

Local Government Procurement



Hon. Richard J. Ornstein
Attorney
Kentucky Association of Counties, Inc.

Presented to:
KACo Leadership Institute

DOCUMENT, DOCUMENT, DOCUMENT

Documentation protects the county and the county official

- Fiscal courts are courts of record—If it is not in the record, it didn't happen
- Proper documentation shows what the county did and how the county did it

Surplus Property

- **'Independent Appraisal' Definition**
 - Unaffiliated person/organization using a generally accepted standard
 - Nationally published property valuation document—most recent edition

- **Written Determination**
 - Description
 - Original purpose
 - Timing
 - Method of Disposition

3

Surplus Property

- **Method of Disposition**
 - Another Government or Economic Development
 - With or Without Compensation
 - Public or Electronic Auction
 - KRS 424.130(1)(b) advertising requirement
 - Sealed Bid
 - Utilize KRS 45A.365(3) & (4)
 - Fair Market Value
 - Trade-Ins—FMV or greater
 - Outright sale—FMV or greater—\$5,000 or less property value
 - County officers and employees are ineligible purchasers
 - Sold for scrap or disposed of as garbage
 - Nominal or no value



4

Surplus Property

- No Bids—What Now?
 - County's best interest
- Forfeiture Property
 - Restricted funds



5

Procurement Process

- To assure selection of the:
 - Lowest bidder; or
 - Lowest and best bidder
- How?
 - An offering to the public;
 - An opportunity for competition; and
 - A basis for exact comparison of bids.

[Handy v. Warren County Fiscal Court, 570 S.W.2d 663 \(Ky. Ct. App. 1978\)](#)

6

KY State Price Contract KRS 45A.420 & KRS 45A.050

- KRS 45A.050. The Kentucky State Price Contract.

KRS 45A.050(3) Allows political subdivisions to purchase under the state price contract without having to advertise as the Commonwealth has already competitively bid these items.

The state price contract is a listing of contractors who have entered into agreements with the Finance Cabinet. The price contract contains the price, vendor, item and order number.

KRS 45A.420(2) Political subdivisions which have adopted the MPC, may purchase from any vendor for the specific good. If the subdivision has not adopted the MPC, they are limited to the MPC vendor.

7

KY State Price Contract KRS 45A.045 & KRS 45A.050

- General Services Administration Price Agreement

KRS 45A.045(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.

KRS 45A.050(3)

Any political subdivision may purchase materials and supplies in accordance with a contract for supplies and materials entered into by the Finance and Administration Cabinet for the Commonwealth, including those contracts negotiated by the cabinet with vendors who maintain a *General Services Administration* price agreement as provided in [KRS 45A.045\(8\)](#). Political subdivisions of the Commonwealth must comply with other provisions of the Kentucky Revised Statutes which require purchase by competitive bidding, before participating in the contract, unless the state contract has been let by competitive bidding, or the contract was negotiated as provided in [KRS 45A.045\(8\)](#).

8

KY State Price Contract Process

- Is the item budgeted?
- Is the item on the State Price Contract?
 - <http://finance.ky.gov/services/eprocurement/Pages/contractinginfo.aspx>
- Has your county adopted the MPC (KRS 45A.343–460)?
 - If yes, your county can purchase that item from any vendor that will honor the State Price Contract price.
If no, your county is limited to the State Price Contract vendor.
- Are you limited to the specific item on the State Price Contract if your county wishes to purchase off the State Price Contract?
 - Yes.
- Do you have to advertise?
 - No.
- Is fiscal court approval required to make the purchase?
 - Yes.

9

Procurement KRS Chapter 424

- KRS 424.260
No...county...may make a contract, lease, or other agreement for materials, supplies except perishable meat, fish, and vegetables, equipment, or for contractual services other than professional, involving an expenditure of more than thirty thousand dollars (\$30,000) without first making newspaper advertisement for bids.

This requirement shall not apply in an emergency if the chief executive officer of the...county...has duly certified that an emergency exists, and has filed a copy of the certificate with the chief financial officer of the county ...or if the sheriff or the county clerk has certified that an emergency exists, and has filed a copy of the certificate with the clerk of the court where his necessary office expenses are fixed pursuant to [KRS 64.345](#) or [64.530...](#)"
- KRS 424.130
Publish notification, at least one time, no less than 7 and no more than 21 days prior to the due date.

