

**A RESOLUTION ADOPTING THE
PROVISIONS OF INDIANA CODE § 5-23
(INDIANA'S PUBLIC-PRIVATE AGREEMENT
STATUTE)**

WHEREAS, the provisions of Indiana Code § 5-23 authorize the utilization of “public-private agreements” (as the term is defined in Indiana Code § 5-23-2) for those entities which are under the purview of Indiana Code § 5-23; and

WHEREAS, pursuant to Indiana Code § 5-23-1-1, the Common Council of the City of Fort Wayne, Indiana must adopt the provisions of Indiana Code § 5-23 by resolution or ordinance in order for the City of Fort Wayne, Indiana, its instrumentalities, and its subordinate entities to enjoy the rights and benefits granted pursuant to Indiana Code § 5-23; and

WHEREAS, the Common Council of the City of Fort Wayne, Indiana has considered the provisions of Indiana Code 5-23 and now desires to adopt the provisions of Indiana Code § 5-23 in their entirety pursuant to Indiana Code § 5-23-1-1.

**NOW, THEREFORE, BE IT RESOLVED BY THE COMMON COUNCIL OF THE
CITY OF FORT WAYNE, INDIANA:**

SECTION 1. That the provisions of Indiana Code § 5-23 are hereby adopted by the Common Council of the City of Fort Wayne, Indiana, pursuant to Indiana Code § 5-23-1-1.

SECTION 2. That this resolution shall be in full force and affect from and after its passage and approval by the Common Council of the City of Fort Wayne, Indiana and all necessary approval by the Mayor of Fort Wayne, Indiana.

Council Member

APPROVED AS TO FORM AND LEGALITY

Carol Helton, City Attorney

IC 5-23**ARTICLE 23. PUBLIC-PRIVATE AGREEMENTS**

- Ch. 1. Application and Construction
- Ch. 2. Definitions
- Ch. 3. BOT Agreements
- Ch. 4. Operating Agreements
- Ch. 4.5. Requests for Information
- Ch. 5. Selection of Contractor by Request for Proposals
- Ch. 6. Contract Terms and Conditions
- Ch. 7. Records

IC 5-23-1**Chapter 1. Application and Construction**

- 5-23-1-1 Applicability of article
- 5-23-1-2 Liberal construction and supplemental nature of powers; conflict of laws
- 5-23-1-3 Public-private agreement
- 5-23-1-4 Application of prior statute to certain contracts, leases, agreements, or extensions
- 5-23-1-5 Application of IC 5-22-16.5 to award of contracts under article

IC 5-23-1-1 Applicability of article

Sec. 1. This article applies to the following:

- (1) The state.
- (2) A political subdivision in a county containing a consolidated city.
- (3) A political subdivision in a county where:
 - (A) the legislative body of the political subdivision; or
 - (B) if the political subdivision does not have a legislative body, the fiscal body of the political subdivision;

adopts the provisions of this article by resolution or ordinance.

As added by P.L. 49-1997, SEC.34.

IC 5-23-1-2**Liberal construction and supplemental nature of powers;
conflict of laws**

Sec. 2. The powers conferred by this article shall be liberally construed in order to accomplish their purposes and shall be in addition and supplemental to the powers conferred by any other law. If any other law or rule is inconsistent with this article, this article is controlling as to any public-private agreement entered into under this article.

As added by P.L. 49-1997, SEC.34.

IC 5-23-1-3**Public-private agreement**

Sec. 3. The state or a political subdivision may enter into a public-private agreement with an operator under the terms of this article.

As added by P.L. 49-1997, SEC.34.

IC 5-23-1-4**Application of prior statute to certain contracts, leases,
agreements, or extensions**

Sec. 4. (a) Except as provided in subsection (b), IC 36-1-14.3 (before its repeal) concerning public-private agreements does not apply to a contract, a lease, an agreement, or an extension of a contract, a lease, or an agreement entered into before May 10, 1995.

