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Build-Operate-Transfer Agreements Under Indonesian Positive Law (A Case Study of the Mataram Mall Building)

Aditiya Yudha Lagantara[1]*, Djumardin[2], Aris Munandar[3]
Universitas Mataram
Corresponding Author: Aditiya Yudha Lagantara alga271099@gmail.com

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ABSTRACT

This study aims to examine the legal framework governing Build-Operate-Transfer (BOT) agreements under Indonesian positive law and to analyze the legal issues arising from the implementation of the BOT agreement between the Government of Mataram City and PT Pacifik Cilinaya Fantacy. The research adopts a normative-empirical legal approach by integrating statutory, conceptual, and sociological perspectives. The study utilizes both primary and secondary data sources, including legislation, legal doctrines, academic literature, and empirical findings obtained from relevant stakeholders. The findings indicate that the legal regulation of Build-Operate-Transfer agreements in Indonesia is generally based on the provisions of Book III of the Indonesian Civil Code concerning obligations and agreements, supplemented by sectoral regulations governing state and regional asset management. These regulations include Government Regulation No. 27 of 2014, Presidential Regulation No. 13 of 2010, and several regulations issued by the Ministry of Finance concerning the utilization and valuation of government assets. The implementation of BOT agreements involves several stages, including project identification, feasibility assessment, partner selection, construction, operation, and asset transfer. Although BOT agreements are fundamentally private contractual arrangements, their implementation also incorporates elements of public law because government institutions act as one of the contracting parties. The study concludes that BOT agreements serve as an effective legal instrument for infrastructure development in situations where government financial resources are limited.

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INTRODUCTION

Infrastructure development constitutes one of the principal responsibilities of both central and regional governments in Indonesia. The implementation of development programs requires the availability of adequate infrastructure facilities capable of supporting economic activities, public services, and regional growth. However, the realization of infrastructure projects often encounters financial limitations due to the restricted capacity of government budgets. Consequently, alternative financing mechanisms involving private sector participation have become increasingly important.

One of the strategic assets possessed by governments is land ownership. In many cases, government-owned land remains underutilized despite having substantial economic potential. The direct development of infrastructure using public funds exposes governments to significant financial burdens and operational risks. Therefore, cooperation with private investors through public-private partnership schemes offers a practical solution for optimizing state and regional assets while minimizing fiscal constraints.

The participation of private entities in government infrastructure projects provides mutual benefits. From the government's perspective, private investment contributes to the acceleration of infrastructure provision without imposing excessive pressure on public finances. From the private sector's perspective, such cooperation creates opportunities to obtain economic benefits through long-term investment arrangements.

To facilitate these collaborative relationships, the government has developed various contractual mechanisms that establish legal relationships between public institutions and private entities. One of the most widely applied mechanisms is the Build-Operate-Transfer (BOT) agreement. BOT agreements function as legal instruments that define the rights, obligations, responsibilities, and authority of each party involved in infrastructure development projects.

LITERATURE REVIEW

Initially, BOT agreements were primarily implemented in cooperation between government institutions and private investors. However, developments in economic and legal practices have expanded their application to include state-owned enterprises, regional enterprises, private corporations, and other legal entities. This development has transformed BOT agreements from purely public-private arrangements into legal instruments that may involve both public and private legal dimensions. Consequently, the legal framework governing BOT agreements has evolved to accommodate these increasingly complex contractual relationships.

METHODOLOGY

The research method used is normative-empirical legal research. Normative legal research is a doctrinal study that emphasizes the analysis of legal texts and norms, rather than societal behavior, to produce prescriptive legal arguments that address legal issues. Meanwhile, empirical legal research is a type of legal research that analyzes and examines how the law functions in society.

The research methods used in this study are as follows:

1. The statutory approach involves examining laws and regulations related to marriage contracts, namely the Civil Code and Minister of Home Affairs Regulation No. 19 of 2016 on Guidelines for the Management of Regional Assets. This approach is used to analyze various laws and regulations related to Build-Operate-Transfer agreements.
2. The conceptual approach draws on the perspectives and doctrines that have developed within legal scholarship. By studying the perspectives and doctrines that have developed within legal scholarship regarding the issue under investigation, it is hoped that the researcher will eventually discover ideas that give rise to legal understandings, concepts, and principles relevant to the issue at hand.
3. The sociological approach serves as the foundation for studies or research aimed at examining social phenomena within society. This approach can offer different perspectives on social phenomena, ensuring that this research is not limited to a single viewpoint and does not claim to represent the sole truth. The sociological approach to law analyzes the reactions and interactions that occur when the normative system operates within society.

