

Contracting Under the BOT System

An Aloof View

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BOT is an expression that has started to be heavily used since several years ago. It is a member of a clan within a large tribe, having BOI, BOO, BOOT, up to more than twenty expressions of kin. All begin with the letter (B) from the word (Build) whose meaning is expandable to mean, "Construct a whole project". Therefore all those systems were developed within the framework of the construction industry and are seen to be a step further of the contracts of that industry. The following letter is (O) that stands for (Operate), and another (O) that stands for (Own) may follow. And the final letter is (T), the initial letter of the word (Transfer).

It is noted that the expression is always introduced as a contracting system, therefore it is said that the contract is under a BOT system. It is also noted that that expression attracts the attention of many people other than the artisans of the construction industry themselves. It attracts financiers, banks, investors, and other industries and services activists, besides other professionals such as consultant engineers, lawyers, and accountants.

It is further noted that the BOT system has become the favorite subject for discussion in the uninterrupted series of symposia and courses organized by the government itself, and professional syndicates and associations, universities, research centers, consulting firms, and funding institutions, in such a manner that roughly constitutes a campaign committed to the propagation of the BOT culture.

Egyptian and foreign speakers deliver speeches in such symposia on the detailed aspects of the system, such as the contractual built up of the project, the essential contracts elements therein, and the distribution of roles, tasks and responsibilities, through a long series of details, which we can call "*the BOT System, a Close View*".

Since my role is to deliver a speech on that topic, so I found it beneficial to tackle the whole matter from a different perspective, providing the general view of the those

contracting systems and their stance among the other well established and widely used contracting systems with regard to performing projects.

Hence came the heading of this paper, "*An Aloof View*", in which the following points shall be tackled extremely in brief:

- 1- General definition.
- 2- Project life phases and the contracting areas at each phase.
- 3- Elements of job Contract.
- 4- What is to be done for a project to start?
- 5- Packaging a project's contracts.
- 6- Contracting modes.
- 7- Contract types.
- 8- The BOT Family.

The project undergoes several stages starting from the moment it is just an idea in the imagination of its owner.

A) Planning Stage

In this stage the idea develops into feasibility study and the sizing and production capacity is defined, in addition to the location. The sources of the raw materials are chosen, and the targeted markets and customers to whom the project's products are addressed, are identified.

B) Implementation Stage

The implementation stage has several phases, first of which is the concept where production operation systems are selected, together with the general form of the project's elements, number of its units, production lines, and deployment of the productive functions over those units and elements.

Follows is the function of design, where measurements, dimensions, quantity, and technical specifications of the different project's elements and units, including plant and buildings, are determined.

The next phase is construction, where the project's elements and buildings are constructed, together with installation of the project's equipment and machines.

C) Exploitation Stage

This stage is naturally the longest as it is running and operation, besides maintenance and overhauling of all components and elements of the project.

In each of the above stages of a project's life, the owner seeks the assistance of specialists to perform the related tasks required for each stage. The owner executes contracts for feasibility study, market survey, and acquisition of the right to utilize specific technology or trademarks, in addition to funding studies and agreements with the banks or other financial institutions to provide loans or credits. The owner may also enter into agreements with the suppliers for long term supply of raw materials and marketing contracts with sale outlets, all during the stage of planning.

During the implementation stage, the owner executes a lot of contracts such as purchase or lease of land, soil testing, setting the designs and specifications, performance supervision, importation or purchase of equipment and machinery, performance of civil and installation works, and as the case warrants, contracting for training of operation and maintenance crews.

During the exploitation stage, contacts such as technical assistance, operation, or product development, and purchase of raw materials and production necessities may also be executed.

The most outstanding contract, not necessarily the most important or largest, concluded in relation to the performance of a project is the job work contract, however it is the contract that receives the most attention, researches, studies, and negotiations. The job contract can be concluded under the provisions of the private law, and thus becomes a civil contract between two equal parties governed by civil law, or under the public law, and thus becomes an administrative contract between an administrative authority as the first party and a contractor as the second party governed by the administrative law. When such a contract is related to any of the public facilities it is given the term "Public Works Contract". The elements of job

contract are five in number, first of which is the first party, owner, employer, or grantor of contract or concession, then the second party, the contractor or the holder of the concession, then the scope or object of the contract and the scope of the obligations of the contractor, then the price or consideration, and finally the term. The Civil Code defines the job contract as follows: "It is a contract by which a person undertakes to perform a work or to render a service to another person in return of a consideration agreed upon by the parties thereto".

