

LEGAL ASPECTS OF PPP CONTRACTS IN THE PROVISION OF DRINKING WATER IN GRESIK DISTRICT

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Abstract

The availability of drinking water is an essential legal issue in life. However, the government budget is limited in funding the infrastructure sector. Government policy on drinking water supply in the capital Gresik through the Public-private partnership (PPP) program. The purpose of this study is to provide background information and considerations for the Government to improve the basic and complete legal rules for PPP contracts for drinking water infrastructure in the capital. Gresik. This study uses empirical legal research methods, namely legal research related to the adoption or implementation of legal norms in force for each specific legal event that occurs in society. The results of this study include (1) legal aspects of the implementation of the right to provide drinking water to residents of the Gresik Regency; (2) Due to budget constraints, and the Government can establish a public-private partnership in the field of Clean Water Supply; (3) The Government can provide regulatory guarantees for drinking water infrastructure projects through the Gresik District PPP program. The results of this study provide recommendations to the Government to ensure better implementation of the Gresik Regency's right to public drinking water.

Keywords: *drinking water; public-private partnership; build-operate-transfer; the legal aspect of the contract*

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Introduction

Water is an essential aspect of human life and other living things. Water is necessary for human life with many different needs, especially clean water for households, industry, and public places. The available freshwater resource is only 2.7% of the open water on earth, but only 1% of the available freshwater (in lakes, rivers and groundwater) is accessible. (Beard & Mitlin, 2021) If this valuable asset is reduced, even depleted, inevitably, people will not be able to continue their lives. (Dinka, 2018) The increasing demand for clean water has encouraged people to provide quality, quantity, and continuity standards. As the primary resource needed to meet the needs of many people, water management is controlled by the State as provided for in Subsection (3) Article 33 of the 1945 Constitution (Song & Soliman, 2019).

In the United Nations Environment Programme's (UNEP) report on environment and security (Centre & Group, 2006) "Understanding Environment, Conflict and Cooperation, UNEP executive director Klaus Toepfer states: Maintaining environmental quality and improving degraded environments are preconditions for achieving sustainable development and meeting the Millennium Development Goals. They are also crucially important for enhancing human well-being, including security. The United Nations Environment Programme has therefore been interested in promoting understanding of the relationship between environment and peace.

As one of the countries that have ratified the Economic, Social, and Cultural Covenant and approved the United Nations (UN) Resolution on the Right to Water, the Indonesian Government should ensure that every Indonesian citizen can access clean water and sanitation. Therefore in fulfilling the right to water in General Comment No. 15 (2002), it is stated that the State has obligations in fulfilling the request to water, namely: (RIGHTS, 2002) (1) To ensure access to a minimum amount of water, which is adequate and safe for personal and domestic use to prevent disease; (2) To ensure that the right to access to water and irrigation facilities and services is not discriminatory, especially to disadvantaged or marginalized groups; (3) To ensure physical access to irrigation facilities and services that provide adequate, safe, and routine water; which has a sufficient number of water outlets to avoid long waiting times; and which is quite close to the household; (4) To ensure that personal safety is not compromised when performing physical access to water; to ensure fair distribution of all irrigation facilities and services; and (4) To establish and implement a national irrigation strategy and an action plan aimed at the entire population. These strategies and action plans should be well planned and reviewed periodically based on a participatory and transparent process. They should include methods, such as rights to water indicators and benchmarks, progress can be closely monitored.

The State's obligation towards human rights is that the State must respect, protect and implement them. One form of State protection of human rights is the existence of human rights provisions, particularly the Human Rights Law No. 39 of 1999. However, the water right is not provided exclusively in the law. However, the right to use water is part of realizing and protecting the right to life. Water is the essential factor for learning and security of the right to life, an absolute and indisputable right. This was also confirmed in Article 28A of the 195 Constitution: "Everyone has the right to live and to protect his own life". Then, Article 28H, paragraph (1) stipulates: "Everyone has the right to develop physically and mentally and to have a good and healthy living environment.

In July 2020, the IIR signed an agreement to provide the Senior Development Term Loan Fund (SDTLF or SPAM) for up to IDR 20 billion or 70% of the total project cost. The main objective of the 1000 litres per second water supply system project is to improve the supply of drinking water to the communities and industry of the Gresik Regency. The local Government aims that this project will increase the coverage of the water service sector up to 60%. It is expected that the project will be built in the

Bungah, Manyar, and Gresik sub-districts of the Gresik Regency. Raw water will be extracted from the Sembayat Dam or 'Bendung Gerak Sembayat' (BGS) in the Bengawan Solo River, approved by the competent authority through letter HK.02.03Mn from the Ministry of Public Works and Housing (PUPR).) 92 dated 15 September 2017 related to the water supply allocation project for the drinking water system at the BGS dam. The system will supply bulk water to PDAM Giri Tirta, distributed to industrial zones and approximately 90,000 residential connections in 11 Gresik Regency's 18 sub-districts. From a social and environmental perspective, this project is classified as a Category B project, where impacts can be avoided and minimized by planning and implementing appropriate mitigation measures during the construction phase. Build and operate.