10

Procurement *KRS Chapter 424*

Handy v. Warren County Fiscal Court, 570 S.W.2d 663 (Ky. Ct. App. 1978)

That it is assumed when a governmental agency awards a contract to one other than the *lowest* bidder, that the award of contract is still to the *best* bidder, and the burden is on one who challenges the bid to show not just that the award was not, in fact, to the *lowest and best bidder*, but that there was an abuse of discretion on the agency's part amounting to fraud, arbitrariness or capriciousness in awarding the contract.

At first blush it would seem that the lower court's opinion opens the door to all sorts of mischief by public agencies empowered to contract. But in discussing this matter, we recognize first and foremost that the regulation of bid acceptance and other related matters is essentially a legislative concern.

Lastly, in preface, we take notice, as we are certain did the Legislature, that the vast majority of public officeholders and appointed public board members are honest and diligent individuals who conscientiously attempt to fulfill the duties of their position. They are not a suspect class of any kind, so we feel no need to read into the statutes and regulations governing their official conduct anything more than ^[*4] the plain language requires.

11

Procurement *KRS Chapter 424*

Handy v. Warren County Fiscal Court, 570 S.W.2d 663 (Ky. Ct. App. 1978)

No appellate opinion or other authority cited in the appellants' brief can properly be said to stand for the proposition that [KRS 424.260](#) requires fiscal courts of counties or their agents to award contracts to the lowest and best bidder. The appellants contend that if there is no such requirement which can be "read" into the statute that the statute then becomes totally meaningless, i.e., why require advertisement for bids if there is no added requirement of acceptance of the lowest and best bid. It has been noted that the advertisement requirement and the bidding process ^[*665] itself involves three important benefits: (a) an offering to the public, (b) an opportunity for competition and (c) a basis for exact comparison of bids. OAG ^[*6] 74-420. Consequently, the requirement of [KRS 424.260](#) for advertisement by publication and competitive bidding satisfies these and other public goals, notwithstanding that the statute makes no provision for the award of contracts to the lowest and best bidder.

12

Procurement KRS Chapter 424

McCloud v. Cadiz, 548 S.W.2d 158 (Ky. Ct. App. 1977)

Interprets KRS 424.260 professional services provision to specifically include banking and insurance services.



13

KRS Chapter 424 Process

- Is the item budgeted?
- Is the item more than \$30,000?
 - If no:
 - Does your county have small purchase procedures?
 - If yes, follow them.
 - If no, the county may procure the item as best determined by the county.
 - Does fiscal court need to approve the purchase?
 - Yes.

14

KRS Chapter 424 Process

- If yes:
 - Is the item on the State Price Contract (option)?
 - Has the CJE certified that an emergency exists with a copy to the Treasurer?
 - If yes, no advertising requirement.
 - Is the item a professional service?
 - If yes, no advertising requirement.
 - Prepare the advertisement and the bid package, if needed.
 - Price only RFP or Price+ RFP
 - Advertise (KRS 424.130—not less than seven nor more than 21 days before the public opening).
 - Public Bid Opening
 - Review Bids
 - Weigh bids if Price +
 - CJE recommendation to fiscal court (not required).
 - Fiscal court vote.
 - Contract—Fiscal court approval required.

15

Construction Manager/Design-Build KRS 65.025

- Design-Build must be bid out.
 - Design only is a professional service.
- OAGs 92-143 & 97-24.
- Construction managers may be required to be bid out.
 - Is it a Professional Service?
 - OAG 79-501 & 92-144 Conclude that Construction Management is a Professional Service with No KRS 424.260 Bidding Requirement.

16

KY Model Procurement Code *KRS 45A.343–45A.460*

- KRS 45A.343

Upon adoption of 45A.343–45A.460, no other purchasing requirements shall apply to the district.

All contracts, whether under KY MPC or other procurement procedures, require a contractor or subcontractor to reveal a violation occurring within the last five (5) years.

If the contractor violates this provision, the district may cancel the contract and disqualify the contractor, or disqualify the subcontractor if the subcontractor is in violation of this requirement, from eligibility for future contracts for a two (2) year period.

