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LEGAL PRINCIPLES IN FUNCTION AND PERFORMANCE OF BOT CONTRACT

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Abstract

Build, Operate and Transfer (BOT) represents a long term partnership of the government and private sector. In BOT project, either the government or a private sector identifies a need for a development project. The philosophy in BOT contract begins from the increasing infrastructural needs in all areas and with a limited budget, government are required to commit the duties and functions state governance so that the concept of BOT give a solution through a partnership with the private sector. The government then gives a concession to the private sector to build the project and operate it for a fixed period years, after the period ended, the building shall be transferred to the government. Through BOT, the country is able to gain asset without government spending while maintaining a measure of regulatory control over the project. BOT permits the government to use private sector fund to finance public infrastructure development. The main issues elaborated in this article are the legal principle in the formation of BOT contract and the legal principle in the performance of BOT contract. There are two results; firstly, in the formation of a BOT contract, the principles of partnership and the principle of transparency should be emphasized. Secondly, in performance of the BOT contract, the principle of risk management and the principle of proportionality should be clearly stated in the rules and legal norms.

Keywords: Principles of Contract Law; Government Contract; BOT Contract.

Abstrak

Build, Operate and Transfer (BOT) merupakan kemitraan jangka panjang antara pemerintah dan sektor swasta. Dalam proyek BOT, baik pemerintah atau sektor swasta mengidentifikasi kebutuhan akan sebuah proyek pembangunan. Filosofi dalam kontrak BOT dimulai dari meningkatnya kebutuhan infrastruktur di semua wilayah dan dengan anggaran yang terbatas, pemerintah dituntut untuk menjalankan tugas dan fungsi tata kelola pemerintahan sehingga konsep BOT memberikan solusi melalui kemitraan dengan sektor swasta. Pemerintah kemudian memberikan konsesi kepada sektor swasta untuk membangun proyek tersebut dan mengoperasikannya untuk periode tertentu, setelah periode tersebut berakhir, bangunan tersebut akan dipindahkan ke pemerintah. Melalui BOT, negara ini mampu memperoleh aset tanpa belanja pemerintah sambil mempertahankan ukuran pengendalian peraturan atas proyek tersebut. BOT mengizinkan pemerintah menggunakan dana sektor swasta untuk membiayai pembangunan infrastruktur publik. Isu utama yang diuraikan dalam tulisan ini adalah prinsip hukum dalam pembentukan kontrak BOT dan prinsip hukum dalam pelaksanaan kontrak BOT. Ada dua hasil yang akan dielaborasi yakni; pertama, dalam pembentukan kontrak BOT, prinsip kemitraan dan prinsip transparansi harus ditekankan. Kedua, dalam pelaksanaan kontrak BOT, prinsip manajemen risiko dan prinsip proporsionalitas harus dinyatakan secara jelas dalam peraturan dan norma hukum.

Kata Kunci: Prinsip Hukum Kontrak; Kontrak Pemerintah; Kontrak BOT.

Introduction

Efforts to carry out equitable development in all areas on both state and region are demonstrated through the government contract as one example of contract that developed very dynamically and become a routine practice.¹ For government contracts, the government is obliged to provide the needs of its people in the form of goods, services and infrastructure development. Contracts made not in the framework of procurement of goods and services are Non-Procurement contracts.² In connection with the establishment of infrastructure, it has been commonly used the Public Privat Partnership (PPP) scheme. PPP recognizes various types of contracts such as Build, Operate and Transfer (BOT); Build, Transfer and Operate (BTO); Build, Own and Operate (BOO); Build, Own, Operate and Transfer (BOOT); Design, Build, Finance and Operate (DBFO); Design, Build, Finance and Maintain (DBFM); Design, Build, Finance and Operate (DBFO) and so on.