The development of SPAM infrastructure is necessary to realize the right to use safe, clean water for the community. Still, the Government has not played an optimal role in providing and building SPAM infrastructure due to limited capital in the development process. Three reasons underpin public-private partnerships.⁹ First, the quantity and quality of available infrastructure are insufficient to support rapid development. Second, the financial capacity of the State to build and repair infrastructure is minimal. Third, unlike the Government, the private sector has better skills and professionalism to build infrastructure efficiently and effectively. Cooperation between regional governments and third parties is possible. SPAM infrastructure has been ensured in the Regional Government Act No. 23 of 2011 in section 363, subsection (1) and subsection (2) as follows: Public services as well as the common good (a) of the district's other areas; (b) third parties; and (c) regional or governmental organizations abroad following applicable laws and regulations.

The type of infrastructure that can cooperate with regional governments and business organizations is outlined in Article 5, paragraph (2) of Presidential Regulation No. 38 of 2015 on cooperation between government and organizations business in the provision of infrastructure, including the letter d of drinking water supply infrastructure. (*Ppp_Book_2015.Pdf*, 2015) Presidential Regulation No. 38 of 2015 Relating to Government- Business Cooperation in Infrastructure Delivery (starting now referred to as PPP President Regulation of Republic of Indonesia) is a regulation governing cooperation between Government and businesses in providing the infrastructure to be able to carry out this cooperation on a large scale, quickly, efficiently, effectively, comprehensively and sustainably. Private sector participation in the provision of drinking water service infrastructure can be accomplished through a partnership between BUMD or PDAM with the private sector. This cooperation can be realized through two programs, and the first is the PPP program with a Business-to-Business partnership.

Infrastructure development necessary a cooperation model in which, on the one hand, infrastructure is ensured for the benefit of the State and especially of the community. (Abbott & Faude, 2021); (Dobbin & Fencl, 2021); (Wu, Cao, Tong, Finkelstein, & Hoek, 2021) On the one hand, private gifts are like investors on the other

hand. Therefore, it is only natural that the private sector can benefit from its involvement. (Grupper, Schreiber, & Sorice, 2021) (Pukhova, Merkulina, & Bashkov, 2021) The implementation of private participation in infrastructure development will involve different parties, including Government, investors, builders, financial institutions, suppliers, operators, executives, and other parties. (Pukhova et al., 2021) The private sector that cooperates well in the PPP program should form a particular body to manage SPAM. (Chen, 2021) The private sector can come from within the country or from abroad. (Greer, Lee, Fencel, & Sneegas, 2021) Still, if the private sector comes from abroad, it must cooperate with the domestic private sector, and the full ownership is only 95% in a specially established body. Public-private partnerships (P3s) offer an alternative for constructing public infrastructure by drawing upon private sector finance and expertise. (Huque, 2020) Public-private partnerships (PPPs) have grown in popularity to leverage private sector actors in the production of government services. With the global challenge of water insecurity, PPPs are becoming more common for large scale water infrastructure projects. (Greer et al., 2021) Public-private partnership (PPP), an innovative infrastructure investment model, has been widely applied in China and has become an essential policy tool to promote sustainable economic development (Chen, 2021); (Greer et al., 2021).

Recent studies on human water security reveal globally significant threats from population and economic growth, mismanaged water use, climate extremes and a general failure to protect landscapes and inland waterways effectively. (Jokar, Aminnejad, & Lork, 2021); (Vörösmarty et al., 2021) Implementing the Urban Drinking Water Supply Project in the form of the Gresik District P3s program may have potential risks of failure, even failure. (Beard & Mitlin, 2021) (Dinka, 2018) (McCall, Wu, Miyani, & Xagorarakis, 2020), (Damkjaer, 2020) Usually, in the implementation of P3s projects, there are obstacles in terms of financing mechanisms and land acquisition. Similarly, disputes arising during the P3s PP infrastructure project implementation are not easy to avoid.

