the validity of an agreement, a cooperation with BOT model may always be undertaken between private parties, therefore the role of legal subject in BOT Agreement is not limited to the government only, but it can be undertaken by another party beyond government, in this case between private parties.

In the practice of BOT cooperation, there are 2 (two) parties, namely the owner and the land provider and the capital owner or investor. The owner or land provider can be called as BOT Provider and the capital owner or investor can be called as BOT Holder.

Cooperation in the Utilization and Management of Land with BOT Model

BOT is one form of cooperation namely there is a party as land provider and another one as the capital owner or investor to provide services and build as well as financing the development of new facilities, it could also be carried out by renovation or refurbishment of the existing facilities to be changed into new facilities, subsequently managing the facilities for an agreed period of time, and after the end of the period, the building together with the facilities are transferred by the investor to the owner or land provider.

Basically BOT is one form of financing of development project where the contractor must provide themselves the funding for the project, and the provision of funding for the procurement for materials, equipment, other services required for the project should first be borne by the contractor. Contractor is given the right to operate and take advantage of its economy in return of all the costs that have been spent during a certain period of time¹.

Generally the facilities provided are in the form of land or vacant land, or it could also be in the form of land that already has buildings and facilities on it but requiring renovation or refurbishment such as malls, office buildings, hotels, tourist places, airports, etc, as such the land and/or building together with its facilities are the main object in BOT cooperation agreement.

In BOT cooperation, landowner obtains funding from investor as a form of compensation for the utilization and management of land or vacant land by the investor for an agreed certain period of time. While investor is given the right to receive revenues from the management of land/or building together with its facilities during a certain period of time as a form of return of investment funds.

Related to the utilization and management of land by BOT Holder, that between landowner and BOT Holder 2 (two) things as option or choice has been agreed, namely:

1. BOT cooperation accompanied with a form of conferment of right to the land for the investor (BOT Holder) ; or
2. BOT cooperation without a form of conferment of right to the land.

Ad.1. BOT cooperation with a form of conferment of right to the land.

For the land which utilization and management is given to the investor, it can be agreed that landowner will give a recommendation to the local Land Office to confer right to the land to the investor for the land managed by them. The right to the land given could be in the form of Right to Use Building (Hak Guna Bangunan {HGB}) or Right to Use (Hak Pakai {HP}). Right to Use Building (Hak Guna Bangunan {HGB}) or Right to Use (Hak Pakai {HP}) of the land can be given if the status of the land surrendered as BOT object having a status of Freehold Title or Right to Manage (Hak Pengelolaan {HPL}). This depends on who the landowner. If the landowner is a natural person, then the provision of Right to Use Building (Hak Guna Bangunan {HGB}) or Right to Use (Hak Pakai {HP}) to investor on the land with Freehold Title is possible (*vide* article 37 letter b and article 43 clause (2) of Law number 5 of 1960 on Basic Agrarian Law (Undang-Undang Pokok Agraria {UUPA}) in conjunction with article 21 letter c and article 41 letter c of Government Regulation Number 40 of 1996 on Right to Cultivation, Right to Use Building and Right to Use on Land (PP No. 40 of 1996). If the ownership of land is under the control of government (SOE or ROE), then HGB or Right to Use can be given to the investor on the land with Right to Manage/ HPL (*vide* article 21 letter b and article 41 letter b PP No. 40 of 1996. It would be different if the provider of land or landowner is a legal entity such as a Limited Liability Company (PT). If the provider of land or landowner is a PT, it can be ascertained that the land controlled having the status of HGB or Right to Use. In that case the provision of HGB or Right to Use to investor (BOT Holder) would not be possible, because in the concept of land law (Agraria), HGB or Right to Use cannot be applied on the land having Right to Use Building/ HGB status.

