

# WASHINGTON COUNTY COUNCIL

99 Public Square, Suite 200

Salem, Indiana 47167

April 3, 2023

Open Session – 9:00 a.m.

9:00 a.m. Called to Order/Approval of Minutes

9:05 a.m.

Abatements

9:09

Additional Appropriations

9:20 a.m.

Brad Isaacs – B.O.T. Agreement

9:30 a.m.

Additional Appropriations

\$57,000 for log Jam Cleanup  
\$6,000 moving tractor

9:40 a.m.

Auditor Kyra Stephenson

9:50 a.m.

Attorney John Mead

10:00 a.m.

Board Comments/Concerns/Updates

9:10 - Brad Isaacs — B.O.T. - Info Attached

10:00 Todd Ewen - Hand outs were not  
Given to media  
About paving + highway Dept Project

# Government Meeting Quality Evaluation Sheet

IndianaProud.com

Date | April 3, 2023

Meeting | Washington County Council / Commissioners Meeting

Was the Agenda Posted Legally?  Yes  No

Was the Correct Meeting Date, Place and Time Posted on the Website?  Yes  No

Were Copies of the Documents Presented During the Meeting Given to the Attending Media?  Yes  No *Todd Ewen did not hand out copies to*

If not, was it Posted on the Website? Yes  No  ~~Yes~~ ~~No~~  
*media*

Was there Department Crossover in this Meeting (Meaning 2 Departments for 1 Meeting – like Council/Commissioner Joint Meeting)?  Yes  No

If yes, which Departments? *This is the normal Council Meeting the Commissioners are other Dept*

Was the Meeting Legal?  Yes  No If not, Why?

## Which Officials Attended and Which Officials Absent?

Mark "Bubba" Abbott  
Kecley Stinger  
Rondale Briskaber  
Karen Wischmeier  
Preston Shell  
Joe Walker  
Gerald Fleming

Commissioners  
Todd Ewen  
Phillip Marshall  
Rick Roberts

Absent  
John Mead - Council lawyer

# Washington County Highway Department

**“B.O.T.”**

**(Build, Operate, and Transfer Process)**

## Build-Operate-Transfer (“BOT”) Method

- A governmental body may enter into a BOT Agreement for the acquisition, planning, design, development, reconstruction, repair, maintenance, operation, and/or financing of any public facility for use by the governmental body.
- BOT Agreement must identify which costs for which developer is responsible and costs for which governmental body responsible.
- Upon completion, developer/offeror must operate the facility for some period of time before transferring it back to governmental entity (30 days common, but could be much longer term).
- BOT Agreement may provide for the transfer of the public facility to the governmental body by means of a lease or an installment purchase contract. The lease payments or installment payments may be made from any source legally available to the governmental body for such purpose.



## Build-Operate-Transfer (“BOT”) Method (cont’d)

### Highlights of the process

- The governmental entity adopts the provisions of the BOT Statute (I.C. 5-23)
- The governmental entity may issue a request for information (RFI) to gain information (1) on factors involved in, the feasibility of, or potential consequences of a proposed project, (2) to assist in preparing a request for proposals (RFP), or (3) to evaluate any aspect of an existing BOT Agreement or associated facility
- Responses to RFI confidential, unless waived by respondent
- No action required to be taken after receiving responses to RFI
- An RFI is not required as part of the BOT method, but may be helpful

## Build-Operate-Transfer (“BOT”) Method (cont’d)

### Highlights of the process (cont’d)

- The governmental entity must solicit proposals through an RFP, which must include:
  - Factors/criteria to be used in evaluating proposals
  - Statement concerning relative importance of price and other factors
  - Statement concerning whether proposals must be accompanied by a certified check or other evidence of financial responsibility
  - Statement concerning whether discussions may be conducted with offerors for the purpose of clarification to assure full understanding of and responsiveness to the RFP
- Notice of the RFP published two times, 1 week apart, with second publication at least 7 days before proposals are due.



## Build-Operate-Transfer (“BOT”) Method (cont’d)

### Highlights of the process (cont’d)

- Once proposals received, discussions may be conducted with offerors for the purpose of clarification if provided in the RFP
- The governmental entity can form an evaluation committee. There are no requirements regarding the composition of a committee
- Eligible offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revisions of proposals
- The governmental body must negotiate the best and final offers of responsible offerors who submit proposals that are determined to be reasonably susceptible of being selected for a BOT Agreement
- After best and final offers have been negotiated, the governmental body shall either make a recommendation to the board to award the BOT Agreement to an offeror or shall terminate the RFP process

## Build-Operate-Transfer (“BOT”) Method (cont’d)

### Highlights of the process (cont’d)

- Once preferred offer selected, must publish notice of public hearing (10-days in advance), hold public hearing on the preferred offer, and award BOT Agreement to the preferred offer.
- If term of BOT Agreement is greater than 5 years, must also be approved by the fiscal body of the political subdivision
- The BOT Agreement must provide for a payment bond in an amount not less than 100% of the cost to design and construct the facility
- The BOT Agreement must provide for a performance bond in an amount not less than 50% of the cost to design and construct the facility
- No retainage required
- The governmental entity may hire an owner’s representative/clerk of the works to monitor performance by the selected developer.