Based on the previous, the issues of interest and discussion in this study are: 1) how is the policy to ensure the right to clean water suitable for the people of Gresik? 2) How to apply the public-private partnership mechanism in domestic water supply (urban water supply service) under the BOT model; 3) How is the protection of PPP investments in the drinking water supply of Gresik Regency secured?.

Method

This study uses the experimental legal research method. Empirical legal research is legal research concerned with the application or implementation of normative legal norms to some legal events occurring in society. Empirical legal research is fieldwork (primary data research) that examines legal regulations combined with data and living behaviour in the community. The study used several data and information collection approaches to analyze and present. The collection of data and information is done by performing library research, both from the various data and information "published" by

the Government; articles by experts in the form of books, journals, independent reports, newsletters; experience of practitioners and decision-makers; national and international policies and regulations; and others. The analysis carried out in this scientific work focuses on norms related to law and policy, so it is quantitative. In contrast, the presentation is descriptive and exploratory.

Results and Discussion

1. Regulations On The Fulfilment Of The Right To Clean Water

The legal basis for the implementation of the policy to ensure the right to drinking water for citizens of the Gresik government includes (1) Law No. July 200 on water resources; (2) Law on Irrigation No. 11 of 197 ; (3) Law No. 23 of 201 regarding regional Government; (4) Investment Law No. 25 2007. The Investment Law is considered a law that helps increase investment competitiveness in Indonesia. Various forms of investment incentives are offered, including, but not limited to: equal treatment between foreign and local investors; ensuring that there will be no nationalization and expropriation of foreign property rights; open areas of activity for foreign investment activities; does not require divestment; more remarkable ability to own foreign shares; create more favourable conditions for foreigners to work in Indonesia; and others; (5) Law No. 7 of 1983 was last revised by Law No. 39 of 2008 on income tax. Many tax incentives have been implemented to encourage investment activities such as tax exemption, fast depreciation, tax benefits, etc. Tax incentives change from time to time following the development of law in the tax field. The interests of investors that must be taken into account in developing infrastructure investments are legal certainty and consistency of implementation in the tax area; (6) Customs Law No. 10 1995. Several customs facilities are provided to investors, including, but not limited to, exemptions. Import duties on goods, equipment, speeding up customs services, priority, etc. Such facilities may be provided, for example, capital goods, if they have been included in the "master list" of capital goods approved by BKPM; (7) Law No. 5 of 1960 deals with agricultural matters. The Agricultural Affairs Act, No. 5 of 1960, regulates several land rights such as property rights, commercial use rights, building use rights, usage rights, etc. However, as far as property rights are concerned, they cannot be granted to foreign natural or juridical persons. One form of incentive for investment activities in terms of land rights is the effort to extend the period of land rights such as cultivation rights, building rights, and use rights, where these rights can be used as mortgage rights; (8) Presidential Instruction No. 3 of 2006 regarding the Investment Climate Improvement Policy Package. This Presidential Instruction is one of the efforts to improve the investment climate to increase Indonesia's economic growth; (9) Presidential Regulation No. 67 of 2005 concerning Cooperation between Government and Business Entities in the Provision of Infrastructure This Presidential Regulation provides a legal basis for cooperation between the Government and Business Entities in the Provision of Infrastructure, including transportation

infrastructure; (10) Presidential Regulation No. 36 of 2005 as amended by Presidential Regulation No. 65 of 2005 concerning Land Acquisition for Development in the Public Interest. In general, the provisions in these two Presidential Regulations are intended to assist the land acquisition process for the public interest, including the welfare of investment in drinking water supply infrastructure. The regulation will provide better legal certainty for investors who participate in the development of drinking water supply infrastructure, especially in terms of the time and cost of land acquisition that must be incurred. This regulation is a form of investment guarantee and protection; (11) Government Regulation Number 122 of 2015 concerning Drinking Water Supply System; and (12) Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities in Infrastructure Provision.

2. Public-Private Partnership

Availability of adequate and sustainable infrastructure is essential. The Government encourages the participation of commercial organizations in the provision of infrastructure. (Owusu-Manu, Kukah, Boateng, Asumadu, & Edwards, 2020); Vladimirovna et al., 2021) Government-business cooperation in infrastructure provision is ensured through the government-business partnership program (P3s). (*Ppp_Book_2015.Pdf*, 2015) P3s regulations for public infrastructure provision as set out in Presidential Regulation No. 38 2015. Article 1 clause 6 states that P3s is a partnership between government and actors business in providing infrastructure for the public good by referring to specifications that have been approved by the Minister / Head of Organization / Head of Region / State Enterprise / Regional Enterprise previously determined. Using part or all of the resources of the Commercial Entity, taking into account risk sharing between the parties.