To improve the welfare of the people in terms of public services and the lack of funds in the state budget, the government needs alternative in financing, one of them is by offering cooperation to the private sector in order to participate in infrastructure supply sector. This private participation can be directed to projects that require substantial funds such as the construction of toll roads, dams, and construction of shopping centers, airport expansions, and power plants. The contract commonly used by the Government of Indonesia to implement the project is through a BOT contract, for example in a contract between PT Pembangunan Jaya Ancol and PT Sea World Indonesia in developing tourist rides, Surabaya City Government with PT Gala Bumi Perkasa in establishing market facilities and Tarakan City Government with PT Gusher in building Grand Tarakan Mall.

The BOT contract is a non-procurement contract for public services carried out by the government with private parties. For BOT contracts, both government and private parties engage as parties in contractual relationships. BOT contract is a form of management of state property/land in the form of land by BOT partners by way of

¹ Hugh Collins, *Regulating Contracts* (Oxford University Press 1999).[3].

² Yohanes Sogar Simamora, 'Prinsip Dan Pengaturan Kontrak Pemerintah Di Indonesia', *Semiloka Pembaharuan Hukum Perdata Indonesia* (Fakultas Hukum Universitas Airlangga 2013).[1].

establishing the building and/or facilities and facilities, then operated within certain period of time agreed upon and after the expiration of the contract period will be handed back to the Government.³

In relation with the management of state/regional goods, in the implementation of the BOT contracts, the Government Regulation No. 27 of 2014 concerning the Management of State or Regional Property (hereinafter referred to as PP No. 27/2014) and the Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 19 Year 2016 on Guidelines for Implementation of Regional Assets (hereinafter referred to as Permendagri No. 19/2016). Although it has been regulated in Article 36 PP. 27/2014, in practice it still raises legal issues, e.g. related to the prohibition of placing BOT objects while the percentage used in BOT financing is 30% (thirty percent) using an investor share and 70% (seventy percent) using bank loans, also related with contributions that must be fulfilled by BOT partners as well as the form of government guarantees to be provided to BOT partners.

For the provision of infrastructure, BOT contracts are also required to abide to other laws and regulations such as Presidential Regulation No. 38 of 2015 on Government Cooperation with Business Entities in the Provision of Infrastructure (hereinafter referred to as Perpres No. 38/2015), Minister of National Development Planning Regulation No. 4 of 2015 on the Implementation on Government Cooperation with Business Entity in Provision of Infrastructure (hereinafter referred to as Vendor of VAT No. 4/2015) and Regulation of Head of Government Procurement Policy Agency Number 19 Year 2015 About Procedure of Implementation of Business Entity of Government Cooperation with Business Entity in Provision of Infrastructure (hereinafter referred to Perka LKPP No. 19/2015).

BOT contracts are contracts with high risk level and require substantial funds and careful consideration, but until now there has been no strict legal regulation on BOT. To overcome this, a legal principle is needed not only as a

³ Siti Ummu Adillah, 'Konstruksi Hukum Perjanjian Build, Operate, Transfer (BOT) Sebagai Alternate Pembiayaan Proyek' (2004) XIV Jurnal Hukum.[16].

basis for solving legal problems but also as an ingredient in the formation of the rule of law, so the BOT contract must be based on the principle of law.

Based on the above description and legal issues, it is understood that BOT Contracts are increasingly in demand in order to provide infrastructure for increasing public interest in various fields. Increasing these needs, the legal issues related to the BOT contract are also increasingly diverse. In order to find answers to the diversity of legal issues, in this study will analyze the legal principles in the formation and execution of contract builds to hand over BOT. Based on the background described above, in this research is divided into two legal issues and issues to be investigated is the first, the legal principle in the formation of BOT contracts; and secondly, the Legal Principles in the execution of the BOT contract.

Legal Principles in the Formation of Build, Operate and Transfer (BOT) Contract

According to A. Yudha Hernoko a rule or norm in essence has a philosophical basis and foundation or principle as his spirit. Through the principle of law, legal norms change its nature to be part of an ethical order in accordance with the value of society so that the principle of law is the foundation that supports the strength of a legal norm.⁴ For the establishment of contracts, it must meet the requirements of contract validity as referred to in Article 1320 BW namely the existence of agreement between the parties, the ability to make an engagement, a certain matter and a lawful cause.

