

## **IC 8-15.7-5**

### **Chapter 5. Public-Private Agreements**

#### **IC 8-15.7-5-1**

##### **Public-private agreement by operator; provisions of agreement**

Sec. 1. (a) Before beginning:

- (1) the development;
- (2) the financing;
- (3) the operation; or
- (4) any combination of the development, financing, or operation;

of a qualifying project, the operator must enter into a public-private agreement with the department. Subject to the other provisions of this article, the department and a private entity may enter into a public-private agreement with respect to a project. Subject to the requirements of this article, a public-private agreement may provide that the private entity, acting on behalf of the department or the authority, is partially or entirely responsible for any combination of developing, financing, or operating the qualifying project.

(b) The public-private agreement may, as determined appropriate by the department for the particular qualifying project, provide for all or part of the following:

- (1) Delivery of performance and payment bonds or other performance security determined suitable by the department, including letters of credit, United States bonds and notes, parent guaranties, and cash collateral, in connection with the development, financing, or operation of the qualifying project, in the forms and amounts set forth in the public-private agreement or otherwise determined as satisfactory by the department to protect the department and payment bond beneficiaries who have a direct contractual relationship with the operator or a subcontractor of the operator to supply labor or material. A payment or performance bond or alternative form of performance security required under a public-private agreement shall not be required for the part of a public-private agreement that includes only design, planning, or financing services, the performance of preliminary studies, or the acquisition of real property.
- (2) Review of plans for any development or operation, or both, of the qualifying project by the department.
- (3) Inspection of any construction of or improvements to the qualifying project by the department or another entity designated by the department or under the public-private agreement to ensure that the construction or improvements conform to the standards set forth in the public-private agreement or are otherwise acceptable to the department.
- (4) Maintenance of:
  - (A) one (1) or more policies of public liability insurance (copies of which shall be filed with the department accompanied by proofs of coverage); or

(B) self-insurance;  
each in the form and amount required by the public-private agreement or otherwise satisfactory to the department as reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project.

(5) If operations are included within the operator's obligations under the public-private agreement, monitoring of the maintenance practices of the operator by the department or another entity designated by the department or under the public-private agreement, and the taking of the actions that the department finds appropriate to ensure that the qualifying project is properly maintained.

(6) Reimbursement to be paid to the department as set forth in the public-private agreement for services provided by the department.

(7) Filing of appropriate financial statements and reports as set forth in the public-private agreement or as otherwise in a form acceptable to the department on a periodic basis.

(8) Compensation or payments to the operator, attorneys, bankers, financial advisors, or other professionals. Compensation or payments may include one (1) or more of the following:

(A) A development fee, payable on a lump sum basis, progress payment basis, time and materials basis, or any other basis considered appropriate by the department.

(B) An operations fee, payable on a lump sum basis, time and material basis, periodic basis, or any other basis considered appropriate by the department.

(C) All or part of the revenues, if any, arising out of operation of the qualifying project.

(D) A maximum rate of return on investment or return on equity or a combination of the two (2).

(E) In kind services, materials, property, equipment, or other items.

(F) Compensation in the event of any termination.

(G) A cash payment to pay part of the project cost.

(H) Other compensation set forth in the public-private agreement or otherwise considered appropriate by the department.

(9) Compensation or payments to the department, if any. Compensation or payments may include one (1) or more of the following:

(A) A concession payment, lease payment, or other fee, which may be payable in a lump sum, on a periodic basis, or on any other basis considered appropriate by the department.

(B) Sharing of revenues, if any, from the operation of the qualifying project.

(C) Payment for any services, materials, equipment, personnel, or other items provided by the department to the

operator under the public-private agreement or in connection with the qualifying project.

(D) Other compensation set forth in the public-private agreement or otherwise considered appropriate by the department.

(10) The date and terms of termination of the operator's authority and duties under this article, and circumstances under which the operator's authority and duties may be terminated before that date.

(11) Reversion of the qualifying project to the department at the termination or expiration of the public-private agreement.

(12) Rights and remedies of the department if the operator defaults or otherwise fails to comply with the terms of the public-private agreement.

(c) A public-private agreement may not provide that the state or the department is responsible for any debt incurred by an operator in connection with the delivery of a project.

