



Collaborative Agreement between the Regional Government of West Nusa Tenggara and the Private Sector through the Elements in the Build Operate Transfer System

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Abstract

This study aims to examine the arrangement of regional cooperation agreements with third parties through the Build-Up System based on Indonesian laws and regulations, and how the parties regulate the rights and obligations of the parties in the regional cooperation agreement with third parties in West Nusa Tenggara through the Build-Up pattern. This research is a normative study so that the approach used is the legislative approach and case approach. The results of the research show that the legal source of cooperation in the management of goods belonging to the region is Law No. 23 of 2014 concerning Regional Government, Government Regulation No. 50 of 2007 concerning Procedures for Implementing Regional Cooperation, Regional Regulation of West Nusa Tenggara Province No. 8 of 2007 concerning Management of Regional Property.

Keywords: Collaborative Agreement; Private Sector; Elements in the Build Operate Transfer

Introduction

Development is one of the manifestations of the implementation of the mandate of the state constitution in achieving a state's goals and objectives that can provide a welfare and justice for every citizen as stated in the fourth paragraph of the Opening of the 1945 Constitution of the Republic of Indonesia. Indonesia, which is a developing country in its constitutional journey, often encounters a variety of constraints faced which can cause the state to be hampered in realizing the country's ideals and goals. The obstacles that are often encountered in development are none other than the lack of management. good regional assets that have the potential to be used as land in regional development to achieve a sustainable national development in accordance with the ideals of the Indonesian people. To carry out the development, especially in regional development, according to the fulfillment of the availability of adequate facilities and infrastructure which will be expected to be able to meet the needs of the public interest. In its implementation the development does not escape the need for large funds, and it will feel heavy if it is only charged to the Regional Budget (APBD). Based on the state of such regional government, which relies on the Regional Budget in the context of the development of this area, it is necessary to renew or new models as a form of financing regional development projects. Lombok Plaza in the construction of the Nusa Tenggara Convention Center, with PT. Alhmara in sharia hotel development and with PT. Varindo in the construction of office and housing complexes for members of the West Nusa Tenggara Province DPRD. This cooperation agreement between the Regional Government and the Third Party (private) creates a legal relationship that occurs privately and binds both of them specifically in accordance with the agreement. To the extent that it does not conflict with the legal terms of the agreement, the agreement is deemed lawful. So that the implementation requires the existence of legal provisions governing this agreement given that in the agreement which becomes the object in the form of government assets and the provisions of the cooperation agreement in book III of the Civil Code have not yet been regulated so that a legal certainty for the rights and obligations of each parties to this agreement and are expected to realize development for the welfare of the community and increase regional income.

Result and Discussion

1. Beginning of the Build Operate Transfer Concept

The concept of building for delivery is also known as "Turgut Formula" because the concept of Build-Up is evolving and was widely known in 1985 in Turkey as a form of the concept of privatization of Prime Minister Turgut Ozal. The cooperation project carried out by the Turkish Government with the Build Operate Transfer model is a construction and management project for the dam on the Syehan River with a project value of 231.5 million US dollars signed on May 11, 1987 between Kamugai Kigumi from Japan and Yuksel Insaat from Turkey. The cooperation agreement carried out by the Government of Turkey with the concept of Build for Handover was later adopted by other developing countries including Indonesia with the same pattern.

1. Understanding Build Operate Transfer

A basic description of what Build-operate-transfer can be found in government regulations, ministerial decisions and opinions of scholars. According to Government Regulation No.27 of 2014 concerning the management of State / Regional Property in article 1 number 14 what is meant by Build-Up for Delivery is

"Utilization of State-owned goods / regions in the form of land by other parties by constructing buildings and / or facilities and facilities, then utilized by other parties within the agreed period, then returning land and buildings and / or facilities and facilities after the end of the period. "

The understanding expressed by several scholars regarding the understanding of Build Operate Transfer is as follows. According to Clifford W. Garstang stated that Build Operate Transfer or BOT is

“is a variety of type of project financing known as contractor provided financing. In the standard contractor provided financing a project entity may request proposal for the construction of a project pursuant to which the contractor will not only provide the materials and services needed to complete the project but will also provide or at least arrange the necessary financing. The contractor will also need to operate the project and use its cash flows to repay the debt it has incurred.”