The study of jurisprudence or the principle of law is one of the most important objects and is the basis of the rule of law. Sudikno Mertokusumo states that the principle of law is not a concrete law, but the basic thoughts are general and abstract, meaning that the principle of law is the background of concrete rules contained in the legal system and presented in the form of legislation and judgment.⁵ Therefore the important legal principle is not only as a basis in solving legal problems but also

⁴ Agus Yudha Hernoko, *Asas Proporsionalitas Dalam Kontrak Komersial* (Kencana 2011).[21].

⁵ Sudikno Mertokusumo, *Penemuan Hukum: Sebuah Pengantar* (Liberty 2001).[5-6].

as material in the formation of rule of law.⁶

According to Asser-Rutten, there are three principles of law in contract law, namely the principle of consensualism, the power of binding covenants and freedom of contract. While Hoffman - Abas put forward the principle of propriety (*billijkheids beginsel*) and Nieuwenhuis put forward three principles such as autonomy beginsel, trust (*vertrouwens beginsel*) and causa (*causa beginsel*).⁷ While Wery put forward the principle of good faith (*goede trouw beginsel*).⁸

According to Nindyo Pramono, there are four principles that are considered to receive special attention in contract law, among others the principle of freedom of contract, the principle of consensualism, the principle of *pacta sunt servanda*, and the principle of good faith.⁹ While M. Isnaeni mentions several principles as pillars of contract law, namely the principle of freedom of contract which stands parallel to other principles based on a balanced proportion of the principle of *pacta sunt servanda*, the principle of equality, the principle of privity of contract, the principle of consensualism and the principle of good faith.¹⁰ In the development of contract law, A. Yudha Hernoko added the importance of the principle of proportionality in the process of pre-contracting, formation and execution of contracts.

In connection with the BOT contract, namely in the functioning of state administration and regional government, the government binds itself to a contractual relationship by observing the principles of contract law in order to be accepted in the legal constellation. The principles of contractual law that put forward include the principles of freedom of contract, the principle of consensualism, the principle of good faith, the principle of contracting power (*Pacta Sunt Servanda*), the principle of justice and proportionality.

In the essence, BOT creates a contractual relationship between the Government

⁶ Yohanes Sogar Simamora, *Hukum Perjanjian Prinsip Hukum Kontrak Pengadaan Barang Dan Jasa Oleh Pemerintah* (LaksBang PRESSindo 2009).[29].

⁷ JH Nieuwenhuis, *Drie Beginselen van Contractenrecht* (Kluwer 1979).[4].

⁸ PL Wery, *Perkembangan Hukum Tentang Itikad Baik Di Netherland* (Percetakan Negara RI 1990).[8].

⁹ Nindyo Pramono, 'Kontrak Komersial: Pembuatan Dan Penyelesaian Sengketa', *Acara Pelatihan Hukum Perikatan Bagi Dosen dan Praktisi* (Fakultas Hukum Universitas Airlangga 2006).[1-3].

¹⁰ Hernoko. *Op. Cit.*[105-106].

and the private sector as well as between the parties who have strategic land with the investors. BOT contracts in the field of infrastructure provide restrictions that involved as party is the government with private parties as partners BOT. The term BOT was first used in Turkey in 1984 as part of a privatization program in infrastructure development, but the BOT concept has been known since the 1840s in pioneering the construction of the Suez Canal financed by the European and Egyptian Governments.¹¹

Not only developed in Europe, the concept of BOT also began to be adopted by countries in Asia such as Indonesia, Philippines, Thailand, Vietnam, Hong Kong and India in order to support infrastructure development. Netherlands is one of the developed countries that is commonly implementing a contract model of Build Build and Maintain Design (DBFM) and Design Build Finance Maintain and Operate (DBFMO) which is also part of the PPP and both contract models are applied with a period of 20 to 30 years.¹²

