

## **200 KAR 5:355. Public-private partnership delivery method.**

RELATES TO: KRS 45A.030, 45A.077, 45A.085, 45A.090, 45A.180, 45A.183, 45A.190, 45A.435, 45A.550-45A.554, 61.878, 65.025, 65.028

STATUTORY AUTHORITY: KRS 45A.035, 45A.077, 45A.085, 45A.180, 45A.183, 65.028

NECESSITY, FUNCTION, AND CONFORMITY: KRS 45A.035 authorizes the Secretary of the Finance and Administration Cabinet to promulgate administrative regulations for the implementation of the Kentucky Model Procurement Code (KRS Chapter 45A). KRS 45A.077 and 65.028 require the secretary to promulgate administrative regulations setting forth the criteria to be used in determining when a public-private partnership is to be used for a particular project. KRS 45A.085 authorizes the secretary to promulgate administrative regulations concerning contracts awarded by competitive negotiation. KRS 45A.180 requires the secretary to promulgate administrative regulations for the implementation of as many recognized alternative methods of management of construction contracting as are determined to be feasible. This administrative regulation establishes guidelines pursuant to KRS 45A.077 and 65.028 relating to public-private partnerships for entities requesting to utilize this procurement delivery method.

Section 1. Definitions. (1) "Cabinet" means the Finance and Administration Cabinet.

(2) "Capital project" is defined by KRS 45.750(1)(f), except that for purposes of this administrative regulation, capital project shall include all projects regardless of the size or scope of same.

(3) "Contract" is defined by KRS 45A.030(8).

(4) "General fund revenues" means the total combined revenue receipts of the local government or local governments that are a party to the public-private partnership agreement from the imposition of ad valorem taxes, occupational license taxes, insurance premium taxes, and franchise fees.

(5) "Governmental body" is defined by KRS 45A.030(17).

(6) "Kentucky Local Government Public-Private Partnership Board" is established and defined by KRS 65.028(11).

(7) "Local government" is defined by KRS 65.028(1)(c).

(8) "Private partner" is defined by KRS 45A.030(21) and KRS 65.025(1)(g).

(9) "Public-private partnership" is defined by KRS 45A.030(23).

(10) "Total contractual value" means the cumulative amount to be paid or reasonably estimated to be paid over the entire term of the public-private partnership agreement between the local government or local governments and the private partner or private partners in consideration of the performance of the private partner or partners.

(11) "Using agency" is defined by KRS 45A.030(30).

Section 2. Use of a Public-Private Partnership. (1) A public-private partnership may be utilized for construction or financing of a capital project or the procurement of services if the head of a governmental body or a local government issues a written determination that due to the nature or circumstances of a capital project or services, a public-private partnership is the most advantageous method of awarding and administering a capital project or other contract.

(2) In determining if the use of a public-private partnership is the most advantageous method of awarding and administering a capital project or other contract, the head of a governmental body or local government, or a person authorized in writing as his or her designee, shall undertake an analysis of the proposed capital project or other contract to determine if a public-private partnership is the procurement method most advantageous to the governmental body or local government that incorporates the components established in this subsection.

(a) Qualitative considerations. The using agency or local government shall evaluate the potential public-private partnership utilizing the following criteria:

1. The ability of the using agency or local government to allocate and control risks, responsibilities, and rewards between itself and a private partner in a way that ultimately benefits the using agency or local government and the citizens it serves;

2. The timeliness of completion and efficiency of delivery of a capital project or other contract via a public-private partnership as compared with other project delivery methods;

3. A determination that the tangible and intangible benefits to be gained by using a public-private partnership equals or exceeds the cost of developing and maintaining a public-private partnership;

4. The ability and expertise of the using agency or local government to measure and monitor performance and operational controls;

5. The ability of the using agency or local government to capture and utilize incentives, efficiencies, and expertise derived from the involvement of a private partner;

6. If the capital project or other contract is likely to be developed or entered into in the absence of private sector involvement;

7. If the public interest is best served through the use of a public-private partnership; and

8. The urgency of need for the capital project or services by the governmental body or local government.

(b) Quantitative Analysis. The using agency or local government shall conduct a quantitative analysis of using a public-private partnership for a given capital project or other contract. The analysis shall include:

1. Net present value of the cost of the capital project or other contract over its entire useful life, including, if applicable:

a. Financing, planning, design, and construction costs;

b. Operation and management costs;

c. Any payments the using agency or local government is required to make to the private partner; and

d. Maintenance costs;

2. The allocation of risks and contingencies between the using agency or local government and the private partner;

3. Operating cash flows reasonably expected to provide a return on investment to a private partner;

4. The net present value of payment the using agency or local government is likely to receive from the private partner or third parties over the life of the capital project or other contract; and

5. The anticipated value of the capital project or other contract deliverables at the end of the term of the public-private partnership, if any.