Legal sources are the places from which data for a study are obtained. In this study, the legal sources used include primary, secondary, and tertiary data, such as:

1. Primary Legal Sources

The legal sources used in this study include:

a. Civil Code
b. Government Regulation No. 28 of 2020 Amending Government Regulation No. 27 of 2014 on the Management of State and Regional Assets.
c. Regulation of the Minister of Home Affairs No. 19 of 2016 on the Management of Regional Assets.
d. Law No. 23 of 2004 on Regional Government.
e. Law No. 1 of 2004 on the State Treasury.
f. Mataram City Regulation No. 17 of 2011 on the Management of Regional Assets
g. Law No. 2 of 2012 on Land Acquisition.
h. Law No. 30 of 2014 on Government Administration.
i. Regulation of the Minister of Home Affairs No. 19 of 2016 on Guidelines for the Management of Regional Assets.
j. Regulation of the Minister of Home Affairs No. 7 of 2024 on the Utilization of Regional Assets

2. Secondary Legal Sources

These are legal resources that provide explanations of primary legal sources, such as: books, legal literature, journals, draft legislation, papers, legal dictionaries, legal encyclopedias, legal literature dictionaries, or other written legal resources.

3. Tertiary Legal Sources

These are materials that provide guidance or explanations regarding primary and secondary legal sources, such as legal dictionaries, print media, and electronic media.

RESULT AND DISCUSSION

Regulations Governing Build-Operate-Transfer (BOT) Agreements Under Positive Law in Indonesia

Regulation of Build-Operate-Transfer (BOT) Agreements in the Indonesian Contract Law System in Accordance with Article 1 of Government Regulation of the Republic of Indonesia No. 6 of 2006 Concerning the Management of State-Owned Assets/ Regional State-Owned Assets are defined as all assets purchased or acquired using the State Budget or derived from other lawful sources, and the asset manager is the authorized official responsible for establishing policies and guidelines as well as managing state/regional assets. The management of state/regional assets is carried out based on the principles of functionality, legal certainty, efficiency, transparency and openness, accountability, and value certainty.

Decision of the Minister of Finance of the Republic of Indonesia No. 243/KMK.04/1995 Regarding Income Tax Treatment for Parties Engaged in Cooperation in the Form of a "Build-Operate-Transfer" Agreement Build-Operate-Transfer ("Build-Operate-Transfer") is a form of cooperation agreement entered into between a land rights holder and an investor, stipulating that the land rights holder grants the investor the right to construct a building during the term of the Build-Operate-Transfer (BOT) agreement, and transfers ownership of the building to the land rights holder upon the expiration of the BOT term. The costs incurred by the investor to construct the building on the land constitute the investor's acquisition cost for obtaining the right to use or operate the building, and these costs are amortized in equal annual installments over the term of the BOT agreement.

Article 5 of Presidential Regulation No. 13 of 2010 Amending Presidential Regulation No. 67 of 2005 on Government-Private Sector Cooperation in Infrastructure Provision states that such cooperation may be carried out through a cooperation agreement or a business license established by mutual agreement between the government and the private sector, provided that it does not conflict with applicable laws and regulations.

The forms of cooperation offered include joint ventures in the form of production sharing, management contracts, technical assistance, franchises, joint enterprises, portfolio investments, build-operate-transfer (BOT), and other forms of cooperation. One common method of financing infrastructure projects is to invite the private sector to participate in government projects through a Build-Operate-Transfer (BOT) system or a Build-Operate-Transfer Agreement (BOT Agreement). Project financing under a BOT/BOT Agreement covers feasibility studies, procurement of goods, financing, and operation.

Mataram City Regional Regulation No. 17 of 2011 on the Management of Regional Assets serves as the legal basis governing the management of all assets owned by the Mataram City Government. Regional assets are all assets purchased or acquired using funds from the Regional Revenue and Expenditure Budget (APBD) or derived from other lawful sources. This regulation was established to ensure that the management of regional assets is administratively and legally sound, efficient, transparent, and accountable, and to provide certainty regarding the value of regional assets.

Normatively, this regional regulation stipulates that the management of regional assets must be carried out in accordance with several fundamental principles, namely the principles of functionality, legal certainty, transparency, efficiency, accountability, and value certainty. The principle of functionality emphasizes that every official involved in asset management must perform their duties in accordance with their authority. The principle of legal certainty requires that all asset management actions be guided by applicable laws and regulations. Meanwhile, the principles of transparency and accountability require openness in every management process as well as clear accountability to the public.

