

**CHAPTER 47****(SB 100)**

AN ACT relating to state government procurement.

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

➔Section 1. KRS 45A.035 is amended to read as follows:

- (1) The secretary of the Finance and Administration Cabinet shall have power and authority over, and may, except as otherwise expressly provided in this code, adopt regulations pursuant to KRS Chapter 13A and consistent with this code governing the purchasing, management, and control of any and all supplies, services, and construction, and other items required to be purchased by the Commonwealth. The secretary shall consider and decide matters of policy with regard to state procurement. The secretary shall have the power of review with respect to the implementation of regulations and policy determinations.
- (2) Regulations shall be adopted governing the following:
  - (a) Conditions and procedures for delegations of purchasing authority;
  - (b) Prequalification, suspension, debarment, and reinstatement of prospective bidders;
  - (c) Small purchase procedures;
  - (d) Conditions and procedures for the purchase of items for resale;
  - (e) Conditions and procedures for the purchase of agricultural products in accordance with KRS 45A.645;
  - (f) Conditions and procedures for the use of source selection methods authorized by this code, including emergency purchases;
  - (g) Opening and rejection of bids or offers, consideration of alternate bids, and waiver of informalities in offers;
  - (h) Confidentiality of technical data and trade secrets information submitted by actual or prospective bidders or offerors;
  - (i) Partial, progressive, and multiple awards;
  - (j) Supervision of storerooms and inventories, including determination of appropriate stock levels and the management, transfer, sale, or other disposal of state-owned property;
  - (k) Definitions and classes of contractual services and procedures for acquiring them; *and*
  - (l) *An appeals process to resolve disputes arising from specifications requiring items deemed to be equivalent or a sole brand as specified in Section 2 of this Act.*

The secretary may adopt such other regulations as deemed advisable to carry out the purposes of this code.

➔Section 2. KRS 45A.170 is amended to read as follows:

- (1) The Finance and Administration Cabinet shall have responsibility for issuing and maintaining all standard specifications for supplies, services, and construction required by the Commonwealth. Among its duties, it shall, to the greatest extent practicable:
  - (a) Prepare and issue standard specifications for supplies, services, and construction commonly required by the Commonwealth;
  - (b) Revise all standard specifications to conform to all technical and scientific advances pertaining to the supplies, services, and construction described in those specifications and to reflect changes in the Commonwealth's requirements;~~and~~
  - (c) Establish guidelines for drafting specifications; *and*
  - (d) *Ensure that every invitation for bids or request for proposals shall provide that an item equal to that named or described in the specifications may be furnished. The specifications may identify a sole brand in cases where, in the written opinion of the chief procurement officer, documented unique and valid conditions require compatibility, continuity, or conformity with established standards. An*

*item shall be considered equal to the item named or described if, in the opinion of the owner and the design professional responsible for the specifications:*

1. *It is at least equal in quality, durability, strength, design, and other criteria deemed appropriate;*
2. *It will perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased; and*
3. *It conforms substantially to the detailed requirements for the item in the specifications.*

- (2) All specifications shall be drafted so as to maximize, to the extent practicable, competition in fulfillment of the Commonwealth's requirements.

➔Section 3. KRS 45A.415 is amended to read as follows:

- (1) The local public agency shall use specifications which assure the maximum practicable competition to meet the agency's needs.
- (2) *Local public agencies shall ensure that every invitation for bids or request for proposals provides that an item equal to that named or described in the specifications may be furnished. The specifications may identify a sole brand in cases where, in the written opinion of the chief procurement officer, documented unique and valid conditions require compatibility, continuity, or conformity with established standards. An item shall be considered equal to the item named or described if, in the opinion of the owner and the design professional responsible for the specifications:*

- (a) *It is at least equal in quality, durability, strength, design, and other criteria deemed appropriate;*
- (b) *It will perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased; and*
- (c) *It conforms substantially to the detailed requirements for the item in the specifications.*

- (3) A specification which describes a product which is proprietary to one (1) company may be used only when ~~[-~~

~~(a) —]no other kind of specification is reasonably available to describe requirements~~[- and~~~~

~~(b) —]Such specification includes language which specifically permits an equivalent product to be supplied. Such specification shall include a description of the salient characteristics of the product~~[- and~~~~.