In Indonesia, the BOT contract is a non-procurement contract within the framework of public services conducted by the government with private parties. Associated with the BOT definition, Hitoshi Leda states that:

“BOT (Build, Operate, Transfer): Private company finance itself, build facilities, manages and operates the facilities for a specific period (some ten years) and then transfer these to a public organ upon completion of capital recovery, since the facilities are transferred after most of the depreciation has progressed, the public business entity has an advantage where the budget scale for the transfer can be reduced”.¹³

While Sidney M. Levy who gives an overview related to the concept of BOT is:

“The BOT Approach, sometimes referred to as BOOT (Build, Own, Operate, Transfer) involves the assembling of private sponsors, usually consortium of private companies, to finance, design, build, operate and maintain some form of revenue producing infrastructure project for a specific period. At the end of this concessionary period, when it has been estimated that all investment costs have been recouped from user fees and a profit turned, title to the project

¹¹ Sidney M Levy, *Build, Operate, Transfer: Paving the Way for Tomorrow's Infrastructure* (John Wiley and Sons 1996).[19].

¹² *ibid.*[125].

¹³ Hitoshi Leda, *Sustainable Urban Transport in an Asian Context* (Springer 2010).[286].

passes from the private consortium to the host government”.¹⁴

The United Nations Industrial Development Organization also provide a devinition related to BOT:¹⁵

“BOT is the terminology for a model or structure that uses private investment to undertake the infrastrucure development that has historically been undertaken by the public sector. In a BOT project, a private company is given concession to build and operate a facility that would normally be built and operate by the government. The private company is also responsible for financing and designing the project. At the end of the concession period, the private company returns ownership of the project to the government (although this need not to be the case)”.

In Indonesia, BOT is regulated in Article 1 paragraph 12 of PP. 38/2008 and Article 1 paragraph 14 of PP. 27/2014 stating that:

“Build Organize and is the Utilization of State/Local Property in the form of land by another party by establishing the building and/or facilities and facilities, then utilized by such other party within certain period of time agreed upon, for subsequent to be handed back the land along with the building and/or facilities and facilities after the expiry of the term”.

In PMK No. 248/KMK.04/1995, Article 1 states the definition of BOT as:

Build Operate and Transfer is a form of cooperation agreement between the holder of land rights and the investor, stating that the holder of the land rights grants the investor the right to construct the building during the contract building period (BOT) and transfer the ownership of the building to the holders of land rights during the wake-up period for the end of delivery.

In Article 1 paragraph 36 Permendagri No. 19/2016 which states that:

Build Operate and Transfer is the utilization of regional property in the form of land by another party by establishing the building and/or facilities and facilities, then utilized by other parties within a certain period which has been agreed, for subsequent to be handed back the land along with the building and/or the following facilities facilities after the expiry of the term.

Based on the above description, in cooperation between the government and

¹⁴ Levy. *Op. Cit.*[16-17].

¹⁵ *Guidelines for Infrastructure Development Through Build Operate Transfer (BOT) Projects* (UNIDO 1996).[5].

private parties through BOT contracts, it can be said that the private party is willing to finance, design and build facilities and operate the object of BOT in the form of land within a certain period and when the concession period ends then the land and the compulsory facilities are handed back to the Government as the holder of Right to Management. It should be remembered, however, that the contractual relationships established between the government and the private sector are not wholly in equal or equal position. The Government has institutionalized immunity rights in Article 50 of Law Number 1 of 2004 on State Treasury (hereinafter referred to as Law No. 1/2004) stating that the prohibition of confiscation of state assets. This is nothing but to protect the wealth of the country in order to meet the welfare of society/public.¹⁶

