

CHAPTER 87

(HB 198)

AN ACT relating to government contracts.

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

➔SECTION 1. A NEW SECTION OF KRS 45A.690 TO 45A.725 IS CREATED TO READ AS FOLLOWS:

- (1) *The head of a contracting body, which includes constitutional officers, shall not award a personal service contract for legal services that provides for payment by contingency fee unless, prior to the award, the head of the contracting body determines in writing:*
 - (a) *The contingency fee is both cost-effective and in the public interest;*
 - (b) *Sufficient and appropriate legal and financial resources do not exist within the contracting body;*
 - (c) *The amount of time and labor required to perform the requested services;*
 - (d) *The novelty, complexity, and difficulty of the matter;*
 - (e) *The skill required to perform the requested services properly;*
 - (f) *The geographic area where the legal services are to be provided; and*
 - (g) *The experience desired for the particular kind of legal services to be provided.*
- (2) *The head of the contracting body or his or her designee shall participate in reviewing and evaluating the responses to the requests for proposals and discussions with offerors.*
- (3) *A contingency fee shall not exceed:*
 - (a) *Twenty percent (20%) of the amount recovered up to ten million dollars (\$10,000,000);*
 - (b) *Fifteen percent (15%) of the amount recovered between ten million dollars (\$10,000,000) and fifteen million dollars (\$15,000,000);*
 - (c) *Ten percent (10%) of the amount recovered between fifteen million dollars (\$15,000,000) and twenty million dollars (\$20,000,000); and*
 - (d) *Five percent (5%) of the amount recovered of twenty million dollars (\$20,000,000) or more.*
- (4) *A contingency fee shall not exceed twenty million dollars (\$20,000,000), regardless of the number of actions or proceedings or the number of attorneys or law firms involved in the matter, and exclusive of any costs and expenses provided for by the contract and actually incurred by the legal services contractor.*
- (5) *A contingency fee shall be payable only from money that is actually received pursuant to a judgment or settlement agreement, and any judgment or settlement funds shall be disbursed in accordance with Section 2 of this Act.*
- (6) *During the contract period and any extension:*
 - (a) *The head of the contracting body or his or her designee shall retain control over the course and conduct of the case and shall retain veto authority over any decision made by the contract attorney;*
 - (b) *The head of the contracting body or his or her designee with authority over the contract shall:*
 1. *Attend all settlement conferences;*
 2. *Be personally involved in overseeing the litigation; and*
 3. *Have exclusive decision-making power regarding any settlement of the matter for which the contract was entered; and*
 - (c) *Any opposing party to the matter for which the contract was entered into may directly contact the head of the contracting body or his or her designee with authority over the contract, without having to notify the contract attorney.*

- (7) *The Finance and Administration Cabinet shall develop a standard addendum to be added to each personal service contract for legal services to include the terms of this section.*
- (8) (a) *Within five (5) business days after the contract award, the Finance and Administration Cabinet shall post on its Web site each personal service contract for legal services that provides for payment by contingency fee and the accompanying written determinations described in subsection (1) of this section. The contract and accompanying determinations shall remain on the Web site during the duration of the contract and any extension.*
- (b) *Any payment of contingency fees shall be posted on the contracting body's Web site within fifteen (15) days after the payment of such contingency fees to the legal services contractor and shall remain posted on the Web site for at least three hundred sixty-five (365) days.*
- (9) (a) *In addition to the information required of each contingency fee contract by the Kentucky Model Procurement Code and KRS 45A.695, a contractor awarded a personal service contract for legal services that provides for payment by contingency fee shall maintain detailed current records, including documentation of:*
1. *Expenses;*
 2. *Disbursements;*
 3. *Charges and credits;*
 4. *Underlying receipts and invoices; and*
 5. *Any other financial transactions that concern the attorney services rendered under the contract.*
- (b) 1. *All records described in this subsection shall become public records subject to KRS 61.870 to 61.884 after a judgment or agreement is entered in the case and all appeals have been exhausted, but shall not be public records until that time.*
2. *Any information that is subject to an evidentiary privilege and is contained within any record described in this subsection shall not be a public record. The privileged information shall be redacted before any public disclosure of the record.*
- (10) (a) *The Finance and Administration Cabinet and the contracting body shall submit a joint report to the Government Contract Review Committee by September 1 of each year identifying all contingency fee contracts for legal services:*
1. *Awarded in the previous fiscal year;*
 2. *Active in the previous fiscal year, but awarded in prior fiscal years; or*
 3. *Concluded in the previous fiscal year.*
- (b) *For each contract, the report shall include:*
1. *The written determinations made under subsection (1) of this section;*
 2. *Any determination made that the contract was not to be procured through the request for proposal process; and*
 3. *Any determination made that the contract may be entered into despite a finding of disapproval by the committee.*
- (c) *In addition, the report shall describe:*
1. *The name of the attorney or law firm with whom the contract was made;*
 2. *The nature and status of the legal matter that is the subject of the contract;*
 3. *The name of the parties to the legal matter that is the subject of the contract;*
 4. *The amount of recovery, if any; and*
 5. *The amount of the contingency fee paid, if any.*
- (12) *The common law authority of any duly elected statewide constitutional officer is specifically abrogated to the extent it is inconsistent with the provisions of this section.*