The granting of HGB, either on the land with Freehold Title (Hak Milik) or Right to Manage (Hak Pengelolaan {HPL}) is given a time period of 30 (thirty) years and can be extended for a period of 20 (twenty) years (*vide* article 35 clause (1) Basic Agrarian Law/ Undang-Undang Pokok Agraria (UUPA) in conjunction with article 25 clause (1) PP No. 40 of 1996. The granting of extension of HGB or Right to Use time period must refer to the agreement reached between the parties in BOT Agreement.

¹ Anita Kamilah, Bangun Guna Serah (Build, Operate and Transfer), Membangun Tanpa Harus Memiliki Tanah (Building without having to own land) {Perspektif Hukum Agraria (Agrarian Perspective Law), Hukum Perjanjian Dan Hukum Publik (Agreement Law and Public Law)}, CV. Keni Media, Bandung, 2013, page.115

The granting of land control legal status, either HGB or Right to Use to the investor provides more extensive authorities on the use of land. By granting the authority to investor as the holder of HGB or Right to Use, it is the same as giving legal protection to the use of land, and from commercial aspect it could provide more space to the investor in obtaining financing to cover operating cost and maintenance of buildings together with its facilities. In this case, investor as the holder of HGB or Right to Use, can make it as a security object to obtain loan from the bank or from other non-bank financing institution.

Ad.2. BOT Cooperation without a form of granting the right to land

Surrendering land to be used and managed by investor without giving the right to the land is something simpler. The cooperation for using the land such as this almost have a similarity as the general lease of land, only that in the cooperation for the utilization of land with BOT model provides an opportunity, right and authority to the investor to develop infrastructure project for public service infrastructures such as mall, hotel, tourist places, office buildings, toll roads, ports, airports, etc. Thus investor or BOT Holder only has the building and its facilities on the land of another party, without legal status of land control such as Right to Use Building (Hak Guna Bangunan {HGB}) or Right to Use (Hak Pakai {HP}) on the land as described above.

Use of Land with BOT Model and Lease

In general the utilization of land with BOT model is carried out with a reasonably large lands, (generally larger than 1 {one} ha), considering that BOT cooperation in the utilization and management of the land is a form of cooperation for the financing of infrastructure development project, such as development of mall, hotel, tourist places, office buildings, toll roads, ports, airports, etc, all of which definitely need a large area. In line with the growth of population today, the availability of land is getting scarce or the land is not as large as before due to the increasing consumerism need of the people on land which often times giving impact to the economy, so that it makes it harder for the business people or investor to obtain a large land area. With a cooperation with BOT concept, businessmen who have the intention to invest in a business that requires a large area of land (such as the development of tourist places, hotel) does not need to purchase or own land, but it is sufficient to develop and manage and operate the building and facilities on the land of another party.

The use of land by another party using BOT cooperation model is different from the use of land by lease though both in essence are the same, i.e. where the status of land ownership remains with the landowner and the physical control of the land is with another party. The use of land by lease generally is included the existing building and facilities (as is) where the lessee can directly enjoy the use of land, so that the land user (lessee) does not need to construct a building, unless for renovation as agreed. In addition the use of land by lease generally is on a not so large piece of land, such as residence, warehouse, house shop, offices, etc. It is different from the transfer of use of land through BOT model cooperation, where land user as BOT Holder or investor do not immediately utilize the land directly but must construct the buildings together with its facilities with their own financing.

For further clarification the difference between use of land through BOT model cooperation and use of land by lease is described below :

Description	BOT Agreement	Lease Agreement
Nature of agreement	Is a form of cooperation for the financing of large scale infrastructure development project.	Is a form of agreement for the use and utilization of land and/or building only.
Period of use of land	For a long term (generally 20-30 years)	A short period of time (generally 1-5 years).
Exclusive right	- Grant the right to BOT Holder to develop, manage/operate and obtain economical profit on land and even given with the right to land (HGB or Hak Pakai) ; - option right is existing.	Lessee is granted the right to use / occupy or enjoy the land and/ building in accordance with the agreement with landowner.
Object	Generally in the form of quite large land/ or vacant (> 1 ha).	Land and/or building with the area in accordance with the need of lessee.
Status of building ownership	During the agreement, the building becomes the entitlement and ownership of land user (in the capacity as BOT Holder) for a certain period of time.	Landowner is the owner of building since the onset.
The expiry of agreement	The land is returned to the landowner together with the building and all of its facilities.	Land and/or building are returned in the original condition.