This Regional Regulation governs the various stages of managing regional assets, ranging from needs planning and budgeting, procurement, use, utilization, security and maintenance, valuation, disposal, transfer of ownership, and administrative management, to guidance, supervision, and control. These regulations are intended to ensure that every regional asset is utilized optimally to support the administration of regional government and the delivery of public services.

Specifically, regarding the Build-Operate-Transfer (BOT) scheme, this local regulation provides a legal basis for the Mataram City Government to transfer the use of regionally-owned land to a third party for the purpose of constructing buildings and/or infrastructure along with their facilities. For a specified period, the third party is granted the right to operate the buildings and derive economic benefits from them; upon the expiration of the agreement, the buildings and their facilities must be returned to the local government.

Thus, Mataram City Regulation No. 17 of 2011 plays a strategic role as a local legal instrument in ensuring that the management of local government assets is conducted professionally and in an orderly manner, and is capable of generating economic benefits for the region. In addition, this regulation also serves as an important foundation for the implementation of BOT agreements as a means of optimizing local government assets to support development and increase local revenue.

According to Article 1 of Government Regulation No. 27 of 2014 on the Management of State/Regional Assets, a Build-Operate-Transfer (BOT) Agreement refers to the utilization of State/Regional Assets in the form of land by a third party by constructing buildings and/or infrastructure along with their facilities, which are then utilized by that other party for a specific, mutually agreed-upon period, after which the land, along with the buildings and/or infrastructure and their associated facilities, is returned upon the expiration of that period.

According to Article 1 of Government Regulation No. 28 of 2020 on the Management of State/Regional Assets, these are all assets purchased or acquired using the regional revenue and expenditure budget or derived from other lawful sources. The asset manager is the authorized official responsible for establishing policies and guidelines and for managing State/Regional Assets.

According to Article 6 of Government Regulation No. 18 of 2021, the Right of Management over State Land is granted provided that the agency's primary duties and functions are directly related to land management. Central government agencies as referred to in Article 5(1)(a) whose primary duties and functions are not directly related to land management may be granted Management Rights upon obtaining approval from the minister responsible for government affairs in the field of finance.

State-owned enterprises/regional-owned enterprises, as referred to in Article 5 paragraph (1) letter c, also include subsidiaries owned by state-owned enterprises/regional-owned enterprises based on state capital participation in other state-owned enterprises/regional-owned enterprises. The legal entity designated by the Central Government as referred to in Article 5, paragraph (1), letter f is a legal entity that has been assigned a special mandate as stipulated by a Presidential Regulation.

Meanwhile, according to Minister of Finance Regulation No. 78/PMK.06/2014 on Procedures for the Utilization of State-Owned Assets, the definition of "Build-Operate-Transfer" (hereinafter abbreviated as BGS) is the utilization of state-owned assets in the form of land by a third party by constructing buildings and/or infrastructure along with their facilities, which are then utilized by that other party for a specific, mutually agreed-upon period, after which the land, along with the buildings and/or infrastructure and their associated facilities, is returned upon the expiration of that period. Thus, a BOT/BGS agreement is a concept in which a project is built entirely at the expense of a private company, several private companies, or in collaboration with a state-owned enterprise (BUMN); once constructed, it is operated by the contractor; and after the operational phase is completed as specified in the BOT agreement, the project is transferred to the government as the project owner.

Meanwhile, Minister of Home Affairs Regulation No. 7 of 2024 on the Management of Regional Assets is a regulation that governs changes to the guidelines for the management of regional assets, including mechanisms for the utilization of regional assets through the Build-Operate-Transfer (BOT) scheme—or what is known in the provisions on the management of regional assets as "Bangun Guna Serah" (BGS). This regulation was issued as part of the government's efforts to strengthen the governance of regional asset utilization in an effective, efficient, transparent, and accountable manner.

Under these provisions, BOT/BGS refers to the use of land owned by a local government by a third party through the construction of facilities or buildings by a cooperation partner. The third party is then granted the right to operate or use the buildings for a specified period as stipulated in the agreement, and upon the agreement's expiration, all buildings and their facilities must be returned to the local government.

A BOT project can only be implemented if a local government needs facilities to support the performance of its governmental duties and public services but does not yet have sufficient funding through its regional budget (APBD). Therefore, BOT serves as an alternative financing option for development that allows local governments to obtain the necessary facilities without having to bear the full cost of construction directly.

This Ministry of Home Affairs Regulation also sets out the stages of BOT implementation, which include needs assessment, asset valuation, approval by the regional head, open and transparent selection of partners, drafting of the cooperation agreement, construction, operation, and monitoring and evaluation throughout the term of the cooperation. These stages are designed to ensure that every cooperation agreement is carried out in accordance with the principles of good governance.