➔Section 4. KRS 65.025 is amended to read as follows:

- (1) As used in this section:

- (a) "Employ" means to hire, retain, or otherwise contract with an individual or entity for goods or services;
- (b) "Local government" means a city, county, charter county government, urban-county government, consolidated local government, or a special district;
- (c) "Construction manager" means a person who coordinates and communicates the entire project process, clarifying cost and time consequences of design decisions as well as clarifying construction feasibility, and who manages the bidding, awarding, and construction phases of the project;~~[- and]~~
- (d) "Design-build" means a system of contracting under which one (1) entity performs both architecture/engineering and construction under one (1) single contract; *and*
- (e) *"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 local government. 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 or request for proposals. Every invitation for bids or request for proposals shall provide that an item equal to that named or described in the specifications may be furnished. The specification may identify a sole brand in cases where, in the written opinion of the chief procurement officer, documented unique and valid conditions require compatibility, continuity, or conformity with established standards. An item shall be considered equal to the item named or described if, in the opinion of the owner and the design professional responsible for the specifications:*

1. *It is at least equal in quality, durability, appearance, strength, design, and other criteria deemed appropriate;*
  2. *It will perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased; and*
  3. *It conforms substantially to the detailed requirements for the item in the specifications.*
- (2) A local government shall not employ the same entity to provide both architectural services and construction management services on the same capital construction project. No local government shall knowingly employ an officer, employee, or agent of, or an immediate family member of an officer, employee, or agent of:
- (a) The architectural firm that provided the architectural services to also provide construction management services for the same capital construction project for which the architectural firm provided architectural services; or
  - (b) The construction management firm that provided the construction management services to also provide architectural services for the same capital construction project for which the construction management firm provided construction management services.
- (3) A violation of subsection (2) of this section shall suspend the local government from receiving any financial assistance from the state, or any state agency, with respect to the project for which the architectural or construction management firm was employed until the matter is resolved.
- (4) *Local governments initiating a capital construction project shall incorporate, or shall require architects or construction managers in the employment of the local government to incorporate, best value procurement criteria in all invitations for bids or requests for proposals as provided for in subsection (1) of this section.*
- (5) Nothing in this section shall prohibit a local government from using design-build as a method of providing for capital construction services *as long as best value contracting principles are followed as specified in subsection (1) of this section.*

➔Section 5. KRS 162.065 is amended to read as follows:

The State Board of Education shall promulgate administrative regulations for use by local school boards when constructing school buildings using construction managers. A construction manager is an experienced and qualified construction contracting organization that is paid a fee for its professional management and supervision services. The regulations shall include, but not be limited to:

- (1) A standard "Request for Proposal" form, including appropriate criteria for use by local school boards to ensure only qualified construction managers are considered:
  - (a) A list of successfully completed projects or a demonstrated capability to perform projects of a similar type;
  - (b) A descriptive detail of projects showing the experience and the ability to perform budget estimating, value engineering, and scheduling; and
  - (c) A list of experienced and qualified personnel with a track record of achieved quality and the capability to provide bidder solicitation;
- (2) Adequate public notice of the invitation for proposals shall be given a sufficient time prior to the date set for the opening of proposals;
- (3) A requirement for bids, when requested by a construction manager, be submitted to the architect or owner and opened in public;
- (4) A requirement that all bids for school construction projects be advertised in newspapers with the largest local circulation;
- (5) A sample fee schedule for construction manager services shall be developed by recommendation of a diversified committee consisting of Department of Education personnel, architects, and construction managers for the guidance of local school boards;
- (6) A requirement that established qualifications-based selection procedures be implemented by local boards when selecting firms to provide architectural and engineering services; *and*

- (7) *A requirement that specifications in every invitation for bids or request for proposals shall provide that an item equal to that named or described in the specifications may be furnished. The specifications may identify a sole brand in cases where, in the written opinion of the chief procurement officer, documented unique and valid conditions require compatibility, continuity, or conformity with established standards. An item shall be considered equal to the item named or described if, in the opinion of the local board and the design professional responsible for the specifications:*
- (a) *It is at least equal in quality, durability, strength, design, and other criteria deemed appropriate;*
  - (b) *It will perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased; and*
  - (c) *It conforms substantially to the detailed requirements for the item in the specifications.*

➔Section 6. KRS 164A.585 is amended to read as follows:

- (1) Subject to authorization by the General Assembly and KRS 164A.580, 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 Office 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.
  - (a) *The governing board shall ensure that every invitation for bids or request for proposals shall provide that an item equal to that named or described in the specifications may be furnished.*
  - (b) *The specifications may identify a sole brand in cases where, in the written opinion of the chief procurement officer, documented unique and valid conditions require compatibility, continuity, or conformity with established standards.*
  - (c) *An item shall be considered equal to the item named or described if, in the opinion of the governing board and the design professional responsible for the specifications:*
    - 1. *It is at least equal in quality, durability, strength, design, and other criteria deemed appropriate;*
    - 2. *It will perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased; and*
    - 3. *It conforms substantially to the detailed requirements for the item in the specifications.*
- (4) A capital construction project, the total cost of completion of which will not exceed two hundred thousand dollars (\$200,000), 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.

**Signed by Governor April 10, 2008.**