

THE BUILD OPERATE TRANSFER PROJECTS BILL

(No. I of 2016)

Explanatory Memorandum

The object of this Bill is to provide for a legal framework for the execution of projects under Build Operate Transfer (BOT) agreements.

Sir ANEROOD JUGNAUTH, G.C.S.K., K.C.M.G., Q.C.
*Prime Minister, Minister of Defence, Home Affairs, Minister
of Finance and Economic Development, Minister for
Rodrigues and National Development Unit*

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A BILL

To provide for a legal framework for the execution of projects under Build Operate Transfer (BOT) agreements

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the Build Operate Transfer Projects Act 2016.

2. Interpretation

In this Act –

“bid” means a proposal submitted in response to a request for proposal pursuant to section 10;

“bidder” means a participant in a request for proposal proceedings;

“BOT” means build, operate and transfer;

“BOT agreement” means an agreement, in relation to a BOT project, between a contracting authority and a private party;

“BOT project” –

(a) means a project based on the granting of rights, under a BOT agreement, to a private party, to build, set up, own, operate, rent, lease, finance, modernise, manage, maintain or develop, and to transfer the undertaking, in accordance with the BOT agreement; and

(b) includes any agreement which may provide for a project based on BOOT (Build, Own, Operate and Transfer), DBFOT (Design, Build, Finance, Operate and Transfer) or MOT (Modernise, Own/Operate and Transfer) models;

“BOT Projects Unit” means the unit referred to in section 4;

“Central Procurement Board” means the Central Procurement Board established under section 8 of the Public Procurement Act;

“contracting authority” means a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government;

“control”, in relation to “Government-controlled”, has the same meaning as in section 3(1D) of the Public Procurement Act;

“Director” means the Director referred to in section 4(1) of the Public Procurement Act;

“foreign State” has the same meaning as in section 3(1)(D) of the Public Procurement Act;

“Minister” means the Minister to whom responsibility for the subject of finance is assigned;

“own”, in relation to “Government-owned”, has the same meaning as in section 3(1D) of the Public Procurement Act;

“private party” means a corporate body established, incorporated or registered in Mauritius, or a consortium of corporate bodies;

“Procurement Policy Office” means the Procurement Policy Office referred to in section 4 of the Public Procurement Act;

“project period” means the initial period of a BOT agreement and any extension thereof.

3. Non-application of enactment

(1) The Public-Private Partnership Act and the Public Procurement Act shall not, subject to subsection (2), apply to any BOT project under this Act.

(2) Where 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, section 3(1A)(a), (1B), and (1Ba) of the Public Procurement Act shall apply to that BOT project.

4. BOT Projects Unit

There shall be, within the Procurement Policy Office, a BOT Projects Unit which shall deal with BOT projects.

5. Functions of BOT Projects Unit

The BOT Projects Unit of the Procurement Policy Office shall –

(a) formulate policies, including directives, procedures and guidelines on BOT projects;

- (b) issue templates in relation to BOT projects;
- (c) assess any feasibility report submitted by a contracting authority and submit its comments and findings to the contracting authority, regarding, inter alia –
 - (i) affordability;
 - (ii) value for money; and
 - (iii) sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
- (d) maintain a register of BOT projects; and
- (e) conduct training programmes on BOT Projects.

6. Staff of BOT Projects Unit

(1) The Secretary to Cabinet and Head of the Civil Service may, on the recommendation of the Procurement Policy Office and subject to the Public Service Commission Regulations –

- (a) designate such public officers as may be necessary to assist the BOT Projects Unit;
- (b) enlist, on ad hoc basis and for such period as may be necessary, the services of suitable BOT experts to advise the Procurement Policy Office.

(2) Any officer designated or expert enlisted under subsection (1) shall be under the administrative control of the Director.

7. Functions of contracting authority

(1) Where a contracting authority identifies a BOT project, other than a BOT project referred to in section 3(2), that may be implemented under this Act, the contracting authority shall –

- (a) appraise the BOT project, prepare or cause to be prepared a feasibility report and submit the report to the BOT Projects Unit for its assessment;
- (b) prepare and submit to the Board a request for proposal documentation pursuant to section 10;

(c) develop and monitor the BOT project.

(2) For the purpose of this Act, a contracting authority shall set up a project team and designate a suitable and qualified project officer who shall be capable to effectively manage a BOT project.

8. Feasibility report

(1) A feasibility report submitted to the BOT Projects Unit under section 7(1)(a) shall –

- (a) define the type, nature, scope and rationale for the BOT project;
- (b) contain specific provisions on sector needs assessment, options analysis, value for money and affordability;
- (c) specify the broad terms proposed for the agreement, including the proposed sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
- (d) describe the legal and institutional framework for implementing the BOT project;
- (e) demonstrate comparative advantage in terms of strategic and operational benefits for implementation under an agreement; and
- (f) contain the observations, comments and recommendations of the contracting authority.

(2) On receipt of a feasibility report, the BOT Projects Unit shall assess the report and submit its comments and findings to the contracting authority.

9. Request for proposal

(1) On receipt of the comments and findings of the BOT Projects Unit under section 8(2), the contracting authority shall, subject to section 7(1)(b), prepare and submit a request for proposal to the Central Procurement Board for its approval in writing.

(2) No contracting authority shall, unless approved by the Central Procurement Board, issue a notice of invitation or document pertaining to a request for proposal to any bidder.

10. Functions of Central Procurement Board

(1) The Central Procurement Board shall, in respect of a BOT project, other than a BOT project referred to in section 3(2) –

- (a) examine and approve the request for proposal documentation to be issued by the contracting authority;
- (b) evaluate bids in accordance with its rules and procedures;
- (c) make recommendations to the contracting authority for entering into negotiations with the preferred bidder; and
- (d) recommend the contracting authority to enter into an agreement with a private party.

(2) Where section 3(1)(b) and (1B) of the Public Procurement Act applies to a BOT project –

- (a) “Ministry”, in section 3(1B)(b) of that Act, shall be deemed to refer to any of the entities described as a contracting authority;
- (b) the high-powered committee shall forward its report to Cabinet, as specified in section 3(1B)(b)(ii)(A) of that Act, through the Prime Minister.

11. BOT agreement

(1) Notwithstanding any other enactment but subject to this Act, a contracting authority may, after informing Cabinet through the Minister responsible for that contracting authority, enter into an agreement with a private party for the purpose of implementing a BOT project.

(2) Every agreement shall include provisions for –

- (a) the rights and obligations of the contracting authority and private party;
- (b) the period of execution of the project;
- (c) the relevant financial terms;
- (d) the conditions for the supply of services;
- (e) the management of performance of the private party;

- (f) the sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
 - (g) the termination of the agreement in case of breach of terms and conditions by either party, or otherwise;
 - (h) the remedies in the event of default by either party, including lenders' step-in-rights;
 - (i) the return of the assets to the contracting authority, at the termination or expiry of the agreement, in such manner as may be provided for in the agreement; and
 - (j) such other requirements as may be prescribed.
- (3) Every agreement shall –
- (a) be governed by, and construed in accordance with, the laws of Mauritius;
 - (b) provide for disputes between the private party and contracting authority to be resolved by amicable settlement, mediation or arbitration according to the rules specified in the agreement;
 - (c) as soon as practicable, be laid before the National Assembly by the contracting authority.
- (4) This section shall also apply to a BOT project referred to in section 3(2).

12. Regulations

(1) The Minister may make such regulations as he thinks fit for purposes of this Act.

(2) Any regulations made under subsection (1) may provide for the levying of fees and charges.
