

CHAPTER 98**(HB 296)**

AN ACT relating to alternative project delivery methods for capital projects.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 45A.030 is amended to read as follows:

As used in this code, unless the context requires otherwise:

- (1) "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity through which business is conducted;
- (2) "Change order" means a written order signed by the purchasing officer, directing the contractor to make changes that the changes clause of the contract authorizes the purchasing officer to order without the consent of the contractor;
- (3) "Chief purchasing officer" means the secretary of the Finance and Administration Cabinet, who shall be responsible for all procurement of the Commonwealth except as provided by KRS Chapters 175, 176, 177, and 180;
- (4) "Construction" means the process of building, altering, repairing, improving, or demolishing any public structures or buildings, or other public improvements of any kind to any public real property. It does not include the routine maintenance of existing structures, buildings, or real property;
- (5) ***"Construction manager-agency" means services to assist the purchasing agency manage construction that are procured through a contract that is qualifications-based.***
- (6) ***"Construction management-at-risk" means a project delivery method in which the purchasing officer enters into a single contract with an offeror that assumes the risk for construction at a contracted guaranteed maximum price as a general contractor, and provides consultation and collaboration regarding the construction during and after design of a capital project. The contract shall be subject to the bonding requirements of KRS 45A.190.***
- (7) "Contract" means all types of state agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and insurance contracts except as provided in KRS 45A.022. It includes supplemental agreements with respect to any of the foregoing;
- ~~(8)(6)~~ "Contract modification" means any written alteration in the specifications, delivery point, rate of delivery, contract period, price, quantity, or other contract provisions of any existing contract, whether accomplished by unilateral action in accordance with a contract provision or by mutual action of the parties to the contract. It includes bilateral actions, such as supplemental agreements, and unilateral actions, such as change orders, administrative changes, notices of termination, and notices of the exercise of a contract option;
- ~~(9)(7)~~ "Contractor" means any person having a contract with a governmental body;
- ~~(10)(8)~~ "Data" means recorded information, regardless of form or characteristic;

- (11) *"Design-bid-build" means a project delivery method in which the purchasing officer sequentially awards separate contracts, the first for architectural, engineering, or engineering-related services to design the project and the second for construction of the capital project according to the design. The contract shall be subject to the bonding requirements of KRS 45A.185.*
- (12) *"Design-build" means a project delivery method in which the purchasing officer enters into a single contract for design and construction of a capital project. The contract shall be subject to the bonding requirements of KRS 45A.190.*
- (13)~~(9)~~ "Designee" means a duly authorized representative of a person holding a superior position;
- (14)~~(10)~~ "Document" means any physical embodiment of information or ideas, regardless of form or characteristic, including electronic versions thereof;
- (15)~~(11)~~ "Employee" means an individual drawing a salary from a governmental body, whether elected or not, and any nonsalaried individual performing personal services for any governmental body;
- (16)~~(12)~~ "Governmental body" means any department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment of the executive or legislative branch of the state government;
- (17)~~(13)~~ "Meeting" means all gatherings of every kind, including video teleconferences;
- (18)~~(14)~~ "Negotiation" means contracting by either the method set forth in KRS 45A.085, 45A.090, or 45A.095;
- (19)~~(15)~~ "Person" means any business, individual, organization, or group of individuals;
- (20)~~(16)~~ "Procurement" means the purchasing, buying, renting, leasing, or otherwise obtaining of any supplies, services, or construction. It includes all functions that pertain to the procurement of any supply, service, or construction item, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration;
- (21)~~(17)~~ "Purchase request" or "purchase requisition" means that document whereby a using agency requests that a contract be obtained for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation of solicitees, suggested sources of supply, and information supplied for the making of any written determination and finding required by KRS 45A.025;
- (22)~~(18)~~ "Purchasing agency" means any governmental body that is authorized by this code or its implementing administrative regulations or by way of delegation from the chief purchasing officer to contract on its own behalf rather than through the central contracting authority of the chief purchasing officer;
- (23)~~(19)~~ "Purchasing officer" means any person authorized by a governmental body in accordance with procedures prescribed by administrative regulations to enter into and administer contracts and make written determinations and findings with respect thereto. The term includes an authorized representative acting within the limits of authority;
- (24)~~(20)~~ "Services" means the rendering by a contractor of its time and effort rather than the furnishing of a specific end product, other than reports that are merely incidental to the required performance of services;

- (25)~~(21)~~ "Supplemental agreement" means any contract modification that is accomplished by the mutual action of the parties;
- (26)~~(22)~~ "Supplies" means all property, including but not limited to leases of real property, printing, and insurance, except land or a permanent interest in land;
- (27)~~(23)~~ "Using agency" means any governmental body of the state that utilizes any supplies, services, or construction purchased under this code;
- (28)~~(24)~~ "Video teleconference" means one (1) meeting, occurring in two (2) or more locations, where individuals can see and hear each other by means of video and audio equipment; and
- (29)~~(25)~~ "Writing" or "written" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

Section 2. KRS 45A.045 is amended to read as follows:

- (1) The Finance and Administration Cabinet shall serve as the central procurement and contracting agency of the Commonwealth.
 - (a) The cabinet shall require all agencies to furnish an estimate of specific needs for supplies, materials, and equipment to be purchased by competitive bidding for the purpose of permitting scheduling of purchasing in large volume. The cabinet shall establish and enforce schedules for purchasing supplies, materials, and equipment. In addition, prior to the beginning of each fiscal year all agencies shall submit to the Finance and Administration Cabinet an estimate of all needs for supplies, materials, and equipment during that year which will have to be required through competitive bidding.
 - (b) The Finance and Administration Cabinet shall have power, with the approval of the secretary of the Finance and Administration Cabinet, to transfer between departments, to salvage, to exchange, and to condemn supplies, equipment, and real property.
 - (c) The Finance and Administration Cabinet shall attempt in every practicable way to ensure that state agencies are fulfilling their business needs through the application of the best value criteria.
- (2) The Finance and Administration Cabinet shall recommend regulations, rules, and procedures and shall have supervision over all purchases by the various spending agencies, except as otherwise provided by law, and, subject to the approval of the secretary of the Finance and Administration Cabinet, shall promulgate administrative regulations to govern purchasing by or for all these agencies. The cabinet shall publish a manual of procedures which shall be incorporated by reference as an administrative regulation pursuant to KRS Chapter 13A. This manual shall be distributed to agencies and shall be revised upon issuance of amendments to these procedures. No purchase or contract shall be binding on the state or any agency thereof unless approved by the Finance and Administration Cabinet or made under general administrative regulations promulgated by the cabinet.
- (3) The Finance and Administration Cabinet shall purchase or otherwise acquire, or, with the approval of the secretary, may delegate and control the purchase and acquisition of the combined requirements of all spending agencies of the state, including, but not limited to, interests in real property, contractual services, rentals of all types, supplies, materials, equipment, and services.

- (4) The Finance and Administration Cabinet shall sell, trade, or otherwise dispose of any interest in real property of the state which is not needed, or has become unsuitable for public use, or would be more suitable to the public's interest if used in another manner, as determined by the secretary of the Finance and Administration Cabinet. The determination of the secretary of the Finance and Administration Cabinet shall be set forth in an order and shall be reached only after review of a written request by the agency desiring to dispose of the property. This request shall describe the property and state the reasons why the agency believes the property should be disposed. All instruments required by law to be recorded which convey any interest in any real property so disposed of shall be executed and signed by the secretary of the Finance and Administration Cabinet and approved by the Governor. Unless the secretary of the Finance and Administration Cabinet deems it in the best interest of the state to proceed otherwise, all interests in real property shall be sold either by invitation of sealed bids or by public auction. The selling price of any interest in real property shall not be less than the appraised value thereof as determined by the cabinet, or the Transportation Cabinet for the requirements of that cabinet.
- (5) The Finance and Administration Cabinet shall sell, trade, or otherwise dispose of all personal property of the state that is not needed, or has become unsuitable for public use, or would be more suitable to the public's interest if used in another manner, or, with the approval of the secretary, may delegate the sale, trade, or other disposal of the personal property. In the event the authority is delegated, the method for disposal shall be determined by the agency head, in accordance with administrative regulations promulgated by the Finance and Administration Cabinet, and shall be set forth in a document describing the property and stating the method of disposal and the reasons why the agency believes the property should be disposed of. In the event the authority is not delegated, requests to the Finance and Administration Cabinet to sell, trade, or otherwise dispose of the property shall describe the property and state the reasons why the agency believes the property should be disposed of. The method for disposal shall be determined by the Division of Surplus Property, and approved by the secretary of the Finance and Administration Cabinet or his or her designee.
- (6) The Finance and Administration Cabinet shall exercise general supervision and control over all warehouses, storerooms, and stores and of all inventories of supplies, services, and construction belonging to the Commonwealth. The cabinet shall promulgate administrative regulations to require agencies to take and maintain inventories of plant property, buildings, structures, other fixed assets, and equipment. The cabinet shall conduct periodic physical audits of inventories.
- (7) The Finance and Administration Cabinet shall establish and maintain programs for the development and use of purchasing specifications and for the inspection, testing, and acceptance of supplies, services, and construction.
- (8) Nothing in this section shall prevent the Finance and Administration Cabinet from negotiating with vendors who maintain a General Services Administration price agreement with the United States of America or any agency thereof. No contract executed under this provision shall authorize a price higher than is contained in the contract between the General Services Administration and the vendor affected.
- (9) Except as provided in KRS Chapters 175, 176, 177, and 180, and subject to the provisions of this code, the Finance and Administration Cabinet shall purchase or otherwise acquire all real property determined to be needed for state use, upon approval of the secretary of the

Finance and Administration Cabinet as to the determination of need and as to the action of purchase or other acquisition. The amount paid for this real property shall not exceed the appraised value as determined by the cabinet or the Transportation Cabinet (for such requirements of that cabinet), or the value set by eminent domain procedure. Subject to the provisions of this code, real property or any interest therein may be purchased, leased, or otherwise acquired from any officer or employee of any agency of the state upon a finding by the Finance and Administration Cabinet, based upon a written application by the head of the agency requesting the purchase, and approved by the secretary of the Finance and Administration Cabinet and the Governor, that the employee has not either himself or herself, or through any other person, influenced or attempted to influence either the agency requesting the acquisition of the property or the Finance and Administration Cabinet in connection with such acquisition. Whenever such an acquisition is consummated, the request and finding shall be recorded and kept by the Secretary of State along with the other documents recorded pursuant to the provisions of KRS Chapter 56.