With regard to the selection of BOT partners, it should be carried out by promoting the principle of fair competition without prejudice to prudential principles since the objects of the BOT are state/regional assets. In Indonesia, the selection of partners in the BOT contract is stipulated through a tender and the contract takes place within a maximum period of 30 (thirty) years, during the stipulated period, the private sector or investor shall pay contributions to the general treasury account of the country/region each year of magnitude shall be determined on the basis of the calculation of the team established by the competent authority, besides the private party shall maintain the BOT object and is prohibited from pledging, pledging or transferring the BOT object as stated in Article 36 PP. 27/2014. Based on the above, there are three main characteristics in the BOT contract:

1. Build, that the Government as the holder of Management Rights on state-controlled land agrees to bind themselves in the contract of cooperation of infrastructure development (in the form of buildings and/or facilities) with private parties who act as investors. The construction of a project with the concept of BOT is the scope of the construction work and related to the BOT building permit shall be on behalf of the Government of the Republic of Indonesia (for state property)

¹⁶ Faizal Kurniawan, 'Bentuk Perlindungan Hukum Terhadap Kekayaan Minyak Dan Gas Bumi Sebagai Aset Negara Melalui Instrumen Kontrak' (2013) XVIII Perpektif.[79].

or the Regional Government (for regional property) and after the establishment of the BOT partner, matters relating to all The costs required in preparation up to the implementation of the BOT shall be the burden and responsibility of the respective partner as referred to in Article 36 paragraph 7 of Government Regulation no. 27/2014.

2. Operate, that is with respect to Article 46 PP. 27/2014, the operation of the BOT contract is a grace period given by the government to private parties to operate and manage BOT objects to obtain economic benefits over a period of time, up to 30 years. Not only does it operate but the private sector also cares for the BOT object and is fully responsible for its maintenance costs. During the BOT contract, the government also obtains economic results in accordance with agreements and BOT objects in cooperation between the Government and private parties is the state/land assets in the form of land. For the duration of the contract, the results of the operation of BOT objects shall be used directly for the implementation of duties and functions of the Central/Regional Government of at least 10% (ten percent) as stated in Article 36 paragraph 4 of PP. 27/2014.
3. Transfer, that at the time of expiration of the contract, the BOT partner is obliged to transfer back BOT objects which are state/regional assets to the Government after the audit by the Government Internal Supervisory.¹⁷ The submission of the BOT object automatically also assigns the Building Use Right attached to the BOT object from the private party to the Government.

Thus, based on the foregoing matters, in BOT contracts, there are several characteristics, among others:

- a. That the BOT Contract constitutes a contract of cooperation between the Government (as contractual) with the private sector/investor for public interest within a maximum period of 30 years;
- b. Whereas in the Contract of BOT shall clearly state the object of the contract, the rights and obligations of the parties and the duration of the contract;
- c. That the project built under the BOT Contract will be fully funded by the

¹⁷ Periksa Pasal 36 ayat 8 dan 9 PP No. 27/2014.

private sector and in the implementation process involves other parties such as contractors, operators, suppliers, lenders and users;

- d. That the private sector is willing to assume risks on a large scale in the implementation of the BOT project;
- e. Whereas in the process of operation, the private parties are required to submit contributions to the Government;
- f. Whereas after the expiry of the period, the BOT object in the form of land or assets of that State/Territory shall be transferred back to the Government. Because the implementation of this BOT contract is granted with Building Use Rights it will not change the status of the land ownership.

To encourage private corporate interest to participate in infrastructure provision cooperation, the government provides fiscal instruments that can support the feasibility of the BOT project. Such support is in the form of Viability Gap Fund (VGF) as stipulated in Regulation of the Minister of Finance of the Republic of Indonesia Number 223/PMK.011/2012 Concerning the Support of Partnership Feasibility on Part of Construction Costs in Government Cooperation Projects with Business Entities in Infrastructure Provision (hereinafter referred to as PMK No 223/PMK.011/2012) and the Government Guarantee as referred to in Presidential Regulation no. 78/2010.