In addition, third parties are required to make contributions to the local government during the operational period. These contributions are determined based on an assessment of the asset value, the amount of investment, and the economic benefits derived. This provision is intended to ensure that the utilization of local government assets not only results in physical development but also generates revenue for the local government's treasury.

Supervision is a key aspect of Ministry of Home Affairs Regulation No. 7 of 2024. Local governments are required to ensure that construction and operations are carried out in accordance with the terms of the agreement. In the event of a breach of contract or violation by a third party, local governments have the authority to take legal action in accordance with applicable regulations.

Overall, Ministry of Home Affairs Regulation No. 7 of 2024 reaffirms that BOT is a strategic instrument for optimizing the utilization of local government assets. Through clearer regulations, this regulation is expected to enhance accountability in the management of local government assets, strengthen public services, and provide sustainable economic benefits for local governments.

The predominant public nature of BGS/BOT agreements is the reason why the rules of conventional contract law are not appropriate for contractual relationships between the government and individuals or private companies. BGS/BOT agreements are still categorized as contracts rather than regulations. However, there are several differences between BGS/BOT agreements and other types of agreements, including the fact that the government is a party to the agreement, meaning that BOT agreements contain elements of public law.

Implementation of the Build-Operate-Transfer (BOT) Agreement for the Mataram Mall Building

The government's status as a legal entity and as a representative of public office gives rise to two forms of legal acts: public legal acts and private legal acts. Public legal acts are acts that are governed by and subject to the provisions of public law, whereas civil legal acts are governed by and subject to the provisions of civil law. Because of these two types of governmental acts, the government bears two types of liability: public liability and civil liability.

In addition to these two types of legal acts—public law acts and civil law acts—there is also a hybrid nature where public law acts are intertwined with civil law acts. Consequently, a third type of liability arises: the government's liability when utilizing legal instruments that combine elements of both public and civil law.

On the one hand, the use of these civil law instruments is important for the government in carrying out its public service functions; on the other hand, however, it can give rise to complex legal issues because the line between the government's status as a public law entity and a private law entity is difficult to define—especially in the absence of legislation that specifically regulates commercial contracts entered into by the government, whether regarding their validity or liability.

This ambiguity can lead to legal uncertainty, which may ultimately harm the state's finances on the one hand and the private parties with whom the government contracts on the other. In this regard, the legal principles that should be observed in commercial contracts entered into by the government are as follows: first, the authority of officials to draft and sign contracts, including those concerning limitations, required procedures, and liability. Second, commercial contracts entered into by the government are private contracts and not administrative contracts; therefore, the principles and legal norms of contract law in the Civil Code (BW) apply to this type of contract.

Third, even though government contracts are private contracts, the government's status as a contracting party implies a prohibition on seizure. Thus, although the government is not immune from lawsuits, it holds a special position as a defendant because no actual enforcement can be carried out against it during the judgment enforcement phase. In such situations, good faith is expected from the government.

Although actual enforcement against the subject matter of the case is not possible, the government may be required to pay damages or compensation equivalent to the value of the assets to be seized. One issue that is no less important than the others concerns the immunity enjoyed by the government when sued in court in connection with the performance of an agreement or contract. There is a concern that, by virtue of its sovereignty, the government of a particular country may object that it cannot be tried in the courts of another country.

In fact, such concerns are not particularly well-founded, given that the government, when engaging in legal acts to enter into agreements or contracts, acts as a subject of civil law; and as a subject of civil law, the government can certainly be sued in court if it commits acts that cause harm to another party (unlawful acts or breach of contract) or to file a lawsuit if it feels it has been wronged or its rights have been violated by another party. Furthermore, Article 1654 of the Civil Code explicitly states that the government, as a legal entity, may engage in civil actions and may therefore be sued either in court or through arbitration.

Furthermore, the answer to this issue lies solely in the government's legal status: whether the government, in entering into or executing the contract, acts in its capacity as a private or public legal entity. When the government enters into a contractual partnership on a private basis, it is deemed from that point forward to have submitted to and complied with private-sector rules; this can also be seen in the clauses of the agreement or contract agreed upon between the government and the private sector or investors. In this situation, all legal consequences arising from the established relationship apply—namely, the application of legal principles and rules in the field of civil law, both substantive and procedural.