- (10) The Finance and Administration Cabinet shall maintain records of all purchases and sales made under its authority and shall make periodic summary reports of all transactions to the secretary of the Finance and Administration Cabinet, the Governor, and the General Assembly. The Finance and Administration Cabinet shall also report trends in costs and prices, including savings realized through improved practices, to the above authorities. The Finance and Administration Cabinet shall also compile an annual report of state purchases by all spending agencies in the state's statewide accounting and reporting system. The report format shall include, but not be limited to, dollar amount, volume, type of purchase, and vendor.
- (11) For capital construction projects, subject to the provisions of this code *and Section 7 of this Act*, the *procurement*~~[bidding]~~ may be on whichever of the following *alternative project delivery* methods, in the judgment of the secretary of the Finance and Administration Cabinet *after first considering the traditional design-bid-build project delivery method*, offers the *best value*~~[lowest real cost]~~ to the taxpayer:
- (a) A *design-build*~~[total design bid]~~ basis; *or*
 - (b) A *construction management-at-risk* ~~[package system commonly referred to as "turnkey"]~~;
 - (c) ~~Phase bidding commonly referred to as "fast track"; or~~
 - (d) ~~Construction management~~.

Proposals~~[Bids]~~ shall be reviewed by the engineering staff to assure quality and value, and compliance with *procurement*~~[bid]~~ procedures. All specifications shall be written to promote competition. *Nothing in this section shall prohibit the procurement of phased bidding or construction manager-agency services.*

- (12) The Finance and Administration Cabinet shall have control and supervision over all purchases of energy-consuming equipment, supplies, and related equipment purchased or acquired by any agency of the state as provided in this code, and shall promulgate administrative regulations to designate the manner in which an energy-consuming item will be purchased so as to promote energy conservation and acquisition of energy efficient products. Major energy components shall be amortized on a seven (7) to ten (10) years' recovery basis and shall take into consideration the projected cost of fuel. The Finance and Administration Cabinet, in consultation with the Cabinet for Economic Development, shall

conduct a thorough economic feasibility analysis on any major energy-using component of at least three million (3,000,000) BTU's per hour heat input and shall issue a certificate of economic feasibility prior to the Finance and Administration Cabinet's purchasing or retrofitting any such component that utilizes any fuel other than coal. The economic feasibility analysis shall consist of life-cycle cost comparisons of a component that would utilize coal and one(s) that would utilize any fuel other than coal. For the analysis, the Finance and Administration Cabinet shall provide detailed estimates of equipment purchase price, installation cost, annual operation and maintenance costs, and usage patterns of energy-using components.

Section 3. KRS 45A.070 is amended to read as follows:

As used in KRS 45A.070 to ~~45A.180~~~~[45A.165]~~, unless the context in which they are used clearly requires a different meaning:

- (1) "Cost-reimbursement contract" means a contract under which the Commonwealth reimburses the contractor for those contract costs, within a stated ceiling, which are allowable and allocable in accordance with cost principles as provided in KRS 45A.215, and a fee, if any.
- (2) "Established catalogue price" means the price included in the most current catalogue, price list, schedule, or other form that:
 - (a) Is regularly maintained by the manufacturer or vendor of an item;
 - (b) Is either published or otherwise available for inspection by customers; and
 - (c) States prices at which sales are currently or were last made to a significant number of buyers constituting the general buying public for that item.
- (3) "Best value" means a procurement in which the decision is based on the primary objective of meeting the specific business requirements and best interests of the Commonwealth. These decisions shall be based on objective and quantifiable criteria that shall include price and that have been communicated to the offerors as set forth in the invitation for bids.
- (4) "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids in accordance with the procedures set forth in KRS 45A.080 of this code.
- (5) "Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals in accordance with the procedures set forth in KRS 45A.085, 45A.090, 45A.095, ~~or~~ 45A.100, *or Section 7 of this Act*.
- (6) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (7) "Responsive bidder" means a person who has submitted a bid under KRS 45A.080 which conforms in all material respects to the invitation for bids, so that all bidders may stand on equal footing with respect to the method and timeliness of submission and as to the substance of any resulting contract.

Section 4. KRS 45A.075 is amended to read as follows:

Except as otherwise authorized by law, all state contracts shall be awarded by:

- (1) Competitive sealed bidding, pursuant to KRS 45A.080; or

- (2) Competitive negotiation, pursuant to KRS 45A.085 and 45A.090 *or Section 7 of this Act*; or
- (3) Noncompetitive negotiation, pursuant to KRS 45A.095; or
- (4) Small purchase procedures, pursuant to KRS 45A.100.