Article 3 states that P3s are implemented with the aim of: (*Ppp_Book_2015.Pdf*, 2015) (a) To sustainably finance the provision of infrastructure through private financing; (b) Achieve quality, efficient, targeted and timely delivery of infrastructure; (c) Create an investment climate that encourages the participation of business actors in the provision of infrastructure based on sound business principles; (d) Encourage the use of the user-paying principle for services received or, in some cases, taking into account the User's ability to pay; and (e) Provide certainty of return on investment of business entities in providing infrastructure through a Government recurring payment mechanism to business entities.

Article states that PPPs are carried out based on the following principles: (*Ppp_Book_2015.Pdf*, 2015) (a) Partnership, namely cooperation between the government and business entities is carried out based on the provisions of laws and regulations and requirements that take into account the needs of both parties; (b) Benefit, namely Infrastructure Provision carried out by the government and Business Entities to provide social and economic benefits for the community; (c) Competing, namely the procurement of Business Entity cooperation partners is carried out

through fair, open and transparent selection stages, and takes into account the principles of honest business competition; (d) Risk control and management, namely cooperation in Infrastructure Provision carried out by risk assessment, development of management strategies, and mitigation of risks; (e) Effective, namely cooperation in the provision of infrastructure is able to accelerate growth as well as improve the quality of infrastructure management and maintenance services; and (f) Efficient, namely cooperation in the provision of infrastructure to meet funding needs in a sustainable manner in infrastructure provision through the support of private funds.

Article 5 paragraph (1) of the infrastructure that can be cooperated based on this Presidential Regulation is economical and social infrastructure. Whereas in section (2), the types of economic infrastructure and social infrastructure as referred to in paragraph (1) include, among others, drinking water infrastructure; in addition to transportation infrastructure; road infrastructure; water resources and irrigation infrastructure; etc. (Yan, Chong, Zhou, & Li, 2019); (Zeng & Chen, 2019), (Chen, 2021).

3. Water Supply Infrastructure Development with build-operate-transfer pattern

The appropriate model for infrastructure investment in the transport sector is the Build, Operate and Transfer (BOT) model. (Cao, Liu, Koh, & Smith, 2020); (Huo, Chen, Zhang, & Li, 2019) This model is considered a fit primarily because of the investment risk during construction and operates with the private sector. At the same time, the Government will acquire these infrastructures at the end of the concession period. Permission. Contracts associated with the development of drinking water infrastructure under the BOT model include concession contracts, construction contracts; shareholder agreements; syndicated loan agreements; operating agreements; direct debit agreements, supply agreements, etc.

It is generally understood that the term BOT is used for all types of "concession agreements". However, there are many variations of other terms used, including: (Zhang, Hu, Li, & Pradhan, 2018) FBOOT (Finance, Build, Own, Operate, Transfer); BOO (Build, Own, Operate); BOL (Build, Operate, Lease); DBOM (Design, Build, Operate, Maintain); DBOT (Design, Build, Operate, Maintain); BOD (Build, rate, Deliver); BOOST (Build, Own, Operate, Subsidize, Transfer); BRT (Build, Rent, Transfer); BTO (Build, Transfer, Operate); DBFM (Design, Build, Finance, Maintain); ROT (Rehabilitate, Operate, Transfer); and BOT (Build, Operate, Transfer). All of the above project forms are other alternatives to BOT, although there are also specific ones, in general, the same strategy is used.

Regarding the boundaries of the BOT project itself, it is formulated as:(Yan et al., 2019) A project based on the granting of a concession by the Principal (the Government) to the Promoter (Concessionaire) where the Promoter is responsible for all activities that include construction, financing, Operation, maintenance of a particular project/facility during a concession period before finally transferring all facilities to the Principal as a full operational facility. (Zhang et al., 2018) During concession period, the Promoter owns and operates the facilities and collect

payments to refund costs and investments that have been incurred, including maintenance costs and operations and a margin of profit thereof. However, pure general provision has given way to private participation in infrastructure. Several factors have prompted many countries to use private participation as an essential tool to deliver infrastructure.

The reasons for private participation in infrastructure included: Investment needs exceed the capacity of national and governmental institutions; Performance of the infrastructure sector, in general, does not meet international standards; The technical and managerial resources available to the Government are insufficient; Technological innovations; Proven effects related to the success of privatization and decoupling efforts, e.g., in the UK) and the ability to use regulation to protect the public interest (e.g., regulation (reference government regulations and incentives used in Spain) new approaches to upgrading viable infrastructure); and Limited infrastructure coverage and quality in some countries have hindered their efforts to achieve international competitiveness.

