

Crawford Law Offices, PLLC

Timothy Crawford
Attorney At Law
(e) tim.crawford@timcrawfordlaw.com

317 North Main Street
Main At Center Streets
Corbin, Kentucky 40701
(p) 606.523.1950
(f) 606.523.1970

Mary C. Vicini
Legal Assistant/Office Manager
(e) mary.vicini@timcrawfordlaw.com

April 10, 2009

Stan Riggs
Executive Director
Kentucky Educational Development Cooperative
904 West Rose Road
Ashland, Kentucky 41102-7104

Re: HPS and UK Purchase Offers to Kentucky School Districts

Dear Stan:

In Kentucky, public school districts must follow the procedures found in either the general bid statute or the Model Procurement Code. We have had some questions regarding HPS and UK and this response will be somewhat lengthy but, I want to insert verbatim sections of the statutes. Unless HPS and UK are in compliance with these bidding procedures, the statutes are being violated.

If a school district operates under the general bidding statute (KRS 424.260), rather than the Model Procurement Code (KRS 45A.345 to 45A.460), here is the general bid statute:

424.260 Bids for materials, supplies, equipment, or services.

- (1) *Except where a statute specifically fixes a larger sum as the minimum for a requirement of advertisement for bids, **no** city, county, or district, or **board** or commission of a city or county, or sheriff or county clerk, **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 twenty thousand dollars (\$20,000) without first making newspaper advertisement for bids.***
- (2) *If the fiscal court requires that the sheriff or county clerk advertise for bids on expenditures of less than twenty thousand dollars (\$20,000), the fiscal court requirement shall prevail.*
- (3) (a) **Nothing in this statute shall limit or restrict the ability of a local school district to acquire supplies and equipment outside of the bidding procedure if those supplies and equipment meet the specifications of the contracts awarded by the Office of Material and**

Procurement Services in the Office of the Controller within the Finance and Administration Cabinet or a federal, local, or cooperative agency and are available for purchase elsewhere at a lower price. A board of education may purchase those supplies and equipment without advertising for bids if, prior to making the purchases, the board of education obtains certification from the district's finance or purchasing officer that the items to be purchased meet the standards and specifications fixed by state price contract, federal (GSA) price contract, or the bid of another school district whose bid specifications allow other districts to utilize their bids, and that the sales price is lower than that established by the various price contract agreements or available through the bid of another school district whose bid specifications would allow the district to utilize their bid.

(b) The procedures set forth in paragraph (a) of this subsection shall not be available to the district for any specific item once the bidding procedure has been initiated by an invitation to bid and a publication of specifications for that specific item has been published. In the event that all bids are rejected, the district may again avail itself of the provisions of paragraph (a) of this subsection.

- (4) This requirement shall not apply in an emergency if the chief executive officer of the city, county, or district has duly certified that an emergency exists, and has filed a copy of the certificate with the chief financial officer of the city, county, or district, 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, or if the superintendent of the board of education has duly certified that an emergency exists, and has filed a copy of the certificate with the chief state school officer.
- (5) The provisions of subsection (1) of this section shall not apply for the purchase of wholesale electric power for resale to the ultimate customers of a municipal utility organized under KRS 96.550 to 96.900.
Effective: June 20, 2005

If a school district operates under the Model Procurement Code, KRS 45A.343 states that a public agency may adopt sections of KRS 45A.345 to 45A.460 and once adopted, no other statutes governing purchases shall apply:

45A.343 Local public agency may adopt provisions of KRS 45A.345 to 45A.460 -- Effect of adoption -- Contracts required to mandate revealing of violations of and compliance with specified KRS chapters -- Effect of nondisclosure or noncompliance.

- (1) *Any local public agency may adopt the provisions of KRS 45A.345 to 45A.460. No other statutes governing purchasing shall apply to a local public agency upon adoption of these provisions.*

The definitions in the Model Procurement include school districts:

KRS 45A.345(11): *"Local public agency" means a city, county, urban-county, consolidated local government, school district, special district, or an agency formed by a combination of such agencies under KRS Chapter 79, or any department, board, commission, authority, office, or other sub-unit of a political subdivision which shall include the offices of the county clerk, county sheriff, county attorney, coroner, and jailer.*

Under the KRS 45A.365(1), competitive bidding is required for all contracts except for those exemptions in 45A.370 to 45A.385:

45A.365 Competitive sealed bidding.

- (1) ***All** contracts or purchases shall be awarded by competitive sealed bidding, except as otherwise provided by KRS 45A.370 to 45A.385 and for the purchase of wholesale electric power by municipal utilities as provided in KRS 96.901(1).*

KRS 45A.370 allows for some competitive negotiations upon written findings of problems with defining specifications, sealed bidding and a few problems with limited resources/time/unresponsive sealed bids; nonetheless, sealed bids have to be solicited under Section 2:

45A.370 Competitive negotiation.