Section 5. KRS 45A.085 is amended to read as follows:

- (1) When, under administrative regulations promulgated by the secretary *or under Section 7 of this Act*, the purchasing officer determines in writing that the use of competitive sealed bidding is not practicable, and except as provided in KRS 45A.095 and 45A.100, a contract may be awarded by competitive negotiation.
- (2) Adequate public notice of the request for proposals shall be given in the same manner and circumstances as provided in KRS 45A.080(3).
- (3) Contracts *other than contracts for projects utilizing an alternative project delivery method under Section 7 of this Act* may be competitively negotiated when it is determined in writing by the purchasing officer that the bids received by competitive sealed bidding either are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which each competitive bidder has been notified of the intention to negotiate and is given reasonable opportunity to negotiate.
- (4) *Contracts for projects utilizing an alternative project delivery method shall be processed in accordance with Section 7 of this Act.*
- (5) The request for proposals shall indicate the relative importance of price and other evaluation factors.
- ~~(6)~~~~(5)~~ Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals.
- ~~(7)~~~~(6)~~ Written or oral discussions shall be conducted with all responsible offerors who submit proposals determined in writing to be reasonably susceptible of being selected for award. Discussions shall not disclose any information derived from proposals submitted by competing offerors. Discussions need not be conducted:
 - (a) With respect to prices, where the prices are fixed by law or administrative regulation, except that consideration shall be given to competitive terms and conditions;
 - (b) Where time of delivery or performance will not permit discussions; or
 - (c) Where it can be clearly demonstrated and documented from the existence of adequate competition or prior experience with the particular supply, service, or construction item, that acceptance of an initial offer without discussion would result in fair and reasonable best value procurement, and the request for proposals notifies all offerors of the possibility that award may be made on the basis of the initial offers.

Section 6. KRS 45A.090 is amended to read as follows:

- (1) In the event that all bids submitted pursuant to competitive sealed bidding under KRS 45A.080 result in bid prices in excess of the funds available for the purchase, and the chief purchasing officer determines in writing:
 - (a) That there are no additional funds available from any source so as to permit an award to the responsive and responsible bidder whose bid offers the best value; and

- (b) The best interest of the state will not permit the delay attendant to a resolicitation under revised specifications, or for revised quantities, under competitive sealed bidding as provided in KRS 45A.080,

then a negotiated award may be made as set forth in subsections (2) or (3) of this section.

- (2) Where there is more than one (1) bidder, competitive negotiations pursuant to KRS 45A.085(3) shall be conducted with the three (3) (two (2) if there are only two (2)) bidders determined in writing to be the most responsive and responsible bidders, based on criteria contained in the bid invitation. Such competitive negotiations shall be conducted under the following restrictions:
- (a) If discussions pertaining to the revision of the specifications or quantities are held with any potential offeror, all other potential offerors shall be afforded an opportunity to take part in such discussions; and
- (b) A request for proposals, based upon revised specifications or quantities, shall be issued as promptly as possible, shall provide for an expeditious response to the revised requirements, and shall be awarded upon the basis of best value.
- (3) Where, after competitive sealed bidding, it is determined in writing that there is only one (1) responsive and responsible bidder, a noncompetitive negotiated award may be made with such bidder in accordance with KRS 45A.095.

Section 7. KRS 45A.180 is amended to read as follows:

- (1) The secretary of the Finance and Administration Cabinet shall ***promulgate administrative***~~issue~~ regulations ***by October 15, 2003***, providing for as many alternative methods of management of construction contracting as he may determine to be feasible;~~and~~ setting forth criteria to be used in determining which method of management of construction is to be used for a particular project; ***establishing a model process parallel to the selection committee procedures established in 45A.810 for the procurement of alternative project services of "construction management-at-risk" and "design-build," and for a "construction manager-agency;"***~~and~~ ***providing***~~granting to the purchasing officer, or the purchasing agency responsible for carrying out the construction project, the discretion to select the appropriate method of construction contracting for a particular project, provided, however,~~ that the ***chief*** purchasing officer shall execute and include in the contract file a written statement setting forth the facts ***recommending that***~~which led to the selection of~~ a particular method of management of construction contracting ***be used***~~in each instance~~. ***The administrative regulations shall include the establishment of:***
- (a) ***The relative weighing between qualifications and price; and***
- (b) ***The level of stipend, if any, available for the various types of projects.***
- (2) ***When a request for proposal for a project utilizing an alternative project delivery method is issued, the contracting body shall transmit a copy of the request for proposal to the Capital Projects and Bond Oversight Committee staff.***
- (3) ***Upon issuance of the contract for a project utilizing an alternative project delivery method, the contracting body shall submit the contract to the Government Contract Review Committee for review in accordance with KRS 45A.690 to 45A.725. The contracting body shall insure the contract clearly identifies to the committee that an alternative project delivery method is being utilized. Upon disapproval of or objection to the contract by the committee, the contracting body shall determine whether the contract***

shall be revised to comply with the objections of the committee, be canceled, or remain in effect. Subsequent contract amendments relating to change orders shall not be required to be submitted to the Government Contract Review Committee.