(b) This subsection applies to an agreement in the nature of a public-private agreement (as defined in IC 36-1-14.3-4 (before its repeal)) that was entered into or extended before May 10, 1995. The parties to an agreement described in this section may enter into an addendum of the agreement to be governed by IC 36-1-14.3 (before its repeal) and to apply the provisions of IC 36-1-14.3 (before its repeal) to the agreement. If the parties enter into an addendum under this section, the addendum becomes a part of the agreement to the same

extent as if the addendum had been part of the original agreement.
As added by P.L.220-2011, SEC.104.

IC 5-23-1-5 Application of IC 5-22-16.5 to award of contracts under article
Sec. 5. (a) IC 5-22-16.5 (Disqualification of Contractors Dealing with the Government of Iran) applies to the awarding of contracts, including contracts for professional services, under this article.

(b) A person may not be awarded a contract under this article if the person would be disqualified from being awarded a contract under IC 5-22-16.5.
As added by P.L.21-2012, SEC.5.

IC 5-23-2 Chapter 2. Definitions

5-23-2-1	Applicability of definitions
5-23-2-2	"Board"
5-23-2-3	"BOT agreement"
5-23-2-4	"Construction"
5-23-2-5	"Cost"
5-23-2-6	"Governmental body"
5-23-2-7	"Operating agreement"
5-23-2-8	"Operator"
5-23-2-9	"Original term"
5-23-2-10	"Person"
5-23-2-11	"Public facility"
5-23-2-12	"Public funds"
5-23-2-13	"Public-private agreement"
5-23-2-14	"Public service"
5-23-2-15	"Public work"
5-23-2-16	"State"

IC 5-23-2-1 Applicability of definitions

Sec. 1. The definitions in this chapter apply throughout this article.

As added by P.L. 49-1997, SEC.34.

IC 5-23-2-2 "Board"

Sec. 2. "Board" refers to the agent, board, commission, officer, or trustee of a public agency having the power to award contracts on behalf of the public agency.

As added by P.L. 49-1997, SEC.34.

IC 5-23-2-3 "BOT agreement"

Sec. 3. "BOT agreement" means any agreement between a governmental body and an operator to construct, operate, and maintain a public facility and to transfer the public facility back to the governmental body at an established future date.

As added by P.L. 49-1997, SEC.34.

IC 5-23-2-4 "Construction"

Sec. 4. (a) "Construction" means the process of building, renovating, reconstructing, expanding, modernizing, or assembling a public work, including any material enhancements or upgrades to an existing public facility.

(b) The term does not include normal repair, operation, general maintenance, or preservation of a public work.

As added by P.L. 49-1997, SEC.34.

IC 5-23-2-5 "Cost"

Sec. 5. "Cost" means the cost of entering into any public-private agreement, including, without limitation, the following:

- (1) The cost of acquisition and construction of any public facility or any modification, improvement, or extension of that facility.
- (2) Any cost incident to the acquisition of any necessary property, easement, or right-of-way.
- (3) Engineering or architectural fees, legal fees, and fiscal agents' and financial advisers' fees.
- (4) Any cost incurred for preliminary planning to determine the economic or engineering feasibility of a proposed public-private agreement.
- (5) Costs of economic investigations and studies, surveys, preparation of designs, plans, working drawings, specifications, the inspection and supervision of the construction of

any public facility, and any other cost incurred by the governmental body.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-6 "Governmental body"

Sec. 6. "Governmental body" has the meaning set forth in IC 5-22-2-13 and includes, for purposes of this article, any state educational institution or other instrumentality of this state.
As added by P.L.49-1997, SEC.34. Amended by P.L.213-2015, SEC.69.

