



STATE OF INDIANA

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ATTORNEY GENERAL

January 9, 2019

OFFICIAL OPINION 2019-1

The Honorable Tom Saunders
Indiana House of Representatives
Third Floor State House
Indianapolis, IN 46204

RE: Regional Jails and Cooperative Agreements

Dear Representative Saunders:

You asked whether there is sufficient statutory authority for the establishment of regional jails contemplated by Ind. Code § 11-12-5.5.

BRIEF ANSWER

Indiana's current statutes authorize counties to establish regional jails and describe steps necessary to accomplish this objective. The statutes are sufficiently broad to allow counties acting pursuant to an interlocal cooperation agreement to contract with a third-party contractor to construct, to maintain, and to operate a regional jail.

ANALYSIS

During the 2018 legislative session, the General Assembly passed HEA 1263, which became PL 184-2018 when signed by the Governor (the "2018 Legislation"). This legislation created, among other things, the framework by which counties can work together in establishing and funding a regional jail. The 2018 Legislation requires that each county conduct a feasibility study on the construction or reconstruction of a county jail, including:

- (1) The feasibility of housing inmates in the county jail of another county or in a multicounty jail established by two (2) or more counties.
- (2) A projection of the county's future jail needs and an estimate of the number and characteristics of future inmates.
- (3) An estimate of the costs, tax rates, and debt service amounts that would result from each of the alternatives addressed by the feasibility study.

Ind. Code § 36-1-8-19(c).

As codified in Ind. Code § 11-12-5.5 *et seq.*, the 2018 Legislation identifies interlocal cooperation agreements as the tool for implementing the construction, maintenance or operation of a regional jail:

(a) Subject to the requirements of this chapter, the executive of a county may enter into an agreement under IC 36-1-7 with one (1) or more entities described in IC 36-1-7-1¹ for the construction, maintenance, or operation of a regional jail.

(b) In the case of a county, the county executive may not enter into a regional jail agreement under this chapter unless the regional jail agreement is first approved by both the county fiscal body and the county sheriff.

Ind. Code § 11-12-5.5-2.

Interlocal cooperation agreements, authorized by Ind. Code § 36-1-7 *et seq.* [the Interlocal Cooperation Act], are the usual device used by governmental entities to provide for the joint exercise of powers under the appropriate circumstances:

- (a) A power that may be exercised by an Indiana political subdivision² and by one (1) or more other governmental entities may be exercised:
- (1) by one (1) or more entities on behalf of others; or
 - (2) jointly by the entities.

Entities that want to do this must, by ordinance or resolution, enter into a written agreement under section 3 [Ind. Code § 36-1-7-3] or 9 [Ind. Code § 36-1-7-9] of this chapter.

Ind. Code § 36-1-7-2.

The Interlocal Cooperation Act provides guidance on the minimum requirements for such a written agreement. The agreement must provide for and authorize the creation of a separate legal entity or joint board to carry out the intent of the agreement:

- (a) An agreement under this section must provide for the following:
- (1) Its duration.
 - (2) Its purpose.
 - (3) The manner of financing, staffing, and supplying the joint undertaking and of establishing and maintaining a budget therefor.

¹ The entities described in Ind. Code § 36-1-7-1 are: (1) the state; (2) all political subdivisions; (3) all state agencies; (4) any of the following created by state law: (A) public instrumentalities and (B) public corporate bodies, (5) another state to the extent authorized by the law of that state; (6) political subdivisions of states other than Indiana, to the extent authorized by laws of the other states; (7) agencies of the federal government, to the extent authorized by federal laws; and (8) Indiana charter schools.

² "Political subdivision" means a "municipal corporation or special taxing district." Ind. Code § 36-1-2-13. A "municipal corporation" includes a "unit," Ind. Code § 36-1-2-10, and a "unit" means a "county, municipality, or township." Ind. Code § 36-1-2-23.

(4) The methods that may be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon partial or complete termination.

(5) Administration through:

(A) a separate legal entity, the nature, organization, composition, and powers of which must be provided; or

(B) a joint board composed of representatives of the entities that are parties to the agreement, and on which all parties to the agreement must be represented.³

(6) The manner of acquiring, holding, and disposing of real and personal property used in the joint undertaking, whenever a joint board is created under subdivision (5)(B).

In addition, such an agreement may provide for any other appropriate matters.

(b) A separate legal entity or joint board established by an agreement under this section has only the powers delegated to it by the agreement. The agreement may not provide for members, directors, or trustees of the separate legal entity or joint board to make appointments (either individually or jointly) to fill vacancies on the separate legal entity or joint board.

Ind. Code § 36-1-7-3. If either county anticipates a savings or reduction in reasonably foreseeable expenses as a result of efficiencies realized from any sharing of functions and resources, the interlocal cooperation agreement must specify how the decrease (if any) shall be factored by the department of local government finance to determine maximum permissible property tax levies, maximum permissible property tax rates, and budgets of the affected county or counties.