- (4) *A request for proposal for a project utilizing an alternative project delivery method under this section shall specifically state the evaluation factors and the relative weight of each to be used in the scoring of awards.*
- (5) *Any governing body of a postsecondary institution that manages its capital construction program under Section 17 of this Act shall adhere to the regulations promulgated under this section when utilizing an alternative project delivery method for capital projects, and shall report to legislative committees as specified in this section.*
- (6) *Any corporation as described by KRS 45.750(2)(c) or as created under the Kentucky Revised Statutes as a governmental agency and instrumentality of the Commonwealth that manages its capital construction program shall adhere to the regulations promulgated under this section when utilizing an alternative project delivery method for capital projects, and shall report to legislative committees as specified in this section.*

SECTION 8. A NEW SECTION OF KRS CHAPTER 45A IS CREATED TO READ AS FOLLOWS:

When a capital project is to be constructed utilizing the design-build construction method in accordance with Section 7 of this Act, the percentage of scoring to be attributed to the guaranteed maximum price shall be stated in the request for proposal. A request for proposal may allow for the payment of stipends for the technical proposal phase provided that the amount of the stipends and the terms under which stipends are to be paid are stated in the request for proposal.

SECTION 9. A NEW SECTION OF KRS CHAPTER 45A IS CREATED TO READ AS FOLLOWS:

The entity selected under KRS 45A.810 to draft the preliminary project design or specifications that forms the basis of a request for proposal for a project utilizing the design-build project delivery method shall not be eligible to act as an offeror to the request for proposal for procuring a design-build team for that project.

SECTION 10. A NEW SECTION OF KRS CHAPTER 45A IS CREATED TO READ AS FOLLOWS:

- (1) *When a capital project is to be constructed utilizing the design-build method in accordance with Section 7 of this Act, a process parallel to the selection committee procedures established in KRS 45A.810 shall apply when procuring a design-build team and shall incorporate the following:*
 - (a) *The evaluation process may include a multiple phased proposal that is based on qualifications, experience, technical requirements, guaranteed maximum price, and other criteria as set forth in the request for proposal. The guaranteed maximum price component shall be submitted by the offeror independently of other documents and shall be held by the director of the Division of Contracting and Administration.*
 - (b) *Each evaluator shall independently score each phase and indicate a total score for all evaluation factors as set forth in the request for proposal.*

- (c) *Final phase proposals from the offerors on the short list shall be evaluated and scored by the evaluation committee members who shall not have knowledge of the guaranteed maximum price component. Each evaluator shall independently score the final phase proposals and indicate a total score. A total average score shall be calculated for each offeror. Then each offeror's respective score for the guaranteed maximum price shall be added. The offeror with the highest point total in the final phase shall receive the contract award unless the guaranteed maximum price proposal is in excess of the authorized budget. If two (2) or more of the offerors achieve the same highest point total at the end of the final phase scoring, the purchasing officer shall request best-and-final proposals from each offeror.*
- (d) *If the guaranteed maximum price of the offeror with the highest point total in the final phase is greater than the amount of funds identified in the request for proposal, then competitive negotiations may be conducted with the offerors under the following restrictions:*
1. *If discussion pertaining to the revision of the specifications or quantities are held, the offerors shall be afforded an opportunity to take part in such discussions; and*
 2. *Written revisions of the specifications shall be made available to each of the offerors and shall provide for an expeditious response.*
 3. *Information derived from revised maximum guaranteed price proposals shall not be disclosed to competing offerors.*
- (2) *A request for proposal or other solicitation may be canceled, or all proposals may be rejected, if it is determined in writing that such action is taken in the best interest of the Commonwealth and approved by the purchasing officer.*

SECTION 11. A NEW SECTION OF KRS CHAPTER 45A IS CREATED TO READ AS FOLLOWS:

When a capital project is to be constructed utilizing the construction management-at-risk method, a process parallel to the selection committee procedures established in KRS 45A.810 shall apply when procuring a construction management-at-risk firm and regulations promulgated in accordance with Section 7 of this Act shall apply that set forth requirements for:

- (1) *Description of the bond, insurance, and other security provisions that apply to a project;*
- (2) *Description of appropriate contract clauses and fiscal responsibility requirements that apply to each project; and*
- (3) *Restrictions relating to conflicts of interest, including a provision that a construction management-at-risk entity shall be eligible to become an offeror of goods or services on a project it manages only when a subcontractor fails to perform and upon prior approval by the contracting body.*

SECTION 12. A NEW SECTION OF KRS CHAPTER 45A IS CREATED TO READ AS FOLLOWS:

The selection committee procedures established in Section 7 of this Act shall apply when procuring services of a construction manager-agency for a fee if the fee amount exceeds fifty thousand dollars (\$50,000).