## Build-Operate-Transfer (“BOT”) Method (cont’d)

### Primary Positives

- The governmental body has the ability to negotiate best and final offers with potential firms, and maintains control of selecting its preferred proposal
- The governmental body holds a single contract with a developer team
- Through RFP process, limitations may be imposed on who may be an acceptable respondent
- The upfront (but not overall) professional costs incurred by the governmental entity may be significantly less
- Penalties and incentives may be included in the BOT Agreement

## Build-Operate-Transfer (“BOT”) Method (cont’d)

### Primary Positives (cont’d)

- If there is a defect in the project, the selected developer is solely responsible for correcting the problem at its cost
- Generally requires less involvement in the project by the governmental entity, compared to traditional design-bid-build method

## Build-Operate-Transfer (“BOT”) Method (cont’d)

### Primary Negatives

- The timeline for the process and the preparation to be done by the respondents may reduce the pool of respondents depending on the size of the project and the time allowed for responses
- Some, or much, of the control of the governmental entity over the design of the project may be lost
- The governmental entity may not be able to provide satisfactory objective information regarding why one qualified offer was selected over the other proposals
- No public bidding required, so it’s unclear whether there are really cost savings from delivery method



## Build-Operate-Transfer (“BOT”) Method (cont’d)

### Primary Negatives (cont’d)

- The governmental entity may lose all or a portion of the benefit of a project coming in under budget if the contract is a guaranteed maximum price contract
- If developer team providing the financing,
  - Embedded interest rate may be at a taxable borrowing rate, rather than much lower tax-exempt interest rate at which governmental entity can borrow
  - Developer financing usually has a 5-10 year term, with a balloon payment due at maturity, which will need to be refinanced and creates interest rate risk
  - Need to follow statutory procedures for incurrence of debt
  - Might be subject to petition-remonstrance or referendum process
- Potential hidden costs in the form of developer fees, developer counsel fees, spread or mark-up on actual interest rate received from developer’s lender

Steps to be taken Per: Council President Keelie Stingel

- o Commissioners adopt BOT statute
  - ↳ RFP / RFQ ✓
  - ↳ Selection of Project Team
    - ↳ Scoping period\*
    - ↳ Public Hearing recommendation
    - ↳ BOT Agreement
      - ↳ County repayment source\*
      - ↳ Financing by developer
        - ↳ Operating / lease agreement



### 5-23 Overview (Build Operate Transfer/BOT)

#### What is IC 5-23?

Indiana Code (IC) 5-23 is a statute that permits a political subdivision to enter into an 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.

The statute is commonly known as **Build Operate Transfer**, or **BOT**. Under the statute, the governmental body enters into a public-private agreement with a development partner (operator) to provide an identified service to the governmental body.

This service can come in a variety of forms, typically a public facility or improvement. Most municipalities that adopt IC 5-23 utilize the statute as an alternative to traditional processes for public capital improvements (Design, Bond, Bid, Build). In a BOT project, the area where the improvements occur is "leased" to, or otherwise under control of, the operator during the construction period, and then transferred back to the governmental body upon project conclusion (hence Build, Operate, Transfer).

#### BOT Alternative

BOT represents an alternative design/construction/financing process with many advantages to the governmental body. With BOT, the proposed project scope is provided at the front end with an RFP/Q seeking firms interested in a public-private partnership to deliver a project (or series of projects) to the body. The RFP/Q must meet certain statutory criteria, and notice of the RFP/Q must be published in accordance with IC-5-3-1.

Following the selection of a preferred proposer, the governmental body works directly with that firm (after a statutorily required notice and public hearing) in a design-build capacity pursuant to a BOT Agreement. The firm and the governmental body work hand-in-hand to arrive at a design that meets the needs of the governmental body at a guaranteed project budget. This scoping period is usually performed free of charge, and the private firm delivers a project team with capacity and experience in similar projects.

If properly structured, and there is evidence of sufficient public funds as repayment sources, BOT Agreements can accommodate certain financing options. The project is only constructed when the design, price, and financing terms are all approved by the governmental body.

#### BOT Advantages

BOT Agreements, when structured appropriately, can offer an efficient design/development process with competitive financing terms, built in cost savings and risk mitigation. This unique approach to design and financing has several advantages when compared to a traditional project procurement process. Those include:

- Selection of the Project Team – from Design to Construction – Under One Contract
- Control of Design Timeline
- Oversight and Authority of Design Elements and Approvals
- No Cost/Low Cost Scoping Period
- No Obligation to Move Forward with the Project
- Replicated Public Process/Ease of Developing Approval Documents
- Expedient Closing on Financing
- Very Low Issuance Costs/No DSR Required
- Guaranteed Budget or Maximum Price – No Change Orders
- Project Team Assumes 100% of Construction Risk



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