(c) Privatization Analysis. Before award of a contract for a public-private partnership, the using agency and the cabinet shall satisfy all of the requirements of KRS 45A.550-45A.554 and 200 KAR 5:340 related to privatization of existing governmental services, if applicable.

(d) Local Government Public-Private Partnerships Subject to Review by the Kentucky Local Government Public-Private Partnership Board. If the total contractual value of a proposed public-private partnership between a local government and a private partner equals or exceeds thirty (30) percent of the general fund revenues received by the local government in the immediately preceding fiscal year, the local government shall submit the proposed public-private partnership agreement to the cabinet and the Department for Local Government for evaluation and presentation to the Kentucky Local Government Public-Private Partnership Board in accordance with KRS 65.028(12) or 65.028(16).

Section 3. Submission of Unsolicited Proposals. (1) Persons, businesses, or other entities may submit unsolicited proposals for a capital project or other contract utilizing a public-private partnership to a governmental body with a copy to the Secretary of the Finance and Administration Cabinet.

(2) Persons, businesses, or other entities wishing to submit an unsolicited proposal for a public-private partnership with a local government shall submit the proposals to the local government with a copy to the Department for Local Government. If the total contractual value of the proposed public-private partnership equals or exceeds thirty (30) percent of the general fund revenues received by the local government in the immediately preceding fiscal year, the Department for Local Government with the assistance of the cabinet shall evaluate each proposal and present same to the Kentucky Local Government Public-Private Partnership Board in accordance with KRS 65.028(12) or 65.028(16).

(3) Proposals submitted pursuant to subsection (1) of this section shall be considered in the manner prescribed in KRS 45A.077(12) and evaluated pursuant to the criteria set forth in Section 2 of this administrative regulation.

(4) Proposals submitted pursuant to subsection (2) of this section shall be considered in the manner prescribed in KRS 65.028(17) and evaluated pursuant to the criteria set forth in Section 2 of this administrative regulation.

(5) A valid unsolicited proposal shall:

(a) Be independently originated and developed by the person or persons, business or businesses, or other entities submitting the proposal;

(b) Be prepared without government supervision, endorsement, direction or direct government involvement; and

(c) Include sufficient detail to permit a determination that government support would be worthwhile and that the proposal could benefit the using agency or local government's constituency.

(6) All unsolicited proposals shall be submitted in a sealed envelope marked "unsolicited proposal." If an unsolicited proposal contains trade secrets, financial records, or other information that would be exempt from public disclosure pursuant to KRS 61.878 or other applicable law, persons, businesses, or other entities submitting unsolicited proposals shall:

(a) Include a cover letter with the proposal, notifying the governmental body or local government that exempt information is contained in the proposal;

(b) Mark all portions of the proposal that contain exempt information as "confidential" or "proprietary"; and

(c) Submit a second copy of the proposal from which the trade secrets, financial records, or other information that would be exempt from public disclosure pursuant to KRS 61.878 or other applicable law have been redacted.

(7) Except for each portion of an unsolicited proposal that contains trade secrets, financial records, or other information that would be exempt from public disclosure pursuant to KRS 61.878 or other applicable law, all unsolicited proposals shall be available for public inspection after the latter of:

(a) The date of the written notification sent by a governmental body or local government that it has rejected the unsolicited proposal;

(b) Sixty (60) days after the end of the notice period provided under KRS 45A.077(12)(b)2. or KRS 65.028(17)(b)2.; or

(c) The date of the award of a contract by a governmental body or local government following an open, competitive procurement process conducted pursuant to KRS 45A.077(12)(c) or KRS 65.028(17)(c).

Section 4. Other considerations. (1) The using agency and the cabinet or local government may ascribe relative weight to the criteria established in Section 2 of this administrative regulation, giving due consideration to the size and nature of the capital project or other contract as well as the previous experience of the using agency or local government, if any, in utilizing public-private partnerships under similar circumstances.

(2) All requests for proposals involving the use of a public-private partnership shall comply with KRS 45A.077(4) or 65.028(7) as applicable.

(3) All performance and payment bonding requirements set forth in KRS 45A.190, 45A.435, and any other statute or local ordinance, shall remain in effect for capital projects and other contracts using the public-private partnership project delivery method.

Section 5. Professional Assistance. The using agency and the cabinet are authorized to retain any professional services deemed necessary by the using agency or the cabinet to enable an adequate review and evaluation of a public-private partnership proposal, including those involving local government that shall be approved by the Kentucky Local Government Public-Private Partnership Board in accordance with KRS 65.028(12) or 65.028(16), if the necessary expertise to perform the review or evaluation within the using agency or the cabinet is inadequate or unavailable. The cost of any professional service, including the cost of any study performed, shall be borne by the private partner if possible. If it is deemed necessary by the using agency or local government for the governmental body to bear a portion of the cost of the professional services needed to assist with the evaluation set forth in this administrative regulation, then the cost may be paid by the using agency or local government. (43 Ky.R.477, 704, 947; eff. 1-6-2017.)