Section 13. KRS 45A.830 is amended to read as follows:

- (1) For architectural, engineering, and engineering-related **construction** services procured under **Section 7 of this Act and** KRS 45A.825, the procuring officer shall make available a copy of the proposed contract to each member of the selection committee involved in the procurement process for that contract after the procuring officer has negotiated an architectural, engineering, or engineering-related services contract for the Finance and Administration Cabinet or an engineering or engineering-related services contract for the Transportation Cabinet, but before the contract is submitted to the Government Contract Review Committee.
- (2) For architectural, engineering, and engineering-related **construction** services procured under **Section 7 of this Act and** KRS 45A.825, the secretary of the procuring agency, the procuring officer, and each voting member of the selection committee shall sign separate certificates, devised by the procuring agency, that shall provide the signatory with the option of certifying that, to the best of his knowledge, he is either aware or unaware of circumstances that may constitute a violation of this chapter occurring in the procurement process. Any employee of the Auditor of Public Accounts, who served as a nonvoting member of the selection committee and who attended any committee proceeding, may participate in the preparation of a report for filing with the Government Contract Review Committee certifying that the applicable procedural provisions of subsections (4), (6), (7), and (8) of KRS 45A.825 were or were not met. Before filing the report, the employee or employees who participated in its preparation shall sign it.
- (3) For architectural, engineering, and engineering-related **construction** services procured under **Section 7 of this Act and** KRS 45A.825, the procuring agency shall maintain the following information, readily available to the Government Contract Review Committee upon request:
 - (a) The certificates;
 - (b) The selection committee's ranking of firms; and
 - (c) A statement affirming that responding firms in all regions of the Commonwealth were given equal consideration for selection.

Section 14. KRS 56.8161 is amended to read as follows:

If the secretary of the Finance and Administration Cabinet determines that an agency is entitled to additional space and that built-to-suit on private property or built-to-suit on state-owned land is the most economically advantageous method for acquiring that space, the secretary shall set forth his determination in a written finding which shall be approved by the Governor. ***The following definitions shall apply to built-to-suit- projects:***

- (1) ***"Design-build-finance" means a built-to-suit project delivery method in which the chief purchasing officer enters into a single procurement and contract award for design, construction, and financing of a capital project over a contractually defined period; and in which the ownership and title of the capital project shall be conveyed at any time to the Commonwealth of Kentucky.***
- (2) ***"Design-build-finance-operate" means a built-to-suit project delivery method in which the chief purchasing officer enters into a single procurement and contract award for design, construction, financing, and operation of a capital project over a contractually defined period; and in which the ownership and title of the capital project shall be conveyed at any time to the Commonwealth of Kentucky.***

Section 15. KRS 56.8177 is amended to read as follows:

All built-to-suit lease agreements shall be ***reviewed by the Office of Financial Management prior to execution on behalf of***~~executed for~~ the Commonwealth by the secretary of the Finance and Administration Cabinet ***or on behalf of an institution in accordance with KRS 164A.630***, and approved for form and legality by the Attorney General or an assistant attorney general, before they shall be binding against the Commonwealth. All the leases shall be lodged for record and recorded in the office of the county clerk of the county in which the leased property is located.

Section 16. KRS 164A.575 is amended to read as follows:

- (1) The governing boards of each institution may elect to purchase interest in real property, contractual services, rentals of all types, supplies, materials, equipment, printing, and services, except that competitive bids may not be required for:
 - (a) Contractual services where no competition exists;
 - (b) Food, clothing, equipment, supplies, or other materials to be used in laboratory and experimental studies;
 - (c) Instructional materials available from only one (1) source;
 - (d) Where rates are fixed by law or ordinance;
 - (e) Library books;
 - (f) Commercial items that are purchased for resale;
 - (g) Professional, technical, scientific, or artistic services, but contracts shall be submitted in accordance with KRS 45A.690 to 45A.725;
 - (h) All other commodities, equipment, and services which, in the reasonable discretion of the board, are available from only one (1) source; and
 - (i) Interests in real property.
- (2) Nothing in this section shall deprive the boards from negotiating with vendors who maintain a General Services Administration price agreement with the United States of America or any agency thereof, provided, however, that no contract executed under this provision shall authorize a price higher than is contained in the contract between General Services Administration and the vendor affected.
- (3) The governing board shall require the institution to take and maintain inventories of plant and equipment.
- (4) The governing board shall establish procedures to identify items of common general usage among all departments to foster volume purchasing. It shall establish and enforce schedules for purchasing supplies, materials, and equipment.
- (5) The governing board shall have power to salvage, to exchange, and to condemn supplies, equipment, and real property.
- (6) Upon the approval of the secretary of the Finance and Administration Cabinet, the governing board may purchase or otherwise acquire all real property determined to be needed for the institution's use. The amount paid shall not exceed the appraised value as determined by a qualified appraiser or the value set by the eminent domain procedure. Any real property acquired under this section shall be in name of the Commonwealth for the use and benefit of the institution.