Before defining and for the successful development and operation of the facility in infrastructure/projects using BOT, conceptual elements, such as facility type, social benefits, government support, qualifications and experience of the Promoter itself, the location of the project/facility; the amount of equity to be used, the guarantee of raw material supply, guaranteed purchases for products and services, concession time figures, components of each package related to construction, operations, maintenance, financing and acquisition drivers receipts.

For the Promoter's interests and other related parties such as an investor, Lender, and User, near location/facility, commercially is essential. To make infrastructure projects with the BOT pattern successful, then there are several factors to consider, namely market conditions, regulatory support, financing conditions through the capital market, the match between the requirements for the project interferes with the a worthy investment, ability to repay debts and investments has been issued, sufficient return on investment, rate of acceptance from the upper society the existence of the project/facility.

Other parties commonly involved in the development and Operation of the infrastructure project under the BOT model are: both the demand for raw materials and the "consumables", which says are "Suppliers", Parties providing loans for the implementation of the project, referred to as "Lenders", investing party as a shareholder stakeholder in the project, namely the "Investor", and finally the party who becomes the User of the facility is called the "user". The partnership between development project participants and operating BOT infrastructure projects, between the Main with the Promoter and between crucial components with other parties is generally bound by an agreement (contract). Type of contract governing partnership and Legal relationship between the parties has the following forms concession agreement, direct debit contract, operation contract, construction contract, shareholder agreement, lending contract, supply contract, and others.

Other parties are usually involved in developing and tendering the infrastructure project under the BOT scheme implemented through the following phases (Cao et al., 2020); Yan et al., 2019). The first phase is (1) initially the Client prepares the strategic concept of the project which will be presented used on the results of the feasibility study justification (feasibility study); (2) In addition the Principal prepares an invitation to pre-qualify for potential promoters who are deemed eligible; (3) The Principal then prepares a draft structure of the concession agreement (Structured Concession Agreement) which consists of Legal Agreement containing general and specific conditions as well as project requirements consisting of packages construction funding and receipts; (4) Invitations to tender are then sent to candidates to Organizers who are deemed to meet these requirements. The Second Stage is (1) The first step a potential promoter takes after the accepts the request for bids is to perform a commercial feasibility assessment of the project by evaluating conditions set the Principal forthy in RFP (Request for Proposal) and Structured Concession"; (2) The assessment is carried out according to the rapid self-assessment method (Quick Assessment Method) or detailed (Detailed Assessment Method); (3) If the evaluation indicates that the project is indeed viable the potential Proponent should also identify other contracts (secondary contracts) as well as considering this would how it affects the project; (4) The Potential Promoter then prepares a bidding document in which another must be submitted immediately to the Principal. Third Stage is (1) During this phase, the Principal assesses assets the adequacy between the bids submitted by the Potential Promoter with parameters of compliance with the requirements established as determined by the Principal; (2) Based on the evaluation results, use the highest cumulative value determined by the winning bidder.

In general, the construction and Operation of infrastructure projects work under the BOT model can be divided into packages each package: (Fu et al., 2020) a) Construction and installation adding package the construction package includes all activities related to construction facilities, including Eligibility, Site survey, Design and supervision, Purchase acquisition of land, Acquisition of tools equipment, Building, Mechanical and electrical installation, Operation; b) Operational Package ("Executive Package") contain all activities related to the Operation and maintenance of the installation of which include Operation, Maintenance, and Training, Consumables, Raw materials, Energy, and Repair; c) Funding package including of Data requirements, Tariff rate, Improved revenue streams, and Acceptance of existing facilities.

In implementing cooperation, especially in the drinking water supply area, it is necessary to understand the existing forms of collaboration with all kinds of consequences. The current conditions of cooperation can be grouped into five: (de Albornoz, Soliño, Galera, & Álvarez, 2021) (1) Service contract is a form of collaboration in providing drinking water with a private partner. The partner The private sector is responsible for providing a service for a type of service within a specific time frame. This service contract is the simplest form of cooperation; (2) a

Management Contract is a cooperation between the Client and a private partner. The intimate partner is responsible for providing management services for all or part of the infrastructure and infrastructure systems. Infrastructure within a specified time frame, including Operation and maintenance of facilities and provision of services to the community, and working capital; (3) Lease contract is a form of cooperation between a project owner and a private partner. The private partner sub-leases to the project owner an infrastructure and particular works/infrastructure within a specific time to be operated and maintained. In this case, the private partner will handle part and or all of the drinking water supply system to provide professional service to the community for a certain period. The private sector includes working capital for Operation and maintenance, including replacing certain parts of the drinking water supply system; (4) The Build Contract, which is a form of cooperation between the Client and private partners, has many variations, namely: (Jokar et al., 2021) Build Operate and Transfer (BOT), Build and Transfer (BT), Build Build Transfer and Operate, Build Lease and Transfer (BTO) (5) and Build Own and Operate (BOO), and Concession contract is a form of cooperation between the Customer and a private partner. The private partner as a franchisee will build and renovate some infrastructure. Infrastructure and installation/infrastructure, including funding, then continues with management, Operation and maintenance, and stakeholder billing accounts. Customers and their managers for a while.