The element of object or scope of the contract has a special importance in relation to this paper, since the scope of a contract widens or narrows in accordance with what the first party specifies and accepted by the second party. The narrowest scope of a job contract is performance of works only having the owner to supply material, this is known in the market as a "Contract of Workmanship". Then the scope gradually widens to include performance of works plus supply of materials, which is more common in practice, "Construction Contract", excluding design works that are contracted out by the owner to another contractor, "Consultant Engineer". Design works can be added to construction and thus we have "Design/ Build Contract". Adding the task of financing to the scope of work, then we have a contract for design, construction and financing, which is commonly known as "Turn Key Contract", where the contractor undertakes providing finance for his works through to the completion of the whole works and handing them over to the owner who then pays the price in full upon delivery or on installments in such a manner agreed upon by the parties to the contract.

The scope can widen to include the function of operation for a specified period of time, and thus the contractor undertakes design, performance, financing, operation for a specified term, and finally handing over the whole work to the owner. There are two categories under this type of contract: 1) the owner keeps the profits generated by the operation, and in this case the owner has to pay the price to the contractor, or, 2) the owner allows the contractor to withhold, wholly or partially, the profits generated by the operation and exploitation for the period during which the contractor is undertaking operation in fulfillment of the price. In the latter case we have a contract under a BOT system, where the letter (T) stands for the word "Transfer" that means

the transfer of the possession of the project to the first party upon the expiry of the contract's term.

In all cases cited above, we are dealing with a job contract first party of which is the owner and the second is the contractor, in both the lexical and terminological senses.

The work or project is predetermined by the owner to serve the owner's own purposes and the contractor has just a transient hand over the project, therefore while the work is being performed the contractor is only a possessor and not an owner. Upon handing the works over to the owner, the contractor transfers only the physical and legal possession and not the title, since the latter is reserved, ab initio, in the hands of the owner.

As we have seen changing the element of the scope/ object of the job contract ushers in a series of contracting modes each of which has its own intrinsic scope/ object.

Similarly, the element of price/ consideration in the job contract has special importance for the purposes of this paper in view of its diversified forms that yield in different contract types. The differences are in both the manner of specifying the price and the mode of payment. The simplest form is the predetermined lump sum price whether being fixed or subject to adjustment via any of the known methods of adjustment. Another form is the result of multiplying predetermined unit rates by the actual quantities physically executed, known as "Unit Rate Remeasured Contract", which is commonly applied in Egypt, at least. In this form the categories may be fixed throughout the contract's term or adjustable via any of the known methods of adjustment as mentioned in the previous form.

There is another form of contacts where the consideration/ price is the actual cost plus the profit for the contractor in the form of lump sum or percentage, fee. This form is known as "Cost Plus Contract", the clearest examples of which in Egypt are the contracts issuing from commissioning orders. There are other forms such as Target Price Contract, which is, in other words, the price set as the target of both parties to the contract upon executing thereof. According to this type of contract, the contractor shall be entitled to earn the target price only if the works are completed according to

that price. In case savings are achieved, both parties to the contract shall share those savings in accordance with agreed percentages. On the other hand if the cost exceeded the target price the contractor shall be entitled only to receive the actual costs with no profit.

As we have seen, changing the element of price/ consideration results in different contract types, since each of those contracts has different definitions of the price and the manner of calculation and mode of payment thereof.

In all the above mentioned cases we are still dealing with a job contract where the owner is known and it is the one who specified the project and its location, capacity, purposes,...etc. and this person is the owner from the beginning of the project while the contractor work for the account and in the interest and under the supervision of the owner, and in return the contractor is entitled to receive a wage for his work or a price for the job performed thereby, which is collected at the amount and in the manner agreed upon.

It is to be noted in this context that all modes of contracting may absorb all contract types, in other words it is possible to use any of the contract types within the framework of almost all contracting modes.

Similarly, under a BOT system the above requirements for a job contract are existing, even with the other members of BOT tribe such as BLT, BRT, BOR, BTO, DBFO, DCMF.

Moving on to BOOT, we find that we have left the direct family of BOT, however still within the tribe of BOT, which has become a term as well.