Ind. Code § 36-1-7-16.

The 2018 Legislation sets out additional terms that must be contained in a regional jail agreement:

In addition to the provisions required under IC 36-1-7-3, a regional jail agreement must include terms concerning the following:

(1) The location of the regional jail.

(2) The acquisition, construction, leasing, maintenance, repair, operation, termination of operations, and administration of the regional jail.

(3) The manner in which each participating entity's proportionate share of the funding for the regional jail will be determined.

(4) The manner in which any:

(A) per diem paid by the state; or

(B) other reimbursement paid by the state;

³ If a regional jail agreement provides for administration through either a separate legal entity or a joint board, "the county sheriff of each county participating in the agreement (or the county sheriff's designee) must be included as a member on the governing board of the separate legal entity or as a member of the joint board." Ind. Code § 11-12-5.5-4.

for the costs of incarcerating individuals in a county jail or the costs of medical care expenses incurred for individuals in a county jail will be used by the participating entities.

(5) Any pledge of local revenue that will be required to carry out the regional jail agreement or to pay bonds issued or leases entered into by a participating entity to carry out the regional jail agreement.

(6) The standards that will apply to the regional jail.

(7) The method of determining the inmate programs, activities, and services that will be provided at the regional jail.

(8) The method of resolving disputes among the participating entities concerning the regional jail agreement, if any such disputes arise.

Ind. Code § 11-12-5.5-3.

After the regional jail agreement has been approved by the Department of Correction as required by Ind. Code § 36-1-7-5,⁴ by the Office of the Attorney General as required by Ind. Code § 36-1-7-4,⁵ and filed with the county recorder as required by Ind. Code § 36-1-7-6, the separate legal entity or the joint board administering the agreement can proceed to perform the acts it is authorized to do under the regional jail agreement. It is the separate legal entity or the joint board that will enter into agreements with contractors to build the facility, maintain the facility, and/or operate the facility, if such powers have been delegated.⁶

If the parties to a regional jail agreement contemplate entering into a public-private BOT Agreement⁷ under Ind. Code § 5-23, each of the counties should adopt the provisions of Ind. Code § 5-23 and should ensure that the regional jail agreement authorizes the

⁴ Ind. Code § 36-1-7-5(a) provides, in pertinent part, “if an [interlocal] agreement under section 3 of this chapter concerns the provision of services or facilities that a state officer or state agency has power to control, the agreement must be submitted to that officer or agency for approval before it takes effect.” Ind. Code § 11-12-4-5 provides, “[i]n addition to the approval required from the agencies listed under IC 36-1-12-10, all final plans and specifications for the construction of a county jail are subject to review by the department [of correction]. Before construction may begin on a county jail[,] ...the board of county commissioners shall submit the plans and specifications to the department[.]”

⁵ The Office of the Attorney General is not required to approve an interlocal agreement if the agreement “delegates to the treasurer or disbursing officer of one (1) of the parties that is an Indiana political subdivision the duty to receive, disburse, and account for all monies of the joint undertaking.” Ind. Code § 36-1-7-4(a)(3). We anticipate that regional jail agreements will likely establish a separate legal entity or joint board to administer the regional jail; under those circumstances the approval of the Office of the Attorney General is required.

⁶ “A separate legal entity or joint board established by an agreement under this section has only the powers delegated to it by the agreement.” Ind. Code § 36-1-7-3(b).

⁷ “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.” Ind. Code § 5-23-2-3. The general understanding is that “BOT” is an acronym for “Build, Operate, and Transfer.”

separate legal entity or joint board to enter into a BOT Agreement.⁸ The separate legal entity or the joint board would be the “governmental body” as defined in Ind. Code § 5-23-2-6; would be the proper entity to enter into a BOT Agreement under Ind. Code § 5-23-3 *et seq.*; would enter into any operating agreement under Ind. Code § 5-23-4-1; would issue requests for information under Ind. Code § 5-23-4.5-1, which could affect any feasibility study or request for proposal; would issue requests for proposals under and select the contractor under Ind. Code § 5-23-5 *et seq.*; and would enter into a contract for the public-private endeavor under Ind. Code § 5-23-6.

CONCLUSION

Indiana’s current statutes authorize counties to establish regional jails and describe steps necessary to accomplish this objective. The statutes are sufficiently broad to allow counties acting pursuant to an interlocal cooperation agreement to contract with a third-party contractor to construct, to maintain, and to operate a regional jail.

SUBMITTED and ENDORSED
FOR PUBLICATION



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⁸ Ind. Code Art. 5-23, which authorizes public-private agreements, is applicable to “[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.” Ind. Code § 5-23-1-1(3). If the public-private agreement to which a political subdivision is a party will have a term in excess of 5 years, it must be approved by the fiscal body of the political subdivision. Ind. Code § 5-23-6-1(b)(3).