4. Types of contracts for investment and development of water supply infrastructure

The construction and Operation of infrastructure projects/works under the BOT model have parties' participation in the working / related relationship. The legal system between the parties is specified in some contracts. A brief description of the types of contracts involved include, among others: (Debaere & Kapral, 2021) (Zeng & Chen, 2019) & (Chen, 2021).

- a. *Franchise agreement.* A franchise agreement is a contract between a principal and a promoter. This contract is a document that governs all aspects of the partnership and legal relationship between the Customer and the developer, including the allocation of risks associated with construction, Operation, maintenance, funding and acceptance packages and franchise requirements for a facility/intended. The main provisions of the Concession Agreement are: The duration of the concession; Scope of the project; A clear picture of the nature of the submission; Limitations of government support; Tariff or tariff structure; governing law and dispute settlement mechanism; consequences of misappropriation or breach of the agreement; the right to transfer the rights and obligations of the Promoter to the Lender; title deed during the concession period and at the end of the term; and financial conditions.
- b. *Construction Contracts.* Developers and Builders Contracts typically come from a construction services company, joint venture, or consortium of construction

companies. Sometimes the builder also takes on the role of promoting some BOT projects.

- c. *Supply Contract*. A Supply Contract is a contract between a Promoter and a Supplier. The supplier is usually BUMN, a private or legal entity that is granted exclusive rights and supplies raw materials to the facility/project for its operation duration. The main provisions of the supply contract generally include the primary conditions; Supply conditions; Quantitative; Quality; Pricing and price adjustments; Inspection, testing and sampling; transport; and Default and Termination.
- d. *Shareholder agreement*. Investors provide capital or goods and are part of a corporate structure that includes vendors, suppliers, builders, and operators; including Shareholders are made up of financial institutions and individuals. Investors provide equity to finance the installation, and this amount is usually determined by the debt/equity ratio required/set by the Lender or based on regulations.
- e. *Operating Contracts*. Operators are usually appointed between companies with specific expertise and experience in using a facility/project or a company specifically established to perform Operation and maintenance of a particular facility/project. The main terms of the operating contract, including the scope of Operation, maintenance, training; Operation time; Mode of Operation; The designation; Costs and resources; participation level; Licenses, authorizations and permits; Performance, liability and insurance; Method of collection and exchange rate; Bonuses and fines; Majeure; Dispute settlement mechanisms; One-time, cost-plus payment mechanism and unit rate payment; Termination of the agreement; and training schedule.
- f. *Loan Agreement*. The Loan Agreement is the basis of an engagement between the Lender and the Promoter. Lenders are generally commercial banks, investment banks that provide loans in debt to finance a particular project facility. The Lender will take on the role of coordinating a consortium of lenders or a syndicated loan.
- g. *Offtake Contract*. A SalesOfftake Contract is usually carried out between the User and the Promoter in projects such as power plants. A user is a legal entity or an individual that uses or purchases products from an installation project. An offtake contract is not required in projects such as potable water supply, where revenue receipts are derived from direct community payments for facility use. Key terms of a direct debit contract typically include limitations; Buyers status; time for building; Price; fuel reserves; Bonuses and fines; Terms of payment; Applicable law; 52 Delivery terms; Government support; Majeure; Dispute settlement mechanism.

5. Legal analysis of risk aspects in dispute settlement and assurance for PPP contracts in the supply of clean water supply infrastructure under the BOT model

Infrastructure projects under the BOT model are often extensive in scale. Therefore, the scale of risk involved can also be larger. Consequently, it is necessary to have the capacity to identify and anticipate these risks, including finding a way out. In general, the chances one faces can be divided into typical overall risks and typical fundamental risks. (Cao et al., 2020); Yan et al., 2019; (Zhang et al., 2018).