IC 5-23-2-7 "Operating agreement"

Sec. 7. "Operating agreement" means an agreement between an operator and the governmental body for the operation, maintenance, repair, or management of a public facility.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-8 "Operator"

Sec. 8. "Operator" means a person who has entered into either an operating agreement or a BOT agreement with a governmental body to provide services to or on behalf of the governmental body.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-9 "Original term"

Sec. 9. "Original term" means the initial term of a public-private agreement. The term includes all automatic renewals and automatic extensions of a public-private agreement.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-10 "Person"

Sec. 10. "Person" means an association, a corporation, a limited liability company, a fiduciary, an individual, a joint stock company, a joint venture, a partnership, a sole proprietorship, or any other private legal entity.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-11 "Public facility"

Sec. 11. "Public facility" means a facility located on, or to be located on, real property owned or leased by a governmental body and upon which a public service is or may be provided.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-12 "Public funds"

Sec. 12. "Public funds" has the meaning set forth in IC 5-22-2-23.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-13 "Public-private agreement"

Sec. 13. "Public-private agreement" means a BOT agreement or an operating agreement.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-14 "Public service"

Sec. 14. "Public service" means any service customarily provided by a governmental body.
As added by P.L.49-1997, SEC.34.

IC 5-23-2-15 "Public work"

Sec. 15. "Public work" means any public building, highway, street, alley, bridge, sewer, drain, or any other public facility that is paid for out of public funds.

As added by P.L. 49-1997, SEC. 34.

IC 5-23-2-16 "State"

Sec. 16. "State" means the state of Indiana or a state agency (as defined in IC 6-1.1-1-18).

As added by P.L. 213-2015, SEC. 70.

IC 5-23-3 Chapter 3. BOT Agreements

5-23-3-1	Agreements between governmental body and operator
5-23-3-2	Provisions
5-23-3-3	Repealed
5-23-3-4	Construction of public facility with public funds; applicable laws

IC 5-23-3-1 Agreements between governmental body and operator

Sec. 1. A governmental body may enter into a BOT agreement with an operator for the acquisition, planning, design, development, reconstruction, repair, maintenance, or financing of any public facility on behalf of the governmental body.

As added by P.L. 49-1997, SEC.34.

IC 5-23-3-2 Provisions

Sec. 2. BOT agreements may provide the following:

- (1) The design, construction, operation, management, maintenance, or financing of the cost of a public facility shall be partially or entirely the responsibility of the operator.
- (2) The governmental body shall lease the public facility and real property owned by the governmental body upon which the public facility is to be located to the operator for a predetermined period. The BOT agreement must provide for ownership of all improvements by the governmental body, unless the governmental body elects to provide for ownership of the public facility by the operator during the term of the BOT agreement. In this case, ownership reverts back to the governmental body upon the termination of the BOT agreement.
- (3) The BOT agreement must identify which costs are to be the responsibility of the operator and which costs are to be the responsibility of the governmental body.
- (4) The operator may be authorized to retain a mutually agreed upon percentage of the revenues received in the operation and management of the public facility, or the operator may be paid an amount established by the governmental body, which shall be applied as follows:

- (A) Capital outlay costs for the public facility and public service plus interest and principal repayment for any debt incurred.
 - (B) Costs associated with the operation, management, and maintenance of the public facility.
 - (C) Payment to the governmental body for reimbursement of the costs of maintenance, law enforcement, and other services if the services are performed by the governmental body under the BOT agreement.
 - (D) An agreed upon return on investment to the operator.
- (5) The operator may pay the governmental body either a lease payment or a percentage of gross revenue per month for the operator's operation and use of the public facility.
 - (6) The BOT agreement may require a performance bond and provide for the payment of contractors and subcontractors under IC 4-13.6-7, IC 5-16-5, or IC 36-1-12, whichever is applicable.

As added by P.L. 49-1997, SEC.34.

IC 5-23-3-3 Repealed

As added by P.L. 49-1997, SEC.34. Repealed by P.L. 252-2015, SEC.14.

IC 5-23-3-4 Construction of public facility with public funds; applicable laws

Sec. 4. If a governmental body enters into a BOT agreement that involves the construction of a public facility with public funds under this section, the construction of that public facility is subject to IC 4-13.6, IC 5-16, or IC 36-1-12, whichever is applicable.