- (7) The governing board shall sell or otherwise dispose of all real or personal property of the institution which is not needed or has become unsuitable for public use, or would be more suitable consistent with the public interest for some other use, as determined by the board. The determination of the board shall be set forth in an order, and shall be reached only after review of a written request by the institution desiring to dispose of the property. Such request shall describe the property and state the reasons why the institution believes disposal should be effected. All instruments required by law to be recorded which convey any interest in any such real property so disposed of shall be executed and signed by the appropriate officer of the board. Unless the board deems it in the best interest of the institution to proceed otherwise, all such real or personal property shall be sold either by invitation of sealed bids or by public auction; provided, however, that the selling price of any interest in real property shall not be less than the appraised value thereof as determined by the Finance and Administration Cabinet or the Transportation Cabinet for such requirements of that department.
- (8) Real property or any interest therein may, subject to the provisions of KRS Chapter 45A, be purchased, leased, or otherwise acquired from any officer or employee of any board of the institution, based upon a written application by the grantor or lessor approved by the board, that the employee has not either himself or through any other person influenced or attempted to influence either the board requesting the purchase of the property. In any case in which such an acquisition is consummated, the said request and finding shall be recorded and kept by the Secretary of State along with the other documents recorded pursuant to the provisions of KRS Chapter 56.
- (9) (a) *As used in this section, "construction manager-agency," "construction management-at-risk," "design-bid-build," and "design-build" shall have the same meaning as in Section 1 of this Act.*
- (b) For capital construction projects, the ~~procurement~~^{bidding} may be on a total ~~design-bid-build~~^{design-bid} basis, a *design-build basis, or construction management-at-risk basis*~~[package system commonly referred to as "turnkey," or construction management]~~, whichever in the judgment of the board offers the *best value*~~[lowest real cost]~~ to the taxpayer. *Proposals*^{Bids} shall be reviewed by the institution's engineering staff to assure quality and value, and compliance with ~~procurement~~^{bid} procedures. All specifications shall be written to promote competition. *Services for projects delivered on the design-build basis or construction management-at-risk basis shall be procured in accordance with Section 7 of this Act and the regulations promulgated in accordance with Section 7 of this Act. Nothing in this section shall prohibit the procurement of construction manager-agency services.*
- (10) The governing board shall attempt in every practicable way to insure the institution's supplying its real needs at the lowest possible cost. To accomplish this the board may enter into cooperative agreements with other public or private institutions of education or health care.
- (11) The governing board shall have control and supervision over all purchases of energy consuming equipment, supplies, and related equipment purchased or acquired by the institution, and shall designate by regulation the manner in which an energy consuming item will be purchased so as to promote energy conservation and acquisition of energy efficient products.

- (12) The governing board may negotiate directly for the purchase of contractual services, supplies, materials, or equipment in bona fide emergencies regardless of estimated costs. The existence of the emergency must be fully explained, in writing, by the vice president responsible for business affairs and such explanation must be approved by the university president. The letter and approval shall be filed with the record of all such purchases. Where practical, standard specifications shall be followed in making emergency purchases. A good faith effort shall be made to effect a competitively established price for emergency purchases.
- (13) The acquisition and disposition of real property for the University of Kentucky Community College System and capital construction projects under KRS 45.750(1)(f) on real property for the use of the University of Kentucky Community College System shall be approved by the Kentucky Community and Technical College System board of regents, which shall transmit the action to the University of Kentucky board of trustees for approval.

Section 17. KRS 164A.580 is amended to read as follows:

Subject to the provisions of KRS 45.750 through 45.800, *Section 7 of this Act*, and KRS 56.870 to 56.874, the governing board of each institution may provide for the management and administration of capital construction projects authorized for such institution including, but not limited to:

- (1) The procurement of necessary consulting services;
- (2) The supervision and control of the making of all contracts for building projects, renovation projects, repair projects, and supervision of same;
- (3) The prescription of the amount and form of evidences of indebtedness submitted in connection with bids and contracts when not otherwise provided by law;
- (4) The preparation of plans and specifications for any construction, alteration, or enlargement of buildings, structures, and other improvements;
- (5) The advertisement of bids and the awarding of contracts in connection with such projects;
- (6) The supervision and inspection of all related work;
- (7) The approval of changes in plans or specifications; and
- (8) The acceptance of such improvements when completed according to such plans and specifications.

Section 18. KRS 164A.585 is amended to read as follows:

- (1) Subject to authorization by the General Assembly *and Section 17 of this Act*, the governing boards may make plans and specifications, advertise for bids, let contracts or incur any financing commitments, either in the way of a charge against institution funds or in the way of negotiations for issuance of revenue bonds, for any capital construction projects involving the improvement of lands or the construction, alteration, reconstruction, or major repair of any building or other structure, or sewage disposal, water supply system or other utility system.
- (2) Review of construction plans for conformance with the uniform state building code shall be conducted by the Department of Housing, Buildings and Construction. The board shall not approve any such project requiring its approval in any instance where it finds that the project is not needed, or that the proposed method of financing is not sound, or in cases where the

project will exceed the amount of the funds available therefor, or the work contemplated will be insufficient to accomplish the purpose of the project, or that after providing for the ordinary recurring expenses of administration and debt service and for payments under existing allotments for extraordinary expenses and capital outlay, cash will not be available in the Treasury to promptly pay for the work or that the work is to be done by employees of the institution.

