LEGAL VIEWPONT

From my book: Banking & Corporate Business Laws

BOOT CONTRACTS

The role of the private sector, in all parts of the world, is now overwhelmingly increasing in accelerating the growth and development of societies. To achieve this respective strategy, many countries are directly encouraging the private sector involvement and are making strong efforts to attract new money from this important sector through certain new project financing techniques.

It has, also, been widely recognized that the private sector involvement can bring with it the knowhow to implement projects in a shorter time, the expectation of more efficient operation, better management and higher technical ability or capability and, in some cases, introduction of an element of fair competition into monopolistic structures.

The search for new way to finance and promote infrastructure projects led to the introduction of new techniques. This financing technique, technically known as "project finance" was originally perfected for major private sector projects mainly in the area of oil and gas exploration and extraction. In addition, to other mega projects in different fields.

Project finance techniques are now applied across the world to numerous privately promoted infrastructure projects including power stations, gas pipelines, waste-disposal plants, waste-to-energy plants, bridges, tunnels, telecommunication facilities, roads, railway networks, hospitals and schools, government accommodation, tourist facilities.

Big investment banks and the financial markets have become increasingly sophisticated in "engineering" the financing packages to finance almost any type of reasonably predictable revenue stream.

Over last years, it has been noticed that, certain major international contracting firms, private individual entrepreneurs and a number of countries have begun to promote infrastructure projects under what is known in law as "B.O.O.T contracts". Under this type of contracts new projects are to be financed in a limited-resource basis, built and operated under a concession from the state or a similar public body as a private venture. At the end of the concession the project is to be transferred back to the state or the public body according to the terms of the contract.

B.O.O.T contract is basically a method wherein the private sector is involved in large scale infrastructure investments by granting a concession from the state to build, finance, own and operate a facility and after the time specified in the concession period is obliged to hand it back to the state according to the terms of the contract. Drafting B.O.O.T contracts requires certain skills and know-how, at this juncture; we need to highlight some of the major components of B.O.O.T contracts:

The letter (B) in BOOT stands for the word 'build", this is because at the concession will grant the promoter the right to design, construct, build and finance the project. Here a construction contract will be required between the promoter and a contractor. This contract is often among the most difficult to negotiate in a BOOT project because of the conflict that increasingly arises between the promoter, the contractor responsible for building the facility and those financing its construction.

Banks and other providers of funds will want to be sure that the commercial terms of the construction contract are reasonable and that the construction risk is placed as far as possible on the contractors. The contractor undertakes responsibility for constructing the asset and is expected to build the project on time, within budget and according to a clear specification and to warrant that

the asset will perform its design function. Typically this work is done by way of a lump-sum turnkey contract. Special drafting skill is required..

The letter (O) in BOOT stands for the word “own”, normally in this case the concession from the state provides for the concessionaire to own, or at least possess, the assets that are to be built and to operate them for a period of time. The concession agreement between the state and the concessionaire will define the extent to which ownership, and its associated attributes of possession and control, of the assets lies with the concessionaire.

The second letter (O) in BOOT stands for the word “operate”, here the operator is to assume full responsibility for maintaining the facility’s assets and operating them on a basis that maximizes profit or minimizes cost on behalf of the concessionaire and, like the contractor undertaking construction of the project, the operator may provide funds to finance construction and to be a shareholder in the project company.

The operator is often an independent company appointed under an arms-length agreement. However, in some cases the promoter operates the facility directly through the promoter company.

The letter (T) in BOOT stands for the word “transfer”, this transfer refers to a change in ownership of the assets which occurs at the end of the concession period, when the concession assets revert to the government grantor. Transfer may be at book value or no value and may occur earlier in the event of failure of the concessionaire.

B.O.O.T contracts are widely used as a new way to find suitable project financing through the involvement of the private sector. This new venture, no doubt, opens the door for the private sector to shoulder an active and more responsibility towards development in their countries.

The private sector and particularly business entities, companies and banks, everywhere, are urged to take the advantage of benefiting from B.O.O.T contracts particularly in performing and financing new development projects

designed by the state / Governments and public authorities for the welfare of the society and all related and concerned entities.

From legal point of view, such contracts could be complicated as different parties may look from different eyes and brains. Special drafting techniques and know-how are required, moreover, it should be a team work of all technical parties involved in the contract, professional contribution is immanent all through.

By all means, it is a new venture that should be taken positively with open minds and joined hands, to achieve the interest of all stockholders and the society.. It would be important to note that, there are other types, of Public & Private Partnership (PPP) contracts, which will be highlighted later..

Dr. AbdelGadir Warsama Ghalib

Founder & Principal Legal Counsel

C \ O Dr. AbdelGadir Warsama Consultancy

Email: awarsama@warsamalc.com