In substantiation of the above statement, the second (O) stands for the verb (Own) which indicates that the ownership during the term of the project is reserved to the second party, and thus can be logically understood that the second party is not a contractor working for the first party. Therefore we are dealing here with a wide scope job contract. The first party is not the owner, and consequently the second party

does not act for the account of the earlier or in the interest thereof in return of a wage or price received from the owner directly or indirectly.

In this context the intuitive question on the nature of a contract executed under the BOOT system is posed. Prior to presenting any opinion through this paper in hand, I see it beneficial to cast a glance over contracts of financing lease and the evident aspects of analogy to the BOOT contracts. In financing lease a person undertakes construction of a project either by himself or by any other person assigned thereby, then leases the project for a specific period of time for a specific rent coupled with a promise of sale for an agreed price upon expiry of the lease term. This means that the project was mainly constructed for the purpose of collecting the rental proceeds then selling it to the leasee, and not to be kept by the person who built it, the owner.

Normally the aggregated paid rent is deducted from the sale price agreed upon, therefore if the lease term is extended and the aggregate paid rent reached the full sale price, then the ownership shall be transferred to the leasee free of charge. Thus the financing lease contract is a tool of carrying out investments and not a job contract.

In BOOT contracts, it is noted that the second party undertakes all functions in relation to the project (of course through the persons to whom those functions are contracted out) and exploits the project for a specified term during which the second party is named the owner and acquires all proceeds of the project and transfers at the end both the ownership and possession to the first party, normally free of charge. Therefor the contract is a sort of investment in which the role of the first party is limited.

The point of ownership during the implementation and exploitation stages is very important from the legal point of view due to the implications and the issuing results therefrom (the term "Exploitation" is the proper word that best explains the status rather than the words "Operation" or "Management"). For example, being the owner he can mortgage the project, while a contractor can not do this, and in case the project was damaged in full or in part, being the owner of the project he is charged with all the damages, however still under the obligation of handing over the project at the end

of the term to the first party. In other words, any repairs shall be at the account of the owner of the project.

BOOT system has similar BOOT family members, such as MOT and ROT. As for BOO and ROO "Build Own Operate" they are not family members of BOT or BOOT, since the (T), the element of "Transfer", that means transfer of ownership or possession to others, is absent. It is rather the initiative on the part of the owner acting for his own interest and for its own account, as it is the case with any normal project. Therefore, the pedigree of that family to the BOT tribe is irrelevant.

The last point to consider is the purpose of all those forms of systems that are introduced as if they were new. In fact it must be directly stated that all those systems are merely different ways of shifting the burden of the construction of important projects required for development, whether being for infrastructure or otherwise, from the state (The General Budget, Chapter Three) to the private sector, being national, foreign, or mixed. Those systems have been mentioned over the past years in conjunction with the second and third phases of economic reform plan after extending and fixing the ownership base, privatization, and reducing the state's participation in the projects and thus relatively reducing the volume of Chapter Three of the General Budget and gradually reallocating it towards social development fields, and reducing the state's role in the productive economic activities against increasing the role of the private sector in those activities.

Based on this qualification, the burden of publicizing the BOT system lies on the shoulders of the government, which should be sure of setting such regulations that are apt to attract the private sector to undertake that role allowing the government the chance to play its modified role on one hand, and on the other to reallocate the allowances of Chapter Three of the General Budget by directing them towards the extended fields of social development. The government has not spared any effort over the last years in that regard, as it executed a series of contracts for highways and electrical stations.

The government has also taken the initiative by introducing amendments to the laws that govern the above facilities, highways and electricity, to absorb projects

performed under the BOT system. In this context, it should be stated that legal point of view, in terms of both judiciary and jurisprudence, regarding those contracts and the disputes issuing therefrom has not been crystallized yet. However, it has been also noticed that many of the jurists' treatises are influenced by the well-established provisions pertinent to concession of the public facilities, while discussing the contracts concluded under the BOT system. Undoubtedly there are aspects of similarity between the two systems, and more profound legal treatises on that topic are anticipated in the near futures.

Prior to presenting the point of view of the compiler of this paper, it should be pointed out that the BOT contract executed between the Egyptian Electricity Authority and one of the investors regarding construction of electricity generating station where the Authority is to purchase all the generated power and then sells it to the public consumers does not constitute granting concession of a public facility to an investor, as the latter does not sell directly to the public and does not substitute the administrative authority in providing the service to the public. It is the authority that undertakes the provision of services and the investor is merely a supplier whose position resembles that of the supplier of diesel required by the authority to propel its boilers.