1. Typical goal risks include:

- a. *Political risks*. Political risks can disrupt political stability and security; unilateral actions such as expropriation, forced sale of assets, tariff valuation changes in tax treaties, increases in taxes and royalties, additions in tax problems with the recovery of profits, changes in external government turmoil, changes in fiscal policy national - debt levels and so on. Meanwhile, at the level of the concession itself, the political risks one may face are other political risks: delays in recognition of benefits deadlines for accommodations Master of Work pricing questions from the community compliance with laws and regulations commitment to the terms of the franchise agreement contract exclusivity and competition from other agencies. Existing facility.
- b. *Legal risk*. The legal risks of the host country may arise from conditions such as weak existing legal framework change of law during the time of franchising disputes in the community, potential conflicts between international laws etc. national and national laws changing export regulations. And imports changes in the field of corporate law changes in standards and regulations aspects of commercial law issues of liability ownership and others. For concession agreements, legal risk can arise from factors such as the type of concession agreement changes in obligations or the basis of the existing legal framework changes in terms of the agreement situation implementation status and dispute settlement mechanism.
- c. *Commercial Risk*. The problem of continuously having enough raw materials exchange rate fluctuations, devaluation and the like will significantly affect the level of business risk.
- d. *Environmental risks*. Factors that can affect ecological risk include project location, existing ecological constraints, ecological changes occurring, the influence of pressure groups external factors affecting the environment. In addition, operational impact environmental impact issues local community acceptance and ecosystem changes throughout the franchise.

2. Typical Elemental Risks *include*: (Lewis, 2021), (Rybnicek, Plakolm, & Baumgartner, 2020)

- a. *Operation Risks*. The level of risk of construction PPPs can change significantly due to changes in natural conditions, land, weather, work, worker expertise, construction period, schedule delays, the technology used,

- construction contracts, type of contract, construction costs, availability of designs, availability of information, according to standards. And specifications.
- b. Operational risk. Factors such as operating conditions, supply of raw materials, whether there are operational interruptions using methods availability of spare parts warranty available time cost and training level work "manual" quality and quantity of personnel etc. Others will significantly affect the small size risk of the Operation.
 - c. Financial risk. The issue of significant small monetary stakes in this BOT project will be largely determined by variables such as interest rate interest calculation method, loan term payment method payment schedule, the balance of payments rate of return. In addition, loan type and source loan availability exchange rate used institutions support dividend payment timing and amount etc.
 - d. Revenue Risks. Revenue risk will also depend mainly on the ability to meet the growing demand required franchising time needed to install facilities acceptance method currency. Revenue currency change in formula tariff change in revenue stream etc.

6. Forms of Guarantee and Protection for Infrastructure Investment in Water Infrastructure Investment Contracts

By referring to the various forms of risk from infrastructure investment as mentioned above, it is necessary to identify and make an inventory of the conditions of investment protection in transportation infrastructure development that can be provided by the "Host Country", which include, among others: (Debaere & Kapral, 2021; (Shao, Tan-Mullins, & Xie, 2021).

- a. *Investment Guarantee and Protection Based on Concession Contract Conditions.* Concession agreements should apply equally to provide adequate guarantees and protection to investors political, legal risks, and commercial risks. Investment guarantees and protections that can be provided include among others increasing political stability and security; Ensure that expropriation nationalization control and confiscation are not carried out without justifiable reasons and with adequate compensation in accordance with applicable international rules; Creating flexible and dynamic tariffs based on agreements; Predictable increase in tax and royalty rates and with valid reasons; Not changing the policy regarding the right of repatriation of profits; Ensure that there is no fundamental change in investment policy due to a change of Government; Ensure stability in fiscal policy; Guarantee the process of granting concessions dispensations approvals permits that are easy cheap and timely; There is support in terms of national legislation; Strong commitment from the Government to consistently implement concession contracts; There are no changes regarding the content of the concession contract; The availability of an effective dispute resolution mechanism and fair; Guaranteed acceptance in a convertible currency; Maintaining the stability of exchange rate

fluctuations including currency devaluation; Government guarantees to facilitate resolution of environmental constraints.

