

## VII. NON-CONSTRUCTION PROCUREMENT

This section only applies to Non-Infrastructure projects. This includes the purchase of items that are not:

- to be used as part of the construction of a project (discussed in Chapter VIII);
- real estate (discussed in Chapter VI); or
- professional services (discussed in Chapter III).

For example: pamphlets, badges, buttons, or vehicles.

For non-infrastructure projects, the LPA is required to follow a procurement process that is outlined in KRS Chapter 45A. This process will depend on the dollar amount of the purchase as well as other factors. The LPA should discuss its proposed purchasing method with its Administering Office prior to taking action to obtain the items needed. There are several different non-construction procurement processes which are outlined below.

### VII.1. Non-Construction Procurement: Competitive Bidding

Contracts must be awarded by competitive sealed bidding unless it is determined in writing that this method is not practicable or that one of the alternative options discussed below is acceptable. Competitively bid contracts shall be awarded based on best value.<sup>1</sup> Best value means that the decision to award the contract will be based on the primary objective of meeting the specific business requirements and best interests of the LPA.<sup>2</sup> Decisions must be based on objective and quantifiable criteria (including price), which were communicated to potential bidders in the invitation for bids.<sup>3</sup> These criteria will be assigned points and will form the basis of the decision to award the contract.

To communicate the best value selection criteria to potential bidders, the LPA must draft a Request for Bids (RFB). The LPA must submit its proposed RFB to its Administering Office to obtain KYTC approval before publishing or providing it to potential bidders.

The RFB must be announced to the public by posting it online or publishing it in a newspaper of general circulation and must be left open for a minimum of 21 days.<sup>4</sup> On the bid closing date, the LPA must either publically read the bids submitted or post them on a website available to the public.<sup>5</sup> The information provided must include the vendor name, the line item price and the guarantee of delivery upon request.

After publishing the bids, the LPA must examine the bids for any clerical or technical errors and to verify that the bidders are responsible and that the bids are responsive.<sup>6</sup> A responsive bidder:

- has the capability in all respects to perform fully if it were to be awarded the contract and the integrity and reliability which will assure good faith performance; and

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<sup>1</sup> KRS § 45A.080(1) and (2)

<sup>2</sup> KRS § 45A.070(1)

<sup>3</sup> KRS § 45A.070(1)

<sup>4</sup> KRS § 45A.080(3)

<sup>5</sup> KRS § 45A.080(4)

<sup>6</sup> KRS § 45A.345(19), KRS § 45A.345(20)

- has submitted a bid under KRS § 45A.365 which conforms in all material respects to the invitation for bid, 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.

Any questions the LPA has about any of the bids must be clarified in writing and the answers will become part of any contract awarded from that bid. Bids that are not responsive, bids that are from bidders that are not responsible, are collusive, or that present a conflict of interest must be rejected.<sup>7</sup> For any procurement that is \$100,000 or more the LPA must ensure that the bidders are not suspended or debarred from doing business with federal agencies.<sup>8</sup>

For the compliant bids, the LPA generates a bid tabulation sheet and scores each bid based on the evaluation criteria established in the RFB. The contract must be awarded to the bidder whose evaluation score is the highest. Once the bid is selected, the LPA must draft and enter into a contract with that bidder to purchase the solicited item, as discussed in **Section VII.5**.

If the bids received are unsatisfactory, the LPA may request approval to conduct the competitive negotiation process discussed in **Section VII.2**.<sup>9</sup> Additionally, if bids received exceed available funds or one or no responsive bid was received, the LPA may request permission for non competitive negotiations.<sup>10</sup>

## **VII.2. Non-Construction Procurement: Competitive Negotiation**

The second type of non-construction procurement is Competitive Negotiation. If the LPA believes that competitive sealed bidding is not practicable it should request a written determination from its Administering Office. In making the determination, KYTC will consider whether specifications can be prepared that permit an award on the basis of best value and the available sources, the time and place of performance, and other relevant circumstances as appropriate.<sup>11</sup> The LPA may also request approval for competitive negotiation if it believes that the bids received by competitive sealed bidding were either unreasonable or were not independently reached in open competition.<sup>12</sup> If approval is given for this reason, each competitive bidder must be notified of the intention to negotiate and must be given a reasonable opportunity to negotiate.<sup>13</sup>

In order to procure an item through competitive negotiation, the LPA must draft a RFP. The LPA must submit its proposed RFP to its Administering Office to obtain KYTC approval before publishing it or providing it to vendors.

The RFP must be announced to the public and left open for a minimum of 21 days. This can be done by posting the RFP online or publishing it in a newspaper of general circulation.<sup>14</sup> When the RFP notice period is closed, the LPA must examine the proposals for any clerical or technical errors and to verify that the vendors are responsible and the proposals are responsive. See **Section**

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<sup>7</sup> FAP 111-34-00(4) and KRS § 45A.340

<sup>8</sup> FAP 111-59-00

<sup>9</sup> Approval will be given according to the criteria set in KRS § 45A.090(2).

<sup>10</sup> KRS § 45A.090(3), KRS § 45A.095, and KRS § 45A.375.