4. Conclusion

From what has been described in this document, a conclusion could be drawn up as follows :

BOT or what is called with the term Build Operate Transfer is a form of cooperation for the financing of infrastructure development project between landowner and capital owner (investor), where landowner surrenders the physical control of the land to investor to be utilized and managed and investor is given the right to build and manage the buildings together with its facilities on the land and take benefit (economical advantage) as a form of return of investment for a certain period of time and return the land and building including its facilities to the landowner within the agreed period.

Cooperation with BOT model is contained in a legal format i.e. BOT Agreement encompassing cooperation, provisions, arrangements of rights and division of obligations between the parties on the utilization and management of land and building together with its facilities so that the land and building together with its facilities are the primary object in a BOT agreement.

Cooperation with BOT model is not only undertaken between government and private only it can also undertaken between private parties, in view of Article 1338 and Article 1320 of Indonesian Civil Code that provides an opportunity that all forms of agreements made by the parties shall be applicable as a law to the extent the agreement is lawful.

Cooperation with BOT model can be made with granting rights to the land without giving the right to the land as an option or option of the parties.

BOT agreement in principle is the same as Lease Agreement, namely the land is surrendered to and controlled physically by another party, but the juridical control remains with the landowner (there is no transfer of right to the land). Broadly speaking BOT agreement is different from Lease Agreement. BOT agreement is a cooperation agreement in the form of financing of infrastructure development project and it lasts for a long period of time. While Lease Agreement is not a financing cooperation agreement, but lease agreement on land and/or building where the owner surrenders the land and/or building in the condition (as is) to be used for an agreed period of time in Lease Agreement.

References

A. Reading Materials

- Anita Kamilah, *Bangun Guna Serah (Build, Operate and Transfer), Building without Having to Own Land (Agrarian Legal Perspective, Agreement Law and Public Law) Membangun Tanpa Harus Memiliki Tanah (Perspektif Hukum Agraria, Hukum Perjanjian Dan Hukum Publik)*, CV. Keni Media, Bandung, 2013.
- Kartini Muljadi, Gunawan Widjaja, *Seri Hukum Perikatan (Series of Law of Obligations) , Perikatan Yang Lahir Dari Perjanjian (Obligations Created from Agreement) ,* Rajawali Press, Jakarta, 2003.
- Ministry of Public Works, *Guidelines for the Cooperation of Government, Private and Society in the Development and or Management of Infrastructures and Facilities in Pubic Works Module 1 and Module 3,* Ministry of Public Works, Directorate General Urban and Village Development, November 1999.

B. Final Report on Academic Research

- Andjar Pachta Wirana, *Academic Paper Formulation Team's Final Report on Laws and Regulations on BOT Agreement (Build, Operate and Transfer)*, National Law Development Agency, Ministry of Justice, 1995/1996

C. List of Regulations

- Indonesian Civil Code (KHUPerdata)
Law Number 5 of 1960, on Basic Agrarian Regulation (UUPA)
Law Number 1 of 2004, on State Treasury
Government Regulation number 40 of 1996, on Right to Cultivation, Right to Use Building and Right to Use on Land
Government Regulation number 6 of 2006, on State / Regional Property Management
Government Regulation number 38 of 2008, on State / Regional Property Management
Government Regulation number 27 of 2014, on State / Regional Property Management
Regulation of Finance Minister Number 96/PMK.07/2007 on Procedure for the Implementation of Use, Utilization, Write-Off and Transfer of State Property.
Decision of Finance Minister of the Republic of Indonesia dated 2 June 1995 Number 248/KMK.04/1995, on the Treatment of Income Tax for the Parties entering into a Cooperation in the form of Build Operate and Transfer/ BOT).