- (1) *A local public agency may contract or purchase through competitive negotiation upon a written finding that:*
- (a) *Specifications cannot be made sufficiently specific to permit award on the basis of either the lowest bid price or the lowest evaluated bid price, including, but not limited to, contracts for experimental or developmental research work, or highly complex equipment which requires technical discussions, and other nonstandard supplies, services, or construction; or*
 - (b) *Sealed bidding is inappropriate because the available sources of supply are limited, the time and place of performance cannot be determined in advance, the price is regulated by law, or a fixed price contract is not applicable; or*
 - (c) *The bid prices received through sealed bidding are unresponsive or unreasonable as to all or part of the requirements, or are identical or appear to have been the result of collusion; provided each responsible bidder is notified of*

the intention to negotiate and is given a reasonable opportunity to negotiate, and the negotiated price is lower than the lowest rejected bid by any responsible bidder.

(2) Proposals shall be solicited through public notice pursuant to KRS 45A.365(3) or any other means which can be demonstrated to notify an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirement of the procurement.

The request for proposals shall indicate the factors to be considered in the evaluation and the relative importance of each factor.

On a limited basis, some competitive negotiations can occur after receipt of sealed bids under KRS 45A.375:

45A.375 Negotiations after competitive sealed bidding when all bids exceed available funds -- Action when no bids received.

(1) In the event that all bids submitted pursuant to competitive sealed bidding under KRS 45A.365 result in bid prices in excess of the funds available for the purchase, and the local public agency **determines in writing:**

(a) **That there are no additional funds then available from any source so as to permit an award to the lowest responsive and responsible bidder; and**

(b) **The best interest of the local public agency will not permit the delay attendant to a resolicitation under revised specifications or revised quantities under competitive sealed bidding as provided in KRS 45A.365; then a negotiated award may be made as set forth in subsections (2) or (3) of this section.**

(2) **Where there is more than one (1) bidder, competitive negotiations pursuant to KRS 45A.370 shall be conducted with the three (3) (two (2) if there are only two (2)) bidders determined in writing by the local public agency to be the lowest responsive and responsible bidders to the competitive sealed bid invitation. Such competitive negotiations shall be conducted under the following restrictions:**

(a) **If discussions pertaining to the revision of the specifications or quantities are held with any potential offeror, all other potential offers shall be afforded an opportunity to take part in such discussions; and**

(b) A request for proposals, based upon revised specifications or quantities, shall be issued as promptly as possible, shall provide for an expeditious response to the revised requirements, and shall be awarded upon the basis of the lowest bid price or lowest evaluated bid price submitted by any responsive and responsible offeror. No discussion shall be conducted with offerors after submission of proposals except for a compelling reason as determined in writing by the local public agency. The request for proposals shall state that award is to be made without discussions except as herein provided.

- (3) **Where, after competitive sealed bidding, it is determined in writing that there is only one (1) responsive and responsible bidder, a noncompetitive negotiated award may be made with such bidder in accordance with KRS 45A.380.**
- (4) Where, after invitation for bids has been made in accordance with KRS 45A.365 and no bids have been received from responsive and responsible bidders, the local public agency may proceed to acquire the supplies, services, or construction by noncompetitive negotiations in accordance with KRS 45A.380.
Effective: April 9, 1980

KRS 45A.380 allows some noncompetitive negotiations in limited circumstances:

45A.380 Noncompetitive negotiation.

A local public agency may contract or purchase through noncompetitive negotiation only **when a written determination is made that competition is not feasible and it is further determined in writing by a designee of the local public agency that:**

- (1) An **emergency** exists which will cause public harm as a result of the delay in competitive procedures; or
- (2) There is a **single source** within a reasonable geographical area of the product or service to be procured; or
- (3) The contract is for the services of a **licensed professional**, such as attorney, physician, psychiatrist, psychologist, certified public accountant, registered nurse, or educational specialist; a technician such as a plumber, electrician, carpenter, or mechanic; or an artist such as a sculptor, aesthetic painter, or musician, provided, however, that this provision shall not apply to architects or engineers providing construction management services rather than professional architect or engineer services; or

- (4) The contract is for the purchase of perishable items purchased on a weekly or more frequent basis, such as fresh fruits, vegetables, fish or meat;
- (5) The contract is for replacement parts where the need cannot be reasonably anticipated and stockpiling is not feasible;
- (6) The contract is for proprietary items for resale;
- (7) In school districts the contract relates to an enterprise in which the buying or selling by students is a part of the educational experience;
- (8) The contract or purchase is for expenditures made on authorized trips outside of the boundaