

RINGKASAN

PRINSIP HUKUM DALAM PEMBENTUKAN DAN PELAKSANAAN KONTRAK BANGUN GUNA SERAH (*BUILD, OPERATE AND TRANSFER/BOT*)

Kontrak pemerintah merupakan salah satu kontrak yang berkembang sangat dinamis dan rutin dilakukan dalam upaya melaksanakan pembangunan yang merata dalam segala bidang baik negara maupun daerah. Dalam kontrak pemerintah, pemerintah berkewajiban menyediakan kebutuhan rakyatnya baik berupa barang, jasa maupun pembangunan infrastruktur. Kontrak yang dibuat tidak dalam rangka pengadaan barang dan jasa merupakan Kontrak Non – Pengadaan (*Non – Procurement Contracts*). Dalam kaitan dengan penyediaan infrastruktur, telah lazim digunakan skema *Public Privat Partnership* (PPP). PPP mengenal beragam jenis kontrak didalamnya misalnya BOT (*Build, Operate and Transfer*), BTO (*Build, Transfer and Operate*), BOO (*Build, Own and Operate*), BOOT (*Build, Own, Operate and Transfer*), DBFO (*Design, Build, Finance and Operate*), DBFM (*Design, Build, Finance and Maintain*), DBFO (*Design, Build, Finance and Operate*) dan sebagainya.

Dalam kontrak pemerintah, dikarenakan tidak tersedianya cukup dana pada APBN/APBD dan dalam rangka meningkatkan kesejahteraan rakyat dalam hal pelayanan publik, maka pemerintah memerlukan alternatif pembiayaan, salah satunya yaitu dengan menawarkan kerjasama kepada pihak swasta agar dapat berpartisipasi dalam sektor penyediaan infrastruktur. Partisipasi swasta ini dapat diarahkan pada proyek yang membutuhkan dana besar, seperti pembangunan jalan tol, bendungan, pembangunan pusat perbelanjaan, perluasan bandara, maupun

pembangkit listrik. Kontrak yang lazim digunakan pemerintah Indonesia untuk melaksanakan proyek tersebut yaitu melalui kontrak BOT.

Kontrak BOT merupakan kontrak non – pengadaan guna pelayanan publik yang dilakukan oleh Pemerintah dengan pihak swasta. Dalam kontrak BOT, baik Pemerintah maupun pihak swasta terlibat sebagai pihak dalam hubungan kontraktual. Kontrak BOT merupakan bentuk pengelolaan barang milik negara/daerah berupa tanah oleh mitra BOT dengan cara mendirikan bangunan dan/atau sarana berikut fasilitasnya, kemudian dioperasikan dalam jangka waktu tertentu yang telah disepakati dan setelah jangka waktu kontrak berakhir maka akan diserahkan kembali kepada Pemerintah.

Dalam keterkaitannya dengan pengelolaan barang milik Negara/Daerah maka dalam pelaksanaannya kontrak BOT harus memperhatikan ketentuan dalam Peraturan Pemerintah Nomor 27 Tahun 2014 tentang Pengelolaan Barang Milik Negara/ Daerah dan Peraturan Menteri Dalam Negeri Republik Indonesia Nomor 19 Tahun 2016 tentang Pedoman Pelaksanaan Barang Milik Daerah. Meskipun telah diatur dalam Peraturan Pemerintah, dalam praktiknya tetap menimbulkan persoalan hukum terutama terkait dengan perlindungan terhadap aset Negara atau daerah seperti larangan menjaminkan atau menggadaikan obyek BOT sementara prosentase yang digunakan dalam pembiayaan BOT adalah 30 % (tiga puluh persen) menggunakan saham investor dan 70 % (tujuh puluh persen) menggunakan pinjaman perbankan.

Dalam hal penyediaan infrastruktur, kontrak BOT juga wajib memperhatikan peraturan perundangan lain seperti Peraturan Presiden Nomor 38

Tahun 2015 tentang Kerjasama Pemerintah dengan Badan Usaha Dalam Penyediaan Infrastruktur, Peraturan Menteri Perencanaan Pembangunan Nasional Nomor 4 Tahun 2015 tentang Tata Cara Pelaksanaan Kerjasama Pemerintah Dengan Badan Usaha Dalam Penyediaan Infrastruktur dan Peraturan Kepala Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah Nomor 19 Tahun 2015 tentang Tata Cara Pelaksanaan Pengadaan Badan Usaha Kerjasama Pemerintah Dengan Badan Usaha Dalam Penyediaan Infrastruktur.

Kontrak BOT merupakan kontrak dengan tingkat risiko tinggi dan membutuhkan dana yang sangat besar serta pertimbangan yang matang, akan tetapi sampai saat ini belum ada regulasi hukum yang tegas tentang BOT. Mengatasi hal tersebut, diperlukan prinsip hukum yaitu tidak hanya sebagai dasar dalam memecahkan persoalan hukum tetapi juga sebagai bahan dalam pembentukan aturan hukum, sehingga kontrak BOT harus berlandaskan prinsip hukum.

Kontrak BOT di Indonesia dilandasi oleh prinsip kebebasan berkontrak, kemitraan, transparansi, proporsionalitas dan prinsip pengelolaan risiko. Kebebasan berkontrak merupakan prinsip dasar bagi Pemerintah untuk mengikat diri dalam hubungan kontraktual. Dalam kontrak BOT, prinsip kemitraan dan transparansi perlu dikedepankan dalam tahap pembentukan kontrak, terutama pada saat pemilihan mitra serta prinsip proporsionalitas wajib diperhatikan pada saat merumuskan hak dan kewajiban para pihak sampai dengan menentukan ganti rugi saat terjadi pemutusan kontrak. Prinsip – prinsip lainnya

juga perlu diperhatikan dengan cermat tidak hanya dalam proses pembentukannya tetapi juga dalam proses pelaksanaannya.

Pada akhirnya hasil dari penelitian ini direkomendasikan sebagai acuan menyusun legislasi khusus terkait dengan kontrak BOT, baik yang menyangkut prosedur, batas – batas kewenangan dan tanggung gugat serta bertumpu pada prinsip dan norma dalam hukum kontrak.



SUMMARY

LEGAL PRINCIPLE IN THE FORMATION AND PERFORMANCE OF BUILD, OPERATE AND TRANSFER (BOT) CONTRACT

The government contract is one of the contracts that are developing very dynamic and performed regularly an implementation of equitable development in all sectors both the state and the regional area. In the government contract, the Government is obliged provide either of goods, services and infrastructures for citizens. Contracts are not in order to the procurement of goods and services known as non Procurement Contract. Relating to the infrastructure provision, commonly used the scheme of Public Private Partnership (PPP). In the PPP know the various types of contract, for example the BOT (Build, Operate and Transfer), BTO (Build, Transfer and Operate), BOO (Build, Own and Operate), BOOT (Build, Own, Operate and Transfer), DBFO (Design, Build, Finance and Operate), DBFM (Design, Build, Finance and Maintain), DBFO (Design, Build, Finance and Operate) and others.

In government contract, due to lack of funds in APBN / APBD and to improve the welfare of the people related to the public service, the government requires financing alternatives, one of which is by offering a partnership with the private sector to participate in infrastructure provision. Private sector participation can be directed to projects that require large funds, such as constructs the toll roads, the dams, build the shopping malls and public market, airport expansion, power plants and etc. Contracts that are commonly used by Indonesian government to execute the project is through the BOT.

BOT contract is the non Procurement Contracts for public services performed by the government and the private sector. In the BOT contract, both the Government and private parties involved as a party in the contractual relationship. BOT contract is a form of management of state property or region in the form of land by the BOT partner in a way construct buildings and/or the facilities, then operated in the certain period as agreed and after the contract period ends then be transferred to the government.

Related to the management of State or Regional asset then in the execution of the BOT contract should observe the provisions in Government Regulation No. 27 of 2014 concerning Management of State/Regional property and the Ministerial Regulation Home Affairs of the Republic of Indonesia No. 19 of 2016 concerning Guidelines for the asset management Regional. Although it has been contained in Government Regulation, in practice still causing legal issues especially concerned with protecting the assets of the state or regional assets such as the prohibition of collateral or mortgage the BOT object while the percentage used in BOT financing is 30% using the investor equity and 70% use a banking loan.

Related with infrastructure provision, BOT contract also obliged to consider other regulations such as the Presidential Regulation No. 38 of 2015 concerning Cooperation between Government and Business Entities in Infrastructure Provision, Ministry of National Development Planning Agency No. 4 of 2015 concerning Procedures for the Performance of Cooperation between Government and Business Entities in Infrastructure Provision and Head of

Regulatory Agency Procurement of Government Goods/Services No. 19 Year 2015 concerning Procurement Procedures of Cooperation between Government and Business Entities in Infrastructure Provision. Besides that, BOT contracts should be based on legal principles.

Legal principle not only important as the basis for solving the legal issues however also as a consideration in the formation of law. In Indonesia, BOT contracts based on the principle of freedom of contract, partnership, transparency and proportionality. Freedom of contract is a basic principle for the Government to enter into contractual relationships. In BOT contract, the principles of partnership and transparency should be emphasized in the formation of contract, especially when the selection of partners. The principle of proportionality should be considered when formulating rights and obligations of the parties up to the compensation determining when terminated. Other principles as well need to be considered accurately not only in the formation process but also in the performance process.

Finally, from this research, it is recommended as a reference for preparing specific legislation relating to BOT contracts, both concerning the procedures, limits of authority, responsibility to sue and based on the principles and norms in contract law.

**LEGAL PRINCIPLE IN THE FORMATION AND PERFORMANCE
OF BUILD, OPERATE AND TRANSFER (BOT) CONTRACT**

ABSTRACT

The 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 legal research are the legal principle in the formation of BOT contract and the legal principle in the performance of BOT contract. The type of this research is the normative study and the approach of this research are conceptual approach, statute approach, case approach and comparative approach.

There are two results in this research. 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 proportionality and the principle of risk management should be clearly stated in the rules and legal norms.

Keywords : Legal Principle, Government Contract and BOT Contract.