<sup>11</sup> KRS § 45A.080(1)

<sup>12</sup> KRS § 45A .085(3)

<sup>13</sup> KRS § 45A.085(3)

<sup>14</sup> KRS § 45A.080(3)

**VII.1** for an explanation of “responsive bidder.” Any questions the LPA has about any of the proposals must be clarified in writing and the answers will become part of any contract awarded from that bid. Proposals that are not responsive, bids that are from vendors that are not responsible, are collusive, or that present a conflict of interest must be rejected.<sup>15</sup> For any procurement that is \$100,000 or more the LPA must ensure that the vendors are not suspended or debarred from doing business with federal agencies.<sup>16</sup>

For the remaining proposals, the LPA purchasing representative must indicate in writing what it believes would be a fair price for the items (“Cost Proposal”) and any technical changes it would like to make to what was offered in the proposal (“Technical Proposal”). The LPA must then appoint an evaluation committee of three to five people with knowledge of the items to be purchased but who are different from the person who prepared the Cost and Technical Proposals. The evaluation committee members must sign a non-disclosure form before they are given the proposals from the vendors. The Cost and Technical Proposals are not distributed to the evaluation committee members.

The evaluation committee members do an independent review of the proposals and then the committee holds a meeting to score all of the vendors based on the evaluation criteria communicated in the RFP and provides comments to support the scores. Each committee member signs their evaluation sheet. The LPA purchasing representative oversees the meeting to ensure the integrity of the process and compiles the comments and scores onto a spreadsheet to generate a total score for each vendor at the meetings conclusion.

If the cost proposed by the vendor with the highest score is acceptable, the contract is awarded to that vendor. If the cost is unacceptable, the LPA may negotiate the price with that vendor. If the LPA cannot reach an agreement with that vendor, it must begin negotiations with the vendor with the next highest evaluation scores and so on.

### **VII.3. Non-Construction Procurement: Small Purchase Procedure**

The third and most commonly used non-construction procurement procedure for the LPAs is the small purchase procedure. If the item being purchased is expected to cost less than \$20,000, the LPA is not required to open the purchase up for competitive bidding. Instead, it may obtain quotes from three suppliers and award the contract to whichever supplier provides the LPA with the lowest price. If an item costs less than \$5,000, the LPA may obtain a quote from one supplier and award the contract to that supplier, if the price quoted is satisfactory.<sup>17</sup>

Quotes must be obtained in writing and must be kept in the LPA’s project files as evidence that the quotes were obtained. The LPA may not artificially divide their procurement needs in order to make the small purchase procedure applicable<sup>18</sup>. The LPA must obtain approval from KYTC prior to beginning its small purchase procedure by submitting purchase information to its Administering Office.

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<sup>15</sup> FAP 111-34-00(4) and KRS § 45A.340

<sup>16</sup> FAP 111-59-00

<sup>17</sup> KRS § 45A.100; FAP 111-55-00; 200 KAR 5:302, Section 2; The Agency Small Purchase Delegation spread sheet found at <http://finance.ky.gov/business/procurementservices/>

<sup>18</sup> KRS § 45A.100(2)

#### **VII.4. Non-Construction Procurement: Other Exceptions to Competitive Bidding**

There are other types of non-construction procurement that act as exceptions to the competitive bidding requirement that apply regardless of the cost of the item to be purchased. When there is such an exception, the LPA must follow the rules specific to that item when making its purchase. Most of the time these exceptions indicate that the LPA may purchase the item from the vendor they see fit without obtaining quotes from other vendors.

Some of these exceptions are specified by law or regulation.<sup>19</sup> Other exceptions to the competitive bidding rule are made because opening the purchase of the items for bid would not be practicable or feasible. These are all listed in the Kentucky Finance and Administration Cabinet’s Manual of Policy and Procedure and several may be of interest to those doing LPA projects.<sup>20</sup> There may be some documentation requirements to ensure that the items purchased are being obtained for the best price available.

There is also an exception to the competitive bidding requirement for sole source purchases. The LPA may solicit from a “Sole Source” when there is only one known capable supplier of a commodity or service, occasioned by the unique nature of the requirement, the supplier or market conditions.”<sup>21</sup> Whenever it is practical, the LPA should solicit at least three suppliers for quotes and, if more than one supplier responds, the contract must be awarded to whichever supplier offers the best price.<sup>22</sup> The names of the suppliers solicited, the names of the suppliers submitting quotes, and the date and amount of each quote must be retained in the LPA’s project file.<sup>23</sup>

If the LPA intends to follow the process for procurement allowed by any of the above exceptions to competitive bidding it must first obtain KYTC approval by submitting the purchasing information and an explanation of why the purchasing process chosen is appropriate to its Administering Office.

#### **VII.5. Non-Construction Procurement: Awarding a Contract**

After the LPA has chosen its supplier through one of the above described processes, it must enter into a contract with that supplier. This contract must include the Affidavit for Bidders, Offerors and Contractors, a statement regarding revealing violations of and assuring compliance with particular state statutes, language regarding access to documents, and language explaining payment and cancellation terms.<sup>24</sup> There are also federal contract provisions that must be included in the contract. Samples of these can be found in the Forms Library.

Prior to execution, KYTC must verify that the LPA followed the selection process correctly and approve the contract with the chosen supplier. To verify that the LPA followed the selection process correctly, the Administering Office will require a Determination of Findings and the evaluation sheets used to select the vendor. To obtain approval of the contract, the LPA should

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<sup>19</sup> All of these exceptions are found in FAP 111-08-00

<sup>20</sup> FAP 111-09-00.

<sup>21</sup> KRS § 45A.095(1)

<sup>22</sup> KRS § 45A.095(1)

<sup>23</sup> KRS § 45A.095(1)

<sup>24</sup> KRS § 45A.110(2), KRS § 45A.115, KRS § 45A.485, and 200 KAR 5:314. All of these requirements are from FAP 111-44-00

submit the contract to its Administering Office as soon as it is drafted, before sending it to the supplier. Once the contract is approved by KYTC and signed by the LPA and the vendor, the vendor may begin work performing its duties under the contract.