What can then be translated is that Build Operate Transfer is a form of financing for a development project wherein the contractor must provide funding for the project and the contractor must bear all forms of material, equipment, and other services needed to complete the project. The contractor is given the right to manage and take economic benefits as compensation for all costs that have been incurred for a certain period.

2. *Elements in the Build Operate Transfer Agreement*
 - a. Subject of Build Operate Transfer Agreement

The subject in the Build Operate Transfer agreement involves investors or financiers as parties who will carry out financing and carry out construction and take advantage of the construction within a predetermined period of time, and the land owner in this case is the community or private sector that owns the land strategic or the government as the exclusive owner and customary law community as the holder of customary rights.

- b. Object / Achievement of the Build Operate Transfer Agreement

If referring to the provisions in article 1234 of the KUH Perdata Build Operate Transfer agreement fulfilling the three objects of the agreement, namely (1) giving something (2) doing something and (3) not carrying out a certain act. Meeting the elements of giving Sesutu is because the landowner or the owner of land rights gives an authority for the investor to develop and manage land or land within a certain period of time. Obligation fulfills the element of doing something because the investor is obliged to carry out the construction and management of the object of Build Operate Transfer agreement and fulfill the element of not carrying out certain actions because the investor is prohibited from transferring or guaranteeing the object of Build Operate Transfer Agreement without the knowledge of the land owner.

3. *Characteristics of the Build Operate Transfer agreement* There are several characteristics of the Build Operate Transfer agreement, among others:¹

- 1) Development (Build)

Investors as holders of management rights are required to build the object of Build Operate Transfer in accordance with what has been agreed with the land owner or holder of land rights within a certain period of time with all the needs and financing of the construction of the object on their own responsibility by the investor.

- 2) Operation or management (Operate)

It is a certain period of time given to the investor to take economic benefits from the results of the construction of the object of the Build Operate Transfer agreement along with matters relating to maintaining the object of the Build Operate Transfer Agreement.

- 3) Submission (Transfer)

It is a situation where the investor returns the object of the agreement Build Operate Transfer to the land owner or holder of land rights after the end of the operation or management period.

- a. Principles in the Management of State / Regional Property Principles relating to the management of state / regional property include:

- 1) Functional Principles

That each issue relating to the management of state / regional property will be resolved or decided by the power of goods users, goods users, goods managers and governors / regents / mayors in accordance with their respective functions, authorities and responsibilities.

- 2) Principle of Legal Certainty

That is, every implementation of management of state / regional property must be carried out based on applicable laws and regulations.

- 3) Principle of Transparency

That every implementation of management of state / regional property should be carried out openly or transparently to the community's right to obtain correct information.

- 4) Principle of Efficiency

That every implementation of management of state / regional property must be directed and used in accordance with the limits of the standard needs needed to support the implementation of optimal basic tasks and functions of government.

- 5) Accountability Principle

Every management activity of state / regional property must be accountable.

- 6) Principle of Certainty of Value

In the management of state / regional property must be supported by the accuracy of the amount and value of goods in the context of optimizing the use and transfer of state / regional property as well as the preparation of government balance sheets.

- b. Risks in the Build Operate Transfer Agreement

Risks that can arise in the implementation of the Build Operate Transfer agreement include:

¹ Budi Santoso, *Aspek Hukum Pembiayaan Proyek Infrastruktur Dengan Model BOT (Build Operate Transfer)*, Genta Press, Yogyakarta, 2008, p.17-21

1) Political Risk

Included in political risks include the nationalization of the project, violation of obligations by the state, special changes in the law that harm the project, failure of payments by the state, overmacht events involving politics such as coups or strikes due to regulations set by the government. Including the unilateral termination by the government of the concession contract as a result of being claimed or demanded by the private sector as the recipient of the concession to the state.

Legal Risk

There is a possibility that the contract cannot be implemented or implemented either in whole or in part by the parties.

2) Economic Risk

This risk occurs because the calculation of the project is based on incorrect assumptions and is biased towards the project implementation costs, market conditions, sudden currency movements so that the situation is very difficult for investors to continue implementing the Build Operate Transfer agreement or BOT.

3) Risk of Forcing Circumstances

In implementing the Build Operate Transfer or BOT agreement, for example, there is a sudden fire, natural disaster, War, riot or government regulation that is directly related to or affects the implementation of the Build Operate Transfer or BOT agreement, and causes the agreement to not be continued.

4) Risk of Market and Income Factors

The following risks are in the form of loss of income due to insufficient direct income from the project, lack of income from other sources related to the project, or the existence of a limitation from the government in terms of increasing tariffs or minimal usage period of the project.

2. Factors affecting the Implementation of the Agreement with the Build Operate Transfer System

In the collaboration carried out by the West Nusa Tenggara Provincial Government with the private sector in the management of regional property with the Build Operate Transfer system, in fact there must be things that are supporting things and obstacles or obstacles faced both in the process of the agreement and the implementation process.

Attention is needed to respond to this. Thus, the existence of considerations that underlie why this collaboration is carried out must continue to be studied, not just looking at economic considerations or the benefits gained, political and socio-cultural considerations of the community but other considerations that may be needed for the smooth implementation of cooperation The West Nusa Tenggara Provincial Government with the private sector.

As described above in the construction of several public facilities, especially facilities in West Nusa Tenggara based on several provisions specifically that regulate Build Operate Transfer or BOT such as Government Regulation Number 27 of 2014 concerning Management of State / Regional Property and Implementation Guidelines, namely Ministerial Regulation Domestic Number 19 of 2016, Government Regulation Number 50 of 2007 concerning Procedures for Implementing Regional Cooperation along with its Implementation Guidelines, namely Minister of Home Affairs Regulation Number 22 of 2009, Presidential Regulation Number 13 of 2010 concerning Amendment to Presidential Regulation Number 67 of 2005 concerning Cooperation Government with Business Entity in Provision of Infrastructure, and Regional Regulation of West Nusa Tenggara Province Number 8 of 2007 concerning Management of Regional Property.

The existing regulatory provisions regarding the Build Operate Transfer System by Regional Governments are often encountered in the implementation of disagreements and the existence of various interpretations for the apartments of the Regional Government, and become a factor in the implementation of asset management in the area with the Build Operate Transfer system. Based on the results of interviews with the parties concerned and the document review in this study, it can be known by several supporters and constraints to the implementation of the cooperation in managing the assets of this area with the Build Operate Transfer system, including the following. From the Government's Side the provisions of the relevant regulations govern the management and empowerment of assets owned by the Regional Government, there are provisions that determine the considerations for managing the use of assets. Among them are Government Regulation Number 27 of 2014, in article 34 paragraph (1) which determines that:

1) Build Operate Transfer or Build State / Regional Property Use carried out with consideration:

a. Goods users need buildings and facilities for the administration of state/regional government for the benefit of public services in the context of carrying out tasks and functions.

b. There are no available or insufficient funds available in the State / Regional Revenue and Expenditure Budget for the provision of such buildings and facilities.

In addition, in the Regional Regulation of West Nusa Tenggara Province Number 8 of 2007 concerning Management of Regional Property in article 46 paragraph (1) which determines that:

1) Build Operate Transfer of goods belonging to the region can be carried out with the following conditions:

a. Regional Governments require buildings and facilities for the administration of government for the benefit of public services in the context of carrying out basic tasks and functions.

b. Land and / or buildings belonging to the Regional Government that have been submitted by the user to the Governor.

c. There are no APBD funds available for the provision of buildings and facilities in question.

The provisions as above show that to be able to implement the Build Operate Transfer system with the existence of the government's needs, especially users of buildings for the purposes of organizing government and public services and the lack of sufficient funds to carry out these activities themselves.

The Regional Government to follow up on the basic considerations rather than the utilization with the Build Operate Transfer system and to carry out the implementation, the government provides incentives and facilities to investors or the private sector involved or involved in collaborating with the Build Operate Transfer system.

Incentives that can be provided by the West Nusa Tenggara Provincial Government:

- 1) Reduction, relief and exemption from regional taxes
- 2) Reduction, relief and exemption from regional levies

In addition to providing incentives to the private sector or investors to encourage and facilitate cooperation or agreements with the Build Operate Transfer System, it also provides convenience to the private sector or convenience investors, including the following:

- a. Provision of land or location information
- b. Acceleration of granting permits
- c. Providing investment promotion facilitation
- d. Facilitation of information on fiscal and non-fiscal incentives
- e. Provision of advocacy
- f. Facilitation or provision of business facilities and infrastructure

The intensive form and facilities carried out in the implementation of the collaboration with the Build Operate Transfer system are the implementation of the West Nusa Tenggara Provincial Regulation No. 3 of 2015 concerning Investment.