Violations refer to KRS Chapters: 136, 139, 141, 337, 338, 341, 342.

136, 139, 141 (taxes); 337 (Wage & Hour); 338 (Occ. Safety); 341 (Unemployment Comp); 342 (Workers Comp)

17

KY Model Procurement Code *KRS 45A.343–45A.460*

- KRS 45A.345--Definition Section

- Aggregate Amount--The total dollar amount of items of a like nature, function, and use during a fiscal year which can be reasonably determined at the beginning of a fiscal year.

(Blacktop, Gasoline...)

- Evaluated Bid Price—"Dollar amount of a bid after bid price adjustments are made pursuant to objective measurable criteria, set forth in the invitation for bids, which affect the economy and effectiveness in the operation or use of the product, such as reliability, maintainability, useful life, residual value, and time of delivery, performance, or completion."



18

KY Model Procurement Code *KRS 45A.343-45A.460*

- Objective Measurable Criteria--"Sufficient information in the invitation to bid as to weight and method of evaluation so that the evaluation may be determined with reasonable mathematical certainty. Criteria which are otherwise subjective, such as taste and appearance, may be established when appropriate."
- Procurement includes "purchasing, buying, renting, leasing, or otherwise obtaining any supplies, services, or construction."
- 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.
- Responsive bidder means a person who has submitted a bid under KRS 45A.365 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.

19

KY Model Procurement Code *KRS 45A.343-45A.460*

- **KRS 45A.355--Determinations--Finality**
All determinations, including findings of the public official making the determination, are to be in writing and saved in a contract file. The findings are final and conclusive unless clearly erroneous, arbitrary, capricious or contrary to law.
- **KRS 45A.360--Administrative Regulations**
A local agency may adopt regulations covering a variety of topics within the scope of the Model Procurement Code. Regulations shall not conflict with statutes.

20

KY Model Procurement Code Competitive Sealed Bidding

- **KRS 45A.365--Competitive Sealed Bidding**

Competitive Sealed Bidding is required *(Some Exceptions)*.

Invitation for Bids: (1)Lowest Bid Price; or
 (2)Lowest Evaluated Bid Price
 Objective Measurable Criteria

Public Notice: At Least Seven (7) Days Prior to the Bid Opening
 (a)Time and Place for Bid Opening
 (b)Time and Place Where the
 Specifications Can Be Obtained

Notice by Internet or Newspaper of General
Circulation

KY Model Procurement Code KRS 45A.343-45A.460

KRS 45A.365 (cont.)

Bid Opening: (1)Public Opening
 (2)Bidder Name and Bid Amount Recorded
 and Open to Public Inspection.

Awarding the Contract: (1)Reasonable Promptness; and
 (2)Written Notice to the Responsive and
 Responsible Bidder With the Lowest Bid
 or Evaluated Bid.

Bid Withdrawal: (1)Patent (Obvious) Error--Permissive by Govt.
 (2)Bid Price Mathematical Error --
 Sufficient Evidence, Substantiated by Bid
 Worksheets

KY Model Procurement Code KRS 45A.343-45A.460

- **Online Bidding Reverse Auctions**

Eligible under competitive sealed bidding procedures and Chapter 424, except for*:

...architectural, engineering, or engineering-related services as described in [KRS 45A.730](#); underwriter, bond counsel, or financial advisors as described in [KRS 45A.850](#); or contracts for construction as described in [KRS 45A.030](#) which are required to be bonded as described in [KRS 45A.185](#) and [45A.190](#) or those projects which would require the preparation of stamped drawings.

KRS 45A.187

There is a question as to whether this prohibition would apply to a local government as the statute is not with KRS 45A.343-45A.460.

23

KY Model Procurement Code KRS 45A.343-45A.460

- **KRS 45A.375--Negotiations After Competitive Sealed Bidding When All Bids Exceed Available Funds--Action When No Bids Received**

If all sealed bids exceed funds available, then the agency may use a negotiated award if they state in writing:

- (1) There are no additional funds available to reach the lowest responsible and responsive bid; and
- (2) Agency best interests will not permit the delay necessary to resolicit revised bids.