- (3) Any capital construction project, except as provided in subsection (4) of this section, shall be contracted for on a competitive bid basis, and the execution of such contracts shall be approved and authorized by the board. When a capital construction project has been approved as provided in this section, in whole or in part, the board shall prepare the plans and specifications, advertise for bids, award the contracts, supervise the construction and handle the financial negotiations.
- (4) A capital construction project, the total cost of completion of which will not exceed one hundred thousand dollars (\$100,000), may be performed by the employees of the institution or by individuals hired specifically for the project. Necessary materials and supplies shall be procured in accordance with the standard purchasing procedures and policies of the board as defined in KRS 164A.575.

Section 19. KRS 164A.595 is amended to read as follows:

Capital construction projects shall be carried out as follows:

- (1) Subject to the provisions of KRS 45.750 through 45.800, **and Section 7 of this Act**, the governing boards of the institutions may acquire, erect, construct, reconstruct, improve, rehabilitate, remodel, repair, complete, extend, enlarge, equip, furnish, and operate any buildings, structures, improvements, or facilities, including any utilities, other related services and appurtenances and land required as the respective governing boards shall deem necessary for carrying on the educational, research or public service programs or discharging the statutory responsibilities of the universities and colleges and various divisions under the jurisdiction of the boards, or for the management, operation, or servicing of the universities and colleges.
- (2) The governing boards may acquire real or personal property, by purchase, lease, sublease, condemnation, trade or exchange, gift, devise, or otherwise, and improve such property whenever in the judgment of the governing board it shall be necessary. The title to any real estate acquired under this section shall vest in the Commonwealth for the use and benefit of the appropriate institution.

Section 20. KRS 164A.600 is amended to read as follows:

- (1) The procedures and limitations related to capital construction and equipment purchases set forth in KRS 45.750 through 45.800 **and for construction of capital projects set forth in KRS Chapter 45A** shall apply to the governing boards. The governing boards shall establish a contingency fund and an emergency repair, maintenance and replacement fund in their plant fund records. Transfer and use of these funds shall be governed by the provisions of KRS 45.770 and 45.780, as appropriate, except that the governing boards of each university shall perform the functions assigned to the Finance and Administration Cabinet in KRS 45.770 and 45.780.
- (2) Capital construction and equipment purchase projects established by the governing boards shall be limited to the scope authorized by the General Assembly, and the total costs of each

project shall not exceed the appropriation; except for emergency projects that may arise. In such instances, the governing boards may transfer funds from other projects or from operating funds; however each emergency project that is authorized by the board and sources of funds shall be promptly reported to the Capital Projects and Bond Oversight Committee.

Section 21. KRS 45A.300 is amended to read as follows:

- (1) Any public purchasing unit may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the acquisition of any supplies, services, or construction with any other public purchasing unit or foreign purchasing activity, in accordance with an agreement entered into between the participants. This cooperative purchasing may include, but is not limited to, joint contracts between public purchasing units and access by local public purchasing units to open-ended state public purchasing unit contracts.
- (2) Nothing in this code shall limit any public purchasing unit from selling to, acquiring from, or using any property belonging to another public purchasing unit or foreign purchasing activity independent of the requirements of KRS 45A.070 to ~~45A.180~~[45A.165].
- (3) Nothing in this code shall limit or restrict any public purchasing unit from entering into an agreement, independent of the requirements of KRS 45A.045(5) and KRS 45A.070 to 45A.165, with any other public purchasing unit or foreign purchasing activity for the cooperative use of supplies or services.
- (4) Any public purchasing unit may enter into an agreement for the joint or common use of warehousing facilities or the lease or common use of capital equipment or facilities with any other public purchasing unit or a foreign purchasing activity subject to the terms as may be agreed upon between the parties.
- (5) Nothing in this code shall limit or restrict the ability of local school districts to acquire supplies outside of the public purchasing agreements when the supplies and equipment meeting the same specifications as the contract items are available at a lower price elsewhere and the purchase does not exceed two thousand five hundred dollars (\$2,500).
- (6) Nothing in this code shall limit any public purchasing unit from receiving notice of or accepting a price reduction on supplies or equipment when the supplies or equipment are being offered by the vendor with whom a price agreement has been made; the supplies or equipment are being offered in accordance with all terms and conditions that are specified in the price agreement, except those relating to price; and the price reduction is offered to all of the participants in the price agreement. Public purchasing units may accept special price reductions under this subsection even if the reduced price requires the purchase of a specified quantity of units different from the quantity stated in the original price agreement. Price reductions under this subsection shall not be considered to permanently alter the price of the supplies or equipment under the price agreement with the Commonwealth, except where the price reductions are to be made permanent under the express terms of the price agreement and where the purchasing agency which solicited the price agreement determines that the enforcement of those terms serves the best interest of the Commonwealth.

Section 22. KRS 45A.155 is amended to read as follows:

The determinations required by KRS 45A.085(1), (3), **(6)**, *and* **(7)**~~[(5) and (6)]~~; 45A.090(1), (2) and (3); 45A.095; 45A.105; 45A.110(1); 45A.120(3); and 45A.130(1) shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

Approved March 18, 2003