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BUILD-OPERATE-TRANSFER AGREEMENTS: WHAT TO KNOW ABOUT INDIANA'S BUILD-OPERATE-TRANSFER PROCUREMENT METHOD

INDIANA'S BUILD-OPERATE-TRANSFER STATUTE

For political subdivisions in Indiana considering pursuing a public-private partnership for the development, design and construction of public facilities, build-operate-transfer ("BOT") is rapidly becoming the "go-to" procurement and delivery method. Subject to satisfaction of the procedural requirements set forth in Indiana Code §5-23 *et seq.* ("BOT Statute"), which governs BOT transactions, the BOT model allows the State of Indiana or a political subdivision thereof (as applicable and regardless of the nature of the political subdivision, a "Public Entity") to negotiate directly with developers the terms of a "build-operate-transfer" agreement under which the developer will build, operate (either short-term or for an extended period) and then transfer a public facility to the Public Entity. Such agreements have come to be known as "BOT Agreements".

It is important to note that, prior to undertaking a BOT transaction, all Public Entities other than the State of Indiana and the City of Indianapolis must specifically adopt by ordinance or resolution the provisions of the BOT Statute. Adopting the provisions of the BOT Statute does not limit the ability of the Public Entity to elect to proceed with a different procurement process but, absent such adoption, there is no authority for the Public Entity to move forward with a BOT transaction.

THE BUILD-OPERATE-TRANSFER PROCESS

At any time after a Public Entity has adopted the provisions of the BOT Statute, it may issue a request for proposals and qualifications ("RFP/Q") for its intended project. The BOT Statute sets forth requirements with respect to the content of the RFP/Q, as well as requirements with respect to publicly noticing the issuance of the RFP/Q. In connection with its issuance of the RFP/Q, the Public Entity will establish a committee to evaluate proposals received in response to the RFP/Q ("RFP/Q Committee").

It is during the evaluation process that the benefits of the BOT structure reveal themselves. Subject to the requirement that all eligible offerors must be accorded fair and equal treatment, the RFP/Q committee is free to enter into discussions with the offerors for the purpose of identifying which proposals have a reasonable possibility of being selected, and, thereafter, to negotiate with each offeror that submitted such an identified proposal to determine such offeror's "best and final" proposal. The RFP/Q committee will evaluate each "best and final" proposal to determine whether the Public Entity should accept any such proposal. Note that, when evaluating the "best and final" proposals, the RFP/Q Committee is not required to select the lowest price; instead, it may select the proposal that it finds to be the best value. Thus, the RFP/Q Committee may take into account the offeror's reputation and expertise, the previous projects undertaken by the offeror and its track record with respect to delivery of such projects. It also may factor in the ability of the offeror to leverage the BOT Agreement to secure funds to construct the project. In freeing a Public Entity from some of the strictures imposed in connection with the "standard" public bidding process, this ability to fully negotiate and evaluate project procurement, delivery and funding often results in a superior outcome for the Public Entity. Once it has completed its evaluation, the RFP/Q Committee will recommend to the Public Entity in writing either that it accept a specified proposal, or that it terminate the BOT process due to a lack of satisfactory proposals.

The final step in the BOT process is for the legislative body of the Public Entity to notice and hold a public hearing at which the transaction may be awarded to the offeror recommended by the RFP/Q Committee. Thereafter, the Public Entity may enter into a BOT Agreement with its selected partner.

FUNDING SOURCES

The BOT model provides a great deal of flexibility when it comes to funding project costs. While the Public Entity may elect to use traditional funding sources, such as bond proceeds or cash on hand, to pay project costs, the BOT Agreement also may contemplate an alternative structure by which the private partner will leverage the BOT Agreement to secure funds for the project.

PRACTICAL TAKEAWAYS

Public Entities should consider the build-operate-transfer model when undertaking public projects, as it provides Public Entities with a flexible and efficient alternative to traditional project procurement and financing methods.

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