The Government guarantee will be provided by the Ministry of Finance through PT. The Indonesia Infrastructure Guarantee (PT.PII) or the Indonesia Infrastructure Guarantee Fund (IIGF) and PT.PII/IIGF are the only executors or as “single windows” in providing government guarantees in the BOT project. Based on PP. 27/2014 in Article 3 paragraph 1 states that the principles or principles that must be applied in the management of State/Regional property included in the implementation of BOT are functional principles, legal certainty principle, transparency principle, efficiency principle, accountability principle and value assurance principle. In addition to the above matters, in the implementation of BOT contracts should also put forward the following principles:

- a. Principle of partnership means BOT Contract is based on the provisions of

legislation and requirements that consider the needs of both parties. In this principle also contain the values contained in the principle of usefulness, effective, efficient and accountable;

- b. The principle of transparency, meaning that all provisions and information about BOT are clear and widely known by interested partners as well as by society in general and BOT Partners election is conducted through fair and open election stages in order to realize healthy and non-discriminative business competition. This principle also aims to protect the state finances from the incidence of losses.
- c. Principle of risk control and management, means BOT is implemented with risk assessment and development of a mature management strategy so as to minimize the loss for the parties.

Thus, based on the above matters, that in the stage of formation, implementation and enforcement of BOT contracts, besides prioritizing the general principles known in contract law, among others the principle of freedom of contract, the principle of consensualism, the principle of good faith, *pacta sunt servanda*, the principle of fairness and proportionality, it is necessary to put forward the Principles of Partnership, Principles of Transparency and Principles of Control and Risk Management, so as to provide maximum benefits and benefits and to suppress the emergence of high risk for the parties in BOT Contract.

Legal Principles in the Implementation of Build, Operate and Transfer Contracts

In the perspective of the Law of Obligations, the implementation of contractual obligations is closely related to payments. While in BOT Contracts, in connection with the implementation of contractual obligations, the government is required to guarantee matters relating to legal instruments for the smooth running of the BOT project and shall be entitled to recover BOT objects and receive income from private parties for the utilization of BOT objects. This is certainly in line with the concept of proportionality principle carried by Agus Yudha Hernoko with emphasis on contractual justice underlying the exchange of rights and obligations

of the parties in accordance with the proportion and/or burden/part that serves to maintain business continuity, in this case between the government and the private sector.¹⁸ Whereas in the perspective of the private sector, in the execution of the BOT contract is entitled to make changes to the BOT object where necessary.¹⁹ As for the financing for the execution of the BOT project must be submitted by the private party and/or has been obtained at the latest within 12 (twelve) months after the private party signed the BOT Contract.

At this stage of contract implementation, all terms and conditions in the contract must be carried out with full responsibility so as to truly achieve the objectives of the contract. Cooperation between the government and private parties using the BOT model is also associated with the payment of contributions and maintenance of the BOT object. So in the BOT contract, the implementation of contractual obligations is not only marked by the establishment of building (building) which became the object of BOT but also marked by the payment of contribution and maintenance of the BOT object.

Implementation of projects with the BOT Contract model, not infrequently requires enormous costs and, like most projects, the BOT project is vulnerable to a wide range of risks. The risks commonly found in the BOT project are as follows:²⁰

1. Construction and Operation Risk

In the event of a delay in completing the construction project, consideration should be given to fines and/or compensation or to request performance bonds at different levels.

2. Cost Risk, Exceeding the original estimation.

To overcome this, in the contract should be agreed a definite cost or cultivated for the risk is borne by both parties.

3. Force majeure.

Generally, the risks posed by force majeure are exceptions in the BOT Contract,

¹⁸ Faizal Kurniawan, 'Bentuk Perlindungan Hukum Terhadap Kekayaan Minyak Dan Gas Bumi Sebagai Aset Negara Melalui Instrumen Kontrak' (2013) XVIII Perpektif.[9].

¹⁹ Budi Santoso, *Aspek Hukum Pembiayaan Proyek Infrastruktur Dengan Model BOT (Build, Operate Transfer)* (Genta Press 2008).[20].