As added by P.L. 49-1997, SEC.34.

IC 5-23-4 Chapter 4. Operating Agreements

5-23-4-1 Agreements between governmental body and operator
5-23-4-2 Repealed

IC 5-23-4-1 Agreements between governmental body and operator

Sec. 1. A governmental body may enter into an operating agreement with an operator for the operation, maintenance, repair, management, or any combination of operation, maintenance, repair, or management of any public facility for any public service to be performed on behalf of the governmental body.

As added by P.L. 49-1997, SEC.34.

IC 5-23-4-2 Repealed

As added by P.L. 49-1997, SEC.34. Repealed by P.L. 252-2015, SEC.15.

IC 5-23-4.5

Chapter 4.5. Requests for Information

- 5-23-4.5-1 Government requests for information regarding public facility projects
- 5-23-4.5-2 Notice of request for information
- 5-23-4.5-3 Responses to request for information confidential; identity of person submitting response is public record
- 5-23-4.5-4 Action not required

IC 5-23-4.5-1

Government requests for information regarding public facility projects

Sec. 1. A governmental body may issue a request for information for any of the following purposes:

- (1) To consider the factors involved in, the feasibility of, or the potential consequences of a contemplated project involving a public facility.
- (2) To prepare a request for proposals.
- (3) To evaluate any aspect of an existing public-private agreement and an associated public facility.

As added by P.L.217-2017, SEC.61.

IC 5-23-4.5-2

Notice of request for information

Sec. 2. Notice of a request for information shall be given in accordance with IC 5-3-1.

As added by P.L.217-2017, SEC.61.

IC 5-23-4.5-3

Responses to request for information confidential; identity of person submitting response is public record

Sec. 3. A response to a request for information is confidential unless, and only to the extent that, the person who submits the response waives confidentiality in writing. The identity of the person submitting the response is a public record.

As added by P.L.217-2017, SEC.61.

IC 5-23-4.5-4

Action not required

Sec. 4. A governmental body is not required to take any action after receiving a response to a request for information.

As added by P.L.217-2017, SEC.61.

IC 5-23-5 Chapter 5. Selection of Contractor by Request for Proposals

5-23-5-1	Public-private agreement; request for proposals required
5-23-5-2	Request for proposals; contents
5-23-5-3	Request for proposals; notice
5-23-5-4	Discussions regarding solicitation requirements
5-23-5-5	Fair and equal treatment of offerors
5-23-5-6	Disclosure of contents of proposals
5-23-5-7	Negotiation for best and final offers
5-23-5-8	Options upon receipt of best and final offer
5-23-5-9	Public hearing on recommendation to award public-private agreement; notice
5-23-5-10	Proposals and explanation of recommendation; inspection and copying
5-23-5-11	Response to request for proposals
5-23-5-12	Termination of request for proposal process

IC 5-23-5-1 Public-private agreement; request for proposals required

Sec. 1. Any public-private agreement contemplated by this chapter must require the governmental body to request proposals under this chapter before entering into the public-private agreement.

As added by P.L.49-1997, SEC.34.

IC 5-23-5-2 Request for proposals; contents

Sec. 2. Proposals for public-private agreements shall be solicited through a request for proposals, which must include the following:

- (1) The factors or criteria that will be used in evaluating the proposals.
- (2) A statement concerning the relative importance of price and the other evaluation factors.
- (3) A statement concerning whether the proposal must be accompanied by a certified check or other evidence of financial responsibility.
- (4) A statement concerning whether discussions may be conducted with the offerors for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements.

As added by P.L.49-1997, SEC.34.

IC 5-23-5-3 Request for proposals; notice

Sec. 3. Notice of the request for proposals shall be given by publication in accordance with IC 5-3-1.

As added by P.L.49-1997, SEC.34.