24

KY Model Procurement Code
KRS 45A.343-45A.460

- **KRS 45A.375--Negotiations After Competitive Sealed Bidding When All Bids Exceed Available Funds--Action When No Bids Received (cont.)**

Competitive negotiations shall be made with the three lowest responsible and responsive bidders. There are two restrictions:

- (1) If you discuss revising the specifications with any potential offeror, all potential offerors shall have the same chance.
- (2) Upon revising the specifications, a new RFP is required. The RFP and award are to be done expeditiously.

After sealed bidding, if there is only one responsive and responsible bidder, then a noncompetitive negotiated award can be made to the bidder.

If the agency receives no responsive and responsible bids, the agency may acquire the supplies, services or construction by noncompetitive negotiation.

25

KY Model Procurement Code
KRS 45A.343-45A.460

- **KRS 45A.380--Noncompetitive Negotiation.**

Need a writing that competition is not feasible prior to entering noncompetitive negotiation and that:

- (1) An emergency exists where delay will cause harm; or
- (2) There is a single source within a reasonable geographic area of the product or service to be procured; or
- (3) Professional Services—(licensed professional, technician, artist); or
- (4) Contract is for the purchase of perishable items purchased at least on a weekly basis; or
- (5) Contract is for replacement parts where the need cannot be reasonably anticipated and stockpiling is not feasible; or
- (6) Contract is for proprietary items for resale; or
- (7) In school districts where the students are buying and selling as part of their educational experience; or
- (8) The purchase is for expenditures made on authorized trips outside of the agencies boundaries; or

26

*KY Model Procurement Code
KRS 45A.343-45A.460*

- **KRS 45A.380--Noncompetitive Negotiation (cont.)**

- (9)The contract is for supplies purchased at public auction or by receiving sealed bids;
- (10)The contract is for group life insurance, group health and accident insurance, group professional liability insurance, worker's compensation insurance, and unemployment insurance; or
- (11)The contract is for a sale of supplies at reduced prices that will render a savings to the local agency.

27

*KY Model Procurement Code
KRS 45A.343-45A.460*

- **KRS 45A.385--Small Purchase Procedures**

Use your own procedures for purchases under thirty thousand dollars and no cents (\$30,000.00). These procedures need to be in writing and available to the public. The legislative body can provide for a lower threshold.

- **KRS 45A.390--Cancellation**

You may cancel an RFP or an invitation for bids or reject all proposals, if there is a written determination that this is in the agencies best interest.



28

KY Model Procurement Code
KRS 45A.343-45A.460

- **KRS 45A.415--Specifications**

The specifications used in the advertisement are to assure maximum practicable competition.

The agency may only use a description which refers to a particular company when:

- (1) No other kind of specification is available; or
- (2) The specification allows an equivalent product to be supplied.

29

KY Model Procurement Code
KRS 45A.343-45A.460

- **KRS 45A.420--Cooperative Purchasing--Price Agreements With Commonwealth.**

Local government can enter into an agreement with another public agency to cooperatively purchase supplies, services or construction.

Where a local public agency purchases off of the state price contract, the agency has the authority to negotiate with the vendor for a better price.

As to school districts only, they may purchase outside of the price contract for goods that meet the same specifications as goods in the state price contract and the goods must be purchased at a lower price than is in the state price contract. Additionally, the purchase may not exceed \$2500.00.

30

KY Model Procurement Code Sealed Bid Process

- Is the item budgeted?
- Is the item more than \$30,000?
 - If no:
 - Follow the county's KRS 45A.385 Small Purchase Procedures.
 - If no written small purchase procedure, the county may be required to bid out.
 - Does fiscal court need to approve the purchase?
 - Yes

31

KY Model Procurement Code Sealed Bid Process

- If yes:
 - Is the item on the State Price Contract (option)?
 - Has the CJE issued a written determination that competition is not feasible and that either an emergency exists or that the services are for professional services?
 - If yes, no advertising requirement.
 - Prepare an advertisement and the bid package, if needed.
 - Price only RFP or Price+ (evaluated bid—objective measurable criteria) RFP
 - Advertise (KRS 45A.365(3))—at least seven days prior to the public opening—newspaper or internet).
 - Public bid opening—Record bids and bidders
 - Review bids
 - Weigh bids if Price+
 - CJE recommendation to fiscal court (not required).
 - Fiscal court vote.
 - Contract—Fiscal court approval.

32