There are still many assets that have not been optimized for government development, and public services in the implementation of the main tasks and functions of the government because the Regional Budget (APBD) is still limited to be used in managing the assets so that other funding sources are needed in this case can be done by inviting the private sector to be involved in it to cooperate and be seen from the values of assets and the potential inherent in the assets themselves owned by the West Nusa Tenggara Province which is indeed possible to collaborate with the Build Operate Transfer system.

In addition to the things that are above the other supporting factors that drive the Implementation of the Build Operate Transfer Agreement is the existence of programs of the NTB Provincial Government that do require Development for important sectors, such as MICE tourism programs (meetings, incentives, conventions, exhibition). This MICE tourism program since 2012 has brought many tourists both locally and internationally. The number of tourists visiting this increase, especially in the implementation of national and international events in the West Nusa Tenggara region, requires direct infrastructure facilities such as venue meetings and conventions with international standards. adequate capacity and integrated with hotels and entertainment venues. this also led to the government's encouragement to optimize infrastructure development.

Then there has been no complex development carried out on important sectors in the West Nusa Tenggara Province which can be synergized with the activities of organizing the government and public servants or other related programs so that there is a possibility that there will be no fierce competition between parties private sector involved in investments in the West Nusa Tenggara Region. In an effort to realize cooperation in the Build Operate Transfer Agreement in NTB, there are several things that are obstacles to the smooth process of implementing the agreement itself, even though in reality this obstacle does not affect it so that it can terminate or cancel the Build Operate Transfer Agreement.

Of the several inhibiting factors that occur in the collaboration between the Build Operate Transfer Agreement in NTB, in terms of the amount of contribution and profit sharing or royalty that will be given by each of the three PTs involved in the cooperation of the Build Operate Transfer Agreement.² In the relevant Regulations concerning the Utilization of assets or Regional Property used with the Build Operate Transfer System as in Government Regulation No. 27 of 2014 concerning Management of State / Regional Property in Article 33 paragraph (1) letter e determines: The amount of payment and regular contribution and profit sharing from the utilization of cooperation is determined from the results of the calculation of the team formed by:

- 1) Property Manager, for State Property in the form of land and / or buildings and part of land and / or buildings that are in the Property User
- 2) Governor / Regent / Mayor, for Property in the form of land and / or buildings
- 3) Goods Users and can involve the Property Manager, for State Property other than land and / or buildings that are in the User's Goods or,
- 4) Regional Property Managers, for Regional Property other than land and / or buildings.

Further also specified in article 36 paragraph (3) letter (a) that:

The established Build Operate Transfer Partner or the Build Up Handover Partner, during the operating period:

² Interview with H. Bayhaqi, Head of Sub-Division of Utilization and Asset Cooperation Regional Financial and Asset Management Agency (BPKAD) of NTB Province, August 15, 2018

Must pay contributions to the State / Regional General Cash account every year, the amount of which is determined based on the calculation of a team formed by authorized officials

Conclusion and Recommendation

Whereas the normative juridical agreement between the regional government and the private sector has been regulated in several laws and regulations, namely, Government Regulation No. 50 of 2007 concerning Procedures for Implementing Regional Cooperation, Regional Regulation of West Nusa Tenggara Province No. 8 of 2007 concerning Management of Regional Property, Law No. 23 of 2014 concerning Regional Government, Government Regulation Number 27 of 2014 concerning State / Regional Property Management, Minister of Home Affairs Regulation Number 19 of 2016 concerning Regional Property Management guidelines.

The implementation in the Build Operate Transfer Agreement in West Nusa Tenggara is divided into two parts, namely the implementation of the preliminary agreement (MoU) and the implementation of the Cooperation Agreement. The implementation of the Build Operate Transfer Agreement in NTB is only at the stage of implementing the preliminary agreement (MOU). As of the end of 2017, this Build Operate Transfer Agreement cannot be followed up by a preliminary agreement (MoU) to the cooperation agreement.

Recommendation

1. That in order to better guarantee legal certainty regarding the implementation of cooperation agreements between the regional government and the private sector, it is necessary to carry out guarantees of implementation that must be delivered by private parties to the government.
2. The Build Operate Transfer Agreement should be carried out through only one stage, namely directly at the stage of the cooperation agreement without having to make a preliminary agreement (MOU).

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