BOT. a way to encourage the private sector in the financing of infrastructure

On 29th March 2016, the National Assembly passed the Build Operate Transfer Projects Act. With BOT, the private sector designs, finances, constructs and operates the facility and eventually, after a specified period, known as the 'concession period', the ownership is transferred to the government.

What is BOT? Build Operate Transfer ("BOT") is a developing technique for infrastructure projects by using private funding. Such infrastructure projects include a wide array of public facilities with the main function to serve public needs, to provide social services and promote economic activity in the private sector. The most common examples of facilities are roads, bridges, water and sewer systems, airports, ports and public buildings. A very recent project under the BOT model is the 357 km railway project which has been announced by the Indian railway ministry this year. In Mauritius, the BOT approach can be used to develop smart cities and toll-road projects.

BOT, a form of privatisation, BOT is based on the principle of privatisation. Privatisation can be divided into primarily three areas: the selling of governmental holdings (e.g., British Telecom in the U.K.), the subcontracting of government services to private undertakers (e.g., US Postal Service in the U.S.), and the subcontracting of financing and developing public facilities (e.g., Channel Tunnel). BOT belongs to the last category. BOT is just one of the many different project delivery schemes within the context of privatisation or public-private partnerships. The value. A comprehensive definition of a "BOT Project" is given in the Build Operate Transfer Projects Act ("Act").

Why BOT? In recent years, a growing trend emerged among governments in many countries to solicit investments for public projects from the private sector. The main reasons for this trend are a shortage of public funds and a hands-off approach of government agencies. When introducing the Build Operate Transfer Projects Bill in the National Assembly, the Hon. Prime Minister, who is also the Minister responsible for the subject of finance, stated that the aim of the BOT law is to judiciously manage public expenditure and propose new avenues to encourage the active participation of the private sector in the financing of our infrastructural needs.

PPP vs BOT. Under a Public-Private Partnership (PPP) approach, cooperation between government and private parties is achieved where the government works "together" with the private sector to provide for public requirements. The Mauritius Road Decongestion PPP Programme (2013) is an example of cooperation between the public and private sectors. The differences between privatisation and PPP are however difficult to detect, depending on the level of government participation.

Private financing is key. Private financing is a key characteristic of BOT. In BOT, the government subcontracts the entire development process, including the associated risks, to the private party. One of these risks is financing, which must be obtained by the concessionaire, who is ultimately responsible for all aspects of the project. A prerequisite for private financing is a need for the facility to be developed. If there is no obvious requirement for the facility, private parties will refuse to participate and provide financial support. Only after market analysis justifies a need will private parties be willing to financially participate as well as become involved in developing the facility.

Selection. One of the stages of the BOT project is the selection process. The selection process depends on who initiates the project. In a public selection process, where the initiative is coming from the public sector (government), a request for qualification (RQ) is distributed. After receiving responses to the RQ, the government selects a few bidders to submit proposals (Request for Proposals - RFP) and from these, a preferred bidder is selected. During this process, the bidders will group interested parties as required for the efficient and adequate execution of the project. Alternatively, in a speculative selection process, the private sector initiates the project and contacts the appropriate government agency for approval. The project is granted after proper negotiations. The Act does not however provide for a speculative selection process.

Under the Act, the selection process is done by the Central Procurement Board (CPB), which is vested with the pow-
private sector cultural needs

...ers to make recommendations to the contracting authority for entering into negotiations and eventually entering into an agreement with a private party (i.e., the preferred bidder).

Transparency. An interesting feature of the Act is the obligation imposed on the contracting authority to lay a copy of the BOT agreement it had entered into, as soon as practicable, before the National Assembly. This will ensure transparency on the terms and conditions of the BOT agreement.

Unlike the Public Procurement Act and arguably the Public-Private Partnership Act, it is a moot point as regards the extent to which the Act ensures transparency of the BOT procurement proceedings. The Act does not provide any avenue for a bidder who is dissatisfied with the decision of the CPB. Under the Public Procurement Act, a dissatisfied bidder can challenge the decision of the public body and if the bidder is still dissatisfied, he can apply for the review of the decision before the Independent Review Panel. Under the Public-Private Partnership Act, it is a moot point whether a review lies before the Independent Review Panel. This grey area can however satisfactorily be dealt with in the RIP documentation. In the absence of such provision, it would be left to a dissatisfied bidder to apply for the judicial review of the recommendation of the CPB and, if it is not too late, to apply for an injunctive relief until the determination of the review. However, the compelling public interest against the granting of an injunctive order, which will have for effect to jeopardise the implementation of a major project of significant public importance, would be a hurdle for an applicant for injunctive relief.

G2G projects. In the event that there is an agreement or arrangement between Mauritius and a foreign State for a BOT project which allows Mauritius to benefit from the expertise and development experience of that foreign State in a particular field, it will be incumbent on the contracting ministry to perform due diligence on the BOT proposal to ensure that the procurement constitutes value for money. The Ministry must then submit a report on the due diligence, together with supporting documents and its recommendations, to a high-powered committee through the Prime Minister. After examination of the documents and recommendations, the committee will forward its report to the Cabinet and thereafter notify the Ministry of its recommendations to enable it to take a decision on the procurement.

The above serves as an introduction to the complex subject of BOT. Financial contracts, construction contracts and operation contracts are but a few contracts which will have to address complex issues such as financial guarantees, construction process, construction completion time and method of operation. The BOT Projects Unit, which is established under the Act, will need proper training in these areas and, if necessary, the Unit may have to enlist the services of experts to assist it.


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“UNDER THE PUBLIC PROCUREMENT ACT,