*As added by P.L.47-2006, SEC.40.*

#### **IC 8-15.7-5-1.5**

##### **Additional required provisions of agreement**

Sec. 1.5. In addition to the other requirements of this article, a public-private agreement entered into under this article must include the following:

(1) A requirement for the completion of all environmental analyses of the project required by state and federal law in the manner and at the times required by the appropriate state and federal agencies.

(2) A requirement for ownership by the department in the name of the state of Indiana of:

(A) all the real property on which the project is located; and

(B) all of the improvements on that real property.

(3) An expedited method for resolving disputes between or among the department, the parties to the public-private agreement, and affected jurisdictions, as required by IC 8-15.7-12-2.

*As added by P.L.85-2010, SEC.18.*

#### **IC 8-15.7-5-2**

##### **User fees**

Sec. 2. (a) The department may fix and revise the amounts of user fees that an operator may charge and collect for the use of any part of a qualifying project in accordance with the public-private agreement. In fixing these amounts, the department may:

(1) establish maximum amounts for the user fees; and

(2) subject to subsection (b), provide for increases or decreases of the maximum amounts based upon the indices, methodologies, or other factors that the department considers appropriate.

(b) For a public-private agreement entered into after June 30,

2011, the department may not use a methodology based on:

- (1) toll collection success rates; or
- (2) other factors internal to the operator;

that could result in increases of the maximum amounts due to actual toll collection rates that are below estimated or anticipated toll collection rates.

(c) User fees established by the department for the use of a qualifying project must be nondiscriminatory and may:

- (1) include different user fees based on categories such as vehicle class, vehicle size, vehicle axles, vehicle weight, volume, location, traffic congestion, or other means or classification that the department determines to be appropriate;
- (2) vary by time of day or year; and
- (3) be based on one (1) or more factors considered relevant by the department, which may include any combination of:

- (A) lease payments;
- (B) financing costs and charges;
- (C) debt repayment, including principal and interest;
- (D) costs of development;
- (E) costs of operation;
- (F) working capital;
- (G) reserves;
- (H) depreciation;
- (I) compensation to the operator;
- (J) compensation to the department; and
- (K) other costs, expenses, and factors set forth in the public-private agreement or otherwise considered appropriate by the department.

(d) A public-private agreement may:

- (1) authorize the operator to adjust the user fees for the use of the qualifying project, so long as the amounts charged and collected by the operator do not exceed the maximum amounts established by the department under this chapter;
- (2) provide that any adjustment by the operator permitted under subdivision (1) may be based on indices, methodologies, or other factors described in subsection (a) or (b), as applicable;
- (3) authorize the operator to charge and collect user fees through manual and nonmanual methods, including, but not limited to, automatic vehicle identification systems, electronic toll collection systems, and, to the extent permitted by law, including rules adopted by the department, global positioning systems and photo or video based toll collection enforcement systems; and
- (4) authorize the collection of user fees by a third party.

(e) A schedule of the current user fees shall be made available by the operator to any member of the public on request. User fees and the setting of user fee rates are not subject to supervision or regulation by any other commission, board, bureau, or agency of the state or any municipality, except to the extent set forth in the public-private agreement.

(f) Any action to contest the validity of user fees fixed under this chapter may not be brought after the fifteenth day following the effective date of a rule fixing the user fees.

*As added by P.L.47-2006, SEC.40. Amended by P.L.163-2011, SEC.14.*

#### **IC 8-15.7-5-3**

##### **Grants or loans for qualifying project**

Sec. 3. In the public-private agreement, the department may agree to make grants or loans for the development or operation, or both, of the qualifying project from amounts received from the federal government, any agency or instrumentality of the federal government, or any state or local agency.

*As added by P.L.47-2006, SEC.40.*

#### **IC 8-15.7-5-4**

##### **Additional provisions of public-private agreement**

Sec. 4. The public-private agreement must incorporate the duties of the operator under this article and may contain the other terms and conditions that the department determines serve the public purpose of this article. The public-private agreement may contain provisions under which the department or the authority agrees to provide notice of default and cure rights for the benefit of the operator and the persons or entities described in the public-private agreement that are providing financing for the qualifying project. The public-private agreement may contain any other lawful term or condition to which the operator and the department mutually agree, including provisions regarding change orders, dispute resolution, required upgrades to the qualifying project, tolling policies, changes and modifications to the qualifying project, unavoidable delays, or provisions for a loan or grant of public funds for the development or operation, or both, of one (1) or more qualifying projects.