➔Section 2. KRS 48.005 is amended to read as follows:

- (1) The General Assembly hereby finds and declares that:
 - (a) Public accountability for funds or other assets recovered in a legal action by or on behalf of the general public, the Commonwealth, or its duly elected statewide constitutional officers is appropriate and required, whether the character of the assets or funds recovered is public or private;
 - (b) Accountability for assets or funds recovered by duly elected statewide constitutional officers is essential to the public trust, and is even more critical when that officer was a party to the action that resulted in the recovery by virtue of the public office he or she holds;
 - (c) Public accountability demands the applicability of the *Kentucky Model Procurement Code, KRS Chapter 45A*, Kentucky Open Records Law, KRS 61.870 to 61.884, and the Kentucky Open Meetings Law, KRS 61.805 to 61.850, so that the actions of individuals or agencies who are charged with the administration of funds or other assets are conducted in full view, and are open to public scrutiny; and
 - (d) The power to appropriate funds for public purposes is solely within the purview of the legislative branch of government, and the General Assembly, as a steward of the budgetary process, shall take steps to assure that future settlements are handled in a manner that assures maximum accountability to the citizens of the Commonwealth and their duly elected legislative representatives.
- (2) Therefore, any other provision of the common law or statutory law to the contrary notwithstanding:
 - (a) The provisions of subsection (3) of this section shall apply whenever the Attorney General or other duly elected statewide constitutional officer is a party or has entered his appearance in a legal action on behalf of the Commonwealth of Kentucky, including ex rel. or other type actions, and a disposition of that action has resulted in the recovery of funds or assets to be held in trust by the Attorney General or other duly elected statewide constitutional officer or a person, organization, or entity created by the Attorney General or the Commonwealth, through court action or otherwise, to administer the trust funds or assets, for charitable, eleemosynary, benevolent, educational, or similar public purposes;
 - (b) Except as otherwise provided in paragraph (a) of this subsection, the provisions of subsection (4) of this section shall apply when any funds or assets of any kind or nature whatsoever, including but not limited to public funds as defined in KRS 446.010 and private funds or assets are recovered by judgment or settlement of a legal action by or on behalf of the Commonwealth of Kentucky, including ex rel. or other type actions filed by a duly elected statewide constitutional officer under that officer's statutory or common law authority.
- (3) Whenever the Attorney General or other duly elected statewide constitutional officer is a party to or has entered his appearance in, a legal action on behalf of the Commonwealth of Kentucky, including ex rel. or other type actions, and a disposition of that action has resulted in the recovery of funds or assets to be held in trust by the Attorney General or other duly elected statewide constitutional officer or by a person, organization, or entity created by the Attorney General, or the Commonwealth, through court action or otherwise, to administer the trust funds or assets, for charitable, eleemosynary, benevolent, educational, or similar public purposes, those funds shall be deposited in the State Treasury and the funds or assets administered and disbursed by the Office of the Controller.
- (4) The Office of Attorney General may first recover its reasonable costs of litigation, as determined by the court and approved by the secretary of the Finance and Administration Cabinet. After recovering the reasonable costs of litigation, any required consumer restitution or payments shall be made. All remaining funds shall be deposited in the general fund surplus account. Any costs recovered under this subsection shall be reported to the Interim Joint Committee on Appropriations and Revenue.
- (5) The common law, including the common law authority of any duly elected statewide constitutional officer, is specifically abrogated to the extent it is inconsistent with the provisions of this section.
- (6) Notwithstanding any statute or common law to the contrary, and except as provided in this subsection, an elected statewide constitutional officer or any other state official or agency shall not file or participate as a plaintiff, petitioner, party, intervening party, attorney, or amicus curiae in any litigation challenging the constitutionality of this section. State funds and employee time shall not be expended by any person or agency in support of such a challenge. If the constitutionality of this section is challenged, the Finance and Administration Cabinet shall be the sole named respondent in that litigation, and shall consult with the Legislative Research Commission regarding defense of that litigation.