²⁰ *ibid.*[21-22].

but may use insurance alternatives to address such unexpected risks.

4. Political Risk

In theory, political risk can be government actions or deeds (project disruption caused by adverse acts of government) that can hinder the running of the BOT project. Political risk consists of three parts, namely:

- a. Traditional political risk, in the form of corporate takeovers with or without compensation known as the nationalization of the project company's assets or new tax rules that are detrimental to the prospects for economic growth of the BOT project.
- b. Regulatory risk, in the form of regulatory changes that are detrimental to the BOT project, eg the opening of a new sector that brings much competition.
- c. Quazi-commercial risk, in the form of contract termination by the Government or the existence of changes in government planning and so on.

For some infrastructure projects it is possible to require additional facilities and infrastructure such as road projects, electricity, and telecommunications. Therefore, in the BOT Contract should include also assurances that the project will be equipped with facilities and infrastructure and maintenance.

When considered in a contractual relationship, there are 6 (six) ways to manage or control risk, among others:²¹

- a. Risk Avoidance, which is a condition for not doing activities that contain risks at all. If it is decided to continue to do so it must be considered the potential benefits and potential losses to be generated;
- b. Risk Reduction, is a method that can help reduce the likelihood of occurrence of a risk or the impact of damage generated by a risk;
- c. Risk Transfer means that the risk is transferred or transferred to another party, generally through a contract (insurance) or an attempt to maintain the foreign exchange rate against rupiah in order to be fixed (constant or non-volatile) by paying a certain premium to a third party (hedging);

²¹ Suswinarno, *Mengantisipasi Risiko Dalam Pengadaan Barang/Jasa Pemerintah* (Visi Media 2013).[11-12].

- d. Risk Deferral, meaning the impact of a risk is not always constant. The Risk deferral involves delays in a project until the likelihood of occurrence of such risk is small;
- e. Risk Retention, that is, although certain risks may be reduced or transferred, but under certain circumstances there are some risks that must remain accepted as an essential part of a project implementation; and
- f. Contingency Plan, is a backup plan that has been prepared from the beginning to anticipate if the main plan failed.

Based on the above matters, it is understood that the implementation of the BOT contract is not spared from the risks, whether faced by the government or the risks to be faced by private parties as BOT partners. So that the principle of risk control and management is present in order to control and/or reduce the level of risk in the BOT project by conducting risk assessments, developing risk management and mitigation strategies in contractual relationships between government and BOT partners.

Conclusion

In essence, the presence of BOT is in order to improve the welfare of the people, realizing the provision of infrastructure in various fields and get around the limitations of APBN/APBD through the utilization of state assets/regions in the form of land. Associated with legal principles and norms in the formation of BOT contracts are the same as the establishment of private contracts in general, but which is the basic principle in establishing the BOT contract is the principle of partnership and transparency in the selection of BOT partners.

In the implementation phase of BOT contract which is classified as high risk due to the BOT partner is obliged to finance the full implementation of the BOT project, but the BOT object which is the asset of the country/region can not be guaranteed as stated in Article 36 paragraph 3 letter (c) PP No 27/2014, so that in order to minimize the occurrence of conflict and loss, risk management is required. Thus, the principle of risk control and management is an important principle in the implementation of

BOT contracts that aim not only to minimize, but also to control the risk level of BOT projects for the parties. It is therefore important to clearly articulate in BOT contract norms and procedures. If the Government makes a unilateral contract termination and when a dispute arises, the principle of proportionality exists in the function of maintaining the fair exchange of rights and obligations of both parties in order to bring about legal certainty and justice for all parties.

Considering that the BOT contract is one of the regular contracts in the framework of infrastructure provision, it is necessary to revise the existing legal regulation related to BOT contract, especially PP No 27.2014 so as to frame business activities fairly and proportionally. To ensure legal certainty in Indonesia and to learn from other countries that have established the BOT Law, it is also necessary to have legislation or a firm legal instrument on BOT.

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