*As added by P.L.47-2006, SEC.40.*

#### **IC 8-15.7-5-5**

##### **Distribution of payments received by department under public-private agreement**

Sec. 5. To the extent that the department receives any payment or compensation under the public-private agreement other than repayment of a loan or grant or reimbursement for services provided by the department to the operator, the payment or compensation shall be distributed at the direction of the department to the:

- (1) major moves construction fund established under IC 8-14-14;
- (2) department for deposit in the state highway fund established by IC 8-23-9-54;
- (3) alternative transportation construction fund established under IC 8-14-17; or
- (4) operator or the authority for debt reduction.

*As added by P.L.47-2006, SEC.40. Amended by P.L.203-2007,*

SEC.7.

**IC 8-15.7-5-6**

**Takeover of qualifying project upon termination of public-private agreement**

Sec. 6. (a) Upon the termination or expiration of the public-private agreement, including a termination for default, the department may take over the qualifying project and succeed to all of the right, title, and interest in the qualifying project. The department may agree to accept the qualifying project subject to any liens on revenues previously granted by the operator to any person providing financing for the qualifying project.

(b) If the department elects to take over a qualifying project, the department may do all or part of the following:

- (1) Develop, finance, or operate the project.
- (2) Impose, collect, retain, and use user fees, if any, for the project.

(c) The department may use any revenues collected under this section for any of the following purposes or any other authorized use under this article:

- (1) Making payments to individuals or entities in connection with the financing of the qualifying project.
- (2) Paying development costs of the project.
- (3) Paying current operation costs of the project or facilities, including compensation to the department for the services of the department in operating the qualifying project.
- (4) Paying the operator for any compensation or payment owing upon termination.

(d) The full faith and credit of the state or any political subdivision or the authority is not pledged to secure any financing of the operator by the election to take over the qualifying project. Assumption of development or operation, or both, of the qualifying project does not obligate the state or any political subdivision or the authority to pay any obligation of the operator.

*As added by P.L.47-2006, SEC.40.*

**IC 8-15.7-5-7**

**Amendment of public-private agreement**

Sec. 7. Any changes in the terms of the public-private agreement agreed to by the parties shall be added to the public-private agreement by written amendment.

*As added by P.L.47-2006, SEC.40.*

**IC 8-15.7-5-8**

**Public-private agreement with multiple entities**

Sec. 8. Notwithstanding any other provision of this article, the department may enter into a public-private agreement with multiple private entities if the department determines in writing that it is in the public interest to do so.

*As added by P.L.47-2006, SEC.40.*

**IC 8-15.7-5-9****Public-private agreement for phases or segments of project**

Sec. 9. The public-private agreement may provide for all or part of the development, financing, or operation of phases or segments of the qualifying project.

*As added by P.L.47-2006, SEC.40.*

**IC 8-15.7-5-10****Memoranda of understanding for implementation of public-private agreement**

Sec. 10. The department may enter into one (1) or more memoranda of understanding with respect to the implementation and administration of a public-private agreement. The memoranda may provide that the department has responsibility for, and shall administer and oversee certain aspects of the implementation of, the public-private agreement under this article, including:

- (1) undertaking any oversight and monitoring of the operator as provided under the public-private agreement;
- (2) reviewing plans for development and operation, as applicable, as provided under the public-private agreement;
- (3) granting or denying all consents and approvals as provided under the public-private agreement, except for consents and approvals relating to financial matters that the department is not permitted to grant or deny under applicable law, in which case the authority shall execute the consents and approvals prepared by the department;
- (4) receiving all development, operations, and financial reports prepared by the operator or others, as provided under the public-private agreement;
- (5) preparing, negotiating, and executing any change orders and amendments to the public-private agreement;
- (6) issuing other written correspondence and communications on behalf of the authority as provided under the public-private agreement;
- (7) preparing and issuing noncompliance letters and reports, warning notices, and default letters to the operator as provided under the public-private agreement; and
- (8) exercising rights and remedies for a breach or default by the operator as provided under the public-private agreement, except for rights and remedies relating to financial matters that the department is not permitted to exercise under applicable law, in which case the authority shall exercise the rights and remedies.

*As added by P.L.47-2006, SEC.40.*