➔Section 3. KRS 45A.020 is amended to read as follows:

- (1) This code shall apply to every expenditure of public funds by this Commonwealth *and every payment by contingency fee* under any contract or like business agreement, excepting only that this code shall not apply to contracts or like business agreements between the Commonwealth and its political subdivisions or other governments, except as provided in KRS 45A.295 to 45A.320. It shall also apply to the disposal of state property.
- (2) Since this code is a general act intended to provide model coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction of the subsequent legislation can be reasonably avoided.

➔Section 4. 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, 175B, 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) "Construction manager-general contractor" means a project delivery method in which the purchasing officer enters into a single contract with an offeror to provide preconstruction and construction services. During the preconstruction phase, the successful offeror provides design consulting services. During the construction phase, the successful offeror acts as general contractor by:
 - (a) Contracting with subcontractors; and
 - (b) Providing for management and construction at a fixed price with a completion deadline;
- (8) "Contract" means all types of state agreements, including grants and orders, for the *acquisition*, 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, *contingency fee* or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; public-private partnership agreements; and insurance contracts except as provided in KRS 45A.022. It includes supplemental agreements with respect to any of the foregoing;
- (9) "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;
- (10) "Contractor" means any person having a contract with a governmental body;
- (11) "Data" means recorded information, regardless of form or characteristic;
- (12) "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;

- (13) "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;
- (14) "Designee" means a duly authorized representative of a person holding a superior position;
- (15) "Document" means any physical embodiment of information or ideas, regardless of form or characteristic, including electronic versions thereof;
- (16) "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;
- (17) "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;
- (18) "Meeting" means all gatherings of every kind, including video teleconferences;
- (19) "Negotiation" means contracting by either the method set forth in KRS 45A.085, 45A.090, or 45A.095;
- (20) "Person" means any business, individual, organization, or group of individuals;
- (21) "Private partner" means any entity that is a partner in a public-private partnership other than:
 - (a) The Commonwealth of Kentucky, or any agency or department thereof;
 - (b) The federal government;
 - (c) Any other state government; or
 - (d) Any agency of a state, federal, or local government;
- (22) "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;
- (23) "Public-private partnership" means a project delivery method for construction or financing of capital projects, as defined in KRS 45.750, or procurement of services, pursuant to a written public-private partnership agreement entered into pursuant to KRS 45A.077 and administrative regulations promulgated thereunder, between:
 - (a) At least one (1) private partner; and
 - (b) The Commonwealth of Kentucky, or any agency or department thereof;
- (24) "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;
- (25) "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;
- (26) "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;
- (27) "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;
- (28) "Supplemental agreement" means any contract modification that is accomplished by the mutual action of the parties;

- (29) "Supplies" means all property, including but not limited to leases of real property, printing, and insurance, except land or a permanent interest in land;
- (30) "Using agency" means any governmental body of the state that utilizes any supplies, services, or construction purchased under this code;
- (31) "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
- (32) "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 5. KRS 15.100 is amended to read as follows:

- (1) The Attorney General shall appoint a deputy attorney general, who shall have the same qualifications required of a Circuit Judge except for residence in a district and who shall receive the same salary as a Circuit Judge, to serve at the pleasure of the Attorney General and to perform the duties he may designate. The Attorney General may appoint two (2) assistant deputy attorneys general, who shall have the same qualifications required of a District Judge except for residence in a district and who shall receive the same salary as a District Judge, to serve at the pleasure of the Attorney General and to perform the duties he may designate. In addition thereto, he may appoint another assistant deputy attorney general to function as administrator and shall set his salary.
- (2) In addition to the deputy attorney general, the Attorney General shall appoint such assistants and special attorneys as he deems necessary to transact the business of the Department of Law, and to perform the duties he may designate. The deputy attorney general, assistant deputy attorneys general, assistants, and special attorneys shall have full power, as authorized and under the direction of the Attorney General, to perform such duties as may be performed by the Attorney General. The Attorney General shall be responsible for the official acts of his deputy, assistant deputy attorneys general, assistants, and special attorneys.
- (3) In addition to the appointment and designation of a deputy, assistant deputy attorneys general, assistants and special attorneys pursuant to subsections (1) and (2) of this section, the Attorney General may enter into such contracts for legal services as he deems necessary and advisable. ***Such contracts shall be subject to the relevant provisions of the Kentucky Model Procurement Code in KRS Chapter 45A.***
- (4) Each assistant or special attorney so appointed or designated shall be a person admitted to the practice of law by the Supreme Court of this Commonwealth and shall qualify by taking the oath of office.

➔Section 6. This Act shall not apply to contracts which were entered into before the effective date of this Act, nor to extensions of those contracts. This Act shall not apply to any litigation started before the effective date of this Act, nor to litigation stemming from that litigation.

Signed by Governor April 2, 2018.