IC 5-23-5-4 Discussions regarding solicitation requirements

Sec. 4. As provided in the request for proposals, discussions may be conducted with the offerors for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements.

As added by P.L.49-1997, SEC.34.

IC 5-23-5-5 Fair and equal treatment of offerors

Sec. 5. Eligible offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revisions of proposals.

As added by P.L.49-1997, SEC.34.

IC 5-23-5-6 Disclosure of contents of proposals

Sec. 6. The governmental body may refuse to disclose the contents of proposals during discussions with eligible offerors.

As added by P.L.49-1997, SEC.34.

IC 5-23-5-7 Negotiation for best and final offers

Sec. 7. The governmental body shall negotiate the best and final offers of responsible offerors who submit proposals that are determined to be reasonably susceptible of being selected for a public-private agreement.

As added by P.L. 49-1997, SEC.34.

IC 5-23-5-8 Options upon receipt of best and final offer

Sec. 8. After the best and final offers from responsible offerors have been negotiated under section 7 of this chapter, the governmental body shall either make a recommendation to the board to award the public-private agreement to an offeror or offerors or shall terminate the request for proposal process.

As added by P.L. 49-1997, SEC.34.

IC 5-23-5-9 Public hearing on recommendation to award public-private agreement; notice

Sec. 9. If a recommendation to award the public-private agreement is made to the board, the board shall schedule a public hearing on the recommendation and publish notice of the hearing one (1) time in accordance with IC 5-3-1 at least seven (7) days before the hearing. The notice shall include the following:

- (1) The date, time, and place of the hearing.
- (2) The subject matter of the hearing.
- (3) A description of the public-private agreement to be awarded.
- (4) The recommendation that has been made to award the public-private agreement to an identified offeror or offerors.
- (5) The address and telephone number of the board.
- (6) A statement indicating that the proposals and an explanation of the basis upon which the recommendation is being made are available for public inspection and copying at the principal office of the board during regular business hours.

As added by P.L. 49-1997, SEC.34.

IC 5-23-5-10 Proposals and explanation of recommendation; inspection and copying

Sec. 10. (a) The proposals and a written explanation of the basis upon which the recommendation is being made shall be delivered to the board and made available for inspection and copying in accordance with IC 5-14-3 at least seven (7) days before the hearing scheduled under section 9 of this chapter.

(b) At the hearing, the board shall allow the public to be heard on the recommendation.

As added by P.L. 49-1997, SEC.34.

IC 5-23-5-11 Response to request for proposals

Sec. 11. After the procedures required in this chapter have been completed, the board shall make a determination as to the most appropriate response to the request for proposals and may award the public-private agreement to the successful offeror or offerors.

As added by P.L. 49-1997, SEC.34.

IC 5-23-5-12 Termination of request for proposal process

Sec. 12. If the request for proposal process is terminated under section 8 of this chapter, all proposals may, at the option of the governmental body, be returned to the offerors, and the governmental body may refuse to disclose the contents of the offers.

As added by P.L. 49-1997, SEC.34.

IC 5-23-6**Chapter 6. Contract Terms and Conditions**

- | | |
|----------|---------------------------------------|
| 5-23-6-1 | Original term in excess of five years |
| 5-23-6-2 | Termination by board |
| 5-23-6-3 | Payments to parties upon termination |

IC 5-23-6-1**Original term in excess of five years**

Sec. 1. (a) Under the provisions of this article, the governmental body may enter into a public-private agreement for an original term not to exceed five (5) years with board approval.

(b) Any public-private agreement with an original term in excess of five (5) years must be approved by the following:

- (1) The board.
- (2) If the state is a party to the agreement, the governor.
- (3) If a political subdivision is a party to the agreement, by the fiscal body of the political subdivision.

As added by P.L.49-1997, SEC.34.

IC 5-23-6-2**Termination by board**

Sec. 2. A public-private agreement may be terminated by the board in conformity with the terms of the public-private agreement.