Dispute Resolution Regarding the Build-Operate-Transfer (BOT) Agreement for the Mataram Mall Building

Based on the Agreement between the Mataram City Government and PT. Pacifik Cilinaya Fantacy regarding the APHM Cilinaya Area, the breach of contract committed by the second party—PT. Pacifik Cilinaya Fantacy—consists of the second party's failure to fulfill its obligations as stipulated in the agreement regarding the management of the APHM Cilinaya Area

Contract law is a branch of civil law applicable in Indonesia. Promises are a crucial pillar of civil law, as civil law contains many legal provisions based on a person's promises.

A contract is a legal relationship concerning property or assets between two or more parties that grants one party the right to receive performance while simultaneously obligating the other party to fulfill that performance.

Performance refers to the fulfillment of the terms outlined in an agreement by the party bound by it, where such fulfillment is in accordance with the conditions specified in the relevant contract. Pursuant to Article 1234 of the Civil Code, some forms of performance include:

1. To give something
2. To do something
3. To not do something

The legal basis for a contract, pursuant to Article 1233 of the Civil Code, is that every obligation arises from an agreement or by operation of law. Book III of the Civil Code does not define a contractual obligation, but according to legal scholarship, the accepted definition is that a contractual obligation is a relationship between two or more persons in the realm of property, in which one party is entitled to performance and the other party is obligated to fulfill that performance.

Contract law is a complex field, and its application requires great care. This is closely related to the wording of Article 1338 of the Civil Code, which states: "All contracts validly entered into are binding as law upon the parties who entered into them."

Legal consequences are the results of an action taken to achieve an outcome intended by the actor and governed by law. The action taken is a legal act—that is, an action taken to achieve an outcome intended by law.

The Mataram Mall BOT case demonstrates that even though the agreement involves the government, the resulting legal relationship remains subject to civil law. A breach of contract by the private party gives the government the right to demand fulfillment of obligations, compensation, and even termination of the contract.

Consequently, the resolution of disputes arising from the Build-Operate-Transfer (BOT) agreement for the Mataram Mall building has now been taken over by the Mataram City Government, which was previously managed by the second party, PT Pacific Cilinaya Fantasi, because the Build-Operate-Transfer (BOT) agreement between the Mataram City Government and PT Pacific Cilinaya Fantasi expired on July 11, 2026.

Although the handover was not carried out through a specific ceremony, the Mataram Mall building has, in fact, been returned to and is now under the control of the Mataram City Government. With the expiration of the agreement, the previous Build-Operate-Transfer (BOT) partnership can no longer continue because its term has ended and it is no longer relevant. Therefore, if PT Pacific Cilinaya Fantasi wishes to resume a partnership with the Mataram City Government, it must do so through a new cooperation contract in accordance with the provisions for the management of regional assets; one option is to use the HGB (Hak Guna Bangunan) scheme.

However, to resume its role as the operator, PT Pacific Cilinaya Fantasi must still follow the applicable procedures and mechanisms, namely through a "beauty contest"—a selection process for a partnership conducted by the Mataram City Government.

Furthermore, regarding the determination of the royalty rate under the new partnership, the local government will commission an appraisal of the assets by an independent appraiser. The results of this appraisal will serve as the basis for determining both the royalty rate and the form of the partnership to be agreed upon by the parties.

CONCLUSIONS AND RECOMMENDATIONS

This study concludes that the legal framework governing Build-Operate-Transfer (BOT) agreements in Indonesia is based on the general principles of contract law contained in Book III of the Indonesian Civil Code, while also being supported by various sectoral regulations concerning the management of state and regional assets.

The existence of Government Regulations, Presidential Regulations, and Ministerial Regulations demonstrates that BOT agreements have evolved into a strategic legal instrument for facilitating infrastructure development and optimizing government-owned assets, particularly in situations where public financial resources are limited.

The implementation of the BOT agreement concerning the Mataram Mall project illustrates that BOT arrangements involve both private and public legal dimensions. Although the agreement is fundamentally contractual in nature and governed by civil law principles, the involvement of government institutions introduces elements of public law, especially in relation to asset management, accountability, and public interest considerations.

The study further reveals that legal certainty, transparency, and accountability are essential principles for ensuring the successful implementation of BOT agreements.

In the case of the BOT agreement between the Mataram City Government and PT Pacifik Cilinaya Fantacy, the expiration of the contractual period resulted in the transfer of management rights and control of the Mataram Mall building back to the local government.

This case demonstrates that BOT agreements remain legally binding throughout their duration and that disputes arising from their implementation should be resolved in accordance with applicable contract law principles and relevant regulations governing government asset management. Therefore, strengthening the legal framework and improving governance mechanisms are necessary to ensure that future BOT agreements provide optimal legal protection, economic benefits, and public value.

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