- b. *Investment guarantee and construction contract protection.* The construction contract must specify the amount of money assigned to the contractor. Committed to performing the agreement's contents on a good faith basis will enable to reduce the risk because everything can be calculated carefully.
- c. *Assurances and protections related to the operating contract.* If issues related to operation maintenance and training are evident throughout the life of the Operation, this will reduce the risks associated with the Operation. Mandarin. So everything related to this can be detailed in the operating contract, so hopefully, there won't be any unexpected problems. Accuracy in negotiating, developing, and finalizing the agreement will play a significant role. In addition, everything that may arise during the Operation, especially the risks of surgical intervention, must be foresaw.
- d. *Security and protection of shareholders and the loan agreement.* Risks Possible risks under project funding should be considered from the outset. Especially in financing projects, banks (lenders) often require some form of guarantee from the money deliverer. In Indonesia, especially for infrastructure development, such contracts have already begun to be prepared, including provision disbursement and monitoring of infrastructure support funds. And related organizations such as the BLU (public service agency). Another form of support is more accessible access to infrastructure financing through local banks. Investors need to prepare their capital to build and operate transport infrastructure projects with this guarantee.
- e. *Assurance and risk protection on the part of the recipient.* Efforts to reduce risk are accepted as a risk-sharing mechanism that the host country may offer during the concession period. Another thing that can be done is to adjust the tariff to ensure that the economy of the activities carried out is guaranteed.

7. Legal analysis is based on the interests of the government investors and the public interest of the PPP project in acquiring domestic water supply infrastructure.

The application of the BOT model in the acquisition of facilities infrastructure, particularly in the field of clean water supply infrastructure, is an option worth considering. (Debaere & Kapral, 2021; Jokar et al., 2021) By applying the BOT model, it is hoped that more infrastructure can build. The availability of drinking water supply infrastructures such as transmission and distribution channels. Furthermore, water treatment facilities etc., which can support efficient economic activity, will increase the competitiveness of investments and promote economic growth. From the investor's point of view, PPP is an attractive and promising field of activity. From the investor's point of view, PPP is a good field of activity. Therefore, various incentive programs are offered: land; tariff adjustment; guaranteed investment; tax incentives; share the risk; access to finance; business security including legal certainty; refundable investment; and others will give you the

confidence to invest, especially if the return on investment is considered high enough.

In the public interest, people benefit from good drinking water supply infrastructure. This benefit will further facilitate community activities, especially economic activities. Providing quality, safe, secure and flowing drinking water will also increase efficiency helping to increase achievable profit margins. However, it is also possible that communities face higher costs if the infrastructure acquisition is made by the private sector than if it is done by the Government. Here the Government needs to balance the interests and guarantees of supply to the private sector (investors) with the benefits of public services. And community capacity elsewhere. In the interest of the Government, the cooperation program between the Government and private investors in the construction and operation of water supply infrastructure will significantly reduce the burden on the government budget. The benefits of PPP for the Government include that most of the development costs are funded by the private sector. Some of the risk is borne by the private sector. Availability of better drinking water supply infrastructure. The public service sector is improving. Obtain additional sources of state revenue.

The benefits of PPP for the Government include Government obtaining a different development budget from the private sector. In addition, some of the risks are borne by the private sector. For example, the Government can provide better drinking water supply infrastructure. Furthermore, the public service sector improves security and legal protection. In any investment activity, adequate guarantees and legal protection are essential. Moreover, from an investment perspective, legal assurances and protections provide extra security, making things easier to predict.

Moreover, for the interests of (foreign) investors, the existence of adequate legal guarantees and protections for the legal rights and rights held by foreign (alien) individual juridical persons Holding increases confidence and investment comfort. All business and cooperation activities always involve risks. It is reasonable. The risks arising from PPPs in the construction and operation of drinking water supply infrastructure can be reduced.

To minimize the chances of cooperating with a BOT system, the government and private investors must be willing to share the risks. Equal and fair sharing of risks strengthens the partnership. In any cooperation, including cooperation in water supply infrastructure development, disputes may arise regarding the interpretation and performance of the contract. Such things are no exception in cooperation contracts under the BOT model. To anticipate the possibility of a dispute, ideally, the BOT contract should define clear dispute resolution procedures and mechanisms for both parties. The clarity of the dispute resolution provision should cover all stages from dispute resolution from negotiation or other ADR options to settlement through arbitration (decision making) by arbitration. During the construction and Operation of clean water supply infrastructure such as transmission and distribution lines reservoirs, wastewater treatment plants etc., the demand for land and structures will

certainly not be possible to separate. A form of cooperation between the Government and the private sector often encounters problems with land and buildings. Fortunately, the Government's position as one of the parties to the BOT contract affords authority and flexibility in land use for the benefit of the community at large.

Conclusion

The Government can guarantee the right to drink water to the people of the Gresik District. Even with a limited budget, the Government can provide clean water supply infrastructure through the PPP mechanism with the BOT model. Furthermore, the Government can deliver regulatory guarantees to water infrastructure projects in the capital Gresik through the PPP scheme. Therefore, the Government can ensure the exercise of the right to enter drinking water for the people of the Gresik District.

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