As added by P.L.49-1997, SEC.34.

IC 5-23-6-3**Payments to parties upon termination**

Sec. 3. The public-private agreement may provide for the payment of money to either party if the public-private agreement is terminated. The payments may be used in the form of liquidated damages to compensate the operator for demonstrated unamortized costs, to retire or refinance indebtedness created to improve or construct assets owned by the governmental body, or for any other purpose mutually agreeable to the operator and the governmental body.

As added by P.L.49-1997, SEC.34.

IC 5-23-7

Chapter 7. Records

5-23-7-1

Records of operator in public-private agreement

5-23-7-2

Inspection and copying

IC 5-23-7-1

Records of operator in public-private agreement

Sec. 1. Records of an operator that is a party to a public-private agreement are subject to inspection and copying to the same extent the records would be subject to inspection and copying if the operator were a public agency under IC 5-14-3. This section is limited to records directly relating to the public-private agreements.

As added by P.L.49-1997, SEC.34.

IC 5-23-7-2

Inspection and copying

Sec. 2. Records that are provided by an operator to the governmental body that relate to compliance by the operator with the terms of a public-private agreement are subject to inspection and copying in accordance with IC 5-14-3.

As added by P.L.49-1997, SEC.34.

DIGEST SHEET

TITLE OF RESOLUTION. A Resolution Adopting the Provisions of Indiana Code § 5-23 (Indiana's Public-Private Agreement Statute)

DEPARTMENT REQUESTING RESOLUTION. Redevelopment Commission.

SYNOPSIS OF RESOLUTION. The resolution adopts Indiana Code § 5-23 ("BOT Statute") which authorizes the City and its subordinate entities to enter into certain public-private partnerships, including Build-Operate-Transfer (BOT) agreements. BOT agreements are agreements between a governmental body and an operator to construct, operate, and maintain a public facility and to transfer the facility back to the governmental body at an established future date (for example, the completion of construction or after a pre-determined number of years). The BOT Statute requires a governmental body to request proposals through an RFP process before entering into a BOT agreement.

EFFECT OF PASSAGE. The adoption of the BOT Statute gives the City another "tool in the toolbox" to pursue the development of public facilities where traditional methods of project financing are not feasible. It could be used for construction of facilities such as parking garages, public utility facilities, or other municipal buildings.

EFFECT OF NON-PASSAGE. Non-passage would prevent the City from utilizing a financing mechanism that has been leveraged throughout the state to construct a range of public facilities.

MONEY INVOLVED (DIRECT COSTS, EXPENDITURES, SAVINGS). There are no direct monetary costs involved with the passage of the resolution. If the BOT Statute were utilized, the cost of BOT projects would be determined through a competitive RFP process to ensure that projects provided the best value to the City.

ASSIGNED TO COMMITTEE (PRESIDENT). _____



REDEVELOPMENT COMMISSION

City of Fort Wayne
Community Development
200 East Berry Street, Suite 320
Fort Wayne IN 46802
260.427.1127 • 311

www.fwcommunitydevelopment.org

December 5, 2019

MEMO

To: City of Fort Wayne Common Council

Copy: City of Fort Wayne Redevelopment Commission

From: Nancy Townsend, Redevelopment Director, Redevelopment Department, 427-2323

Re: **Resolution Adopting the Provisions of Indiana Code § 5-23 (Indiana's Public-Private Agreement Statute)**

Pursuant to IC § 5-23-1-1, please find enclosed herewith:

1. A Resolution adopting the provisions of Indiana Code § 5-23. This resolution authorizes the City and its subordinate entities to enter into certain public-private partnerships, including Build-Operate-Transfer (BOT) agreements.
2. Text of IC § 5-23, which is the section of Indiana Code being considered for adoption. This is existing Indiana law and is being provided for your reference.

The Redevelopment Commission hereby requests that the Common Council consider and approve the resolution. Approval by Council is the only step in the approval process for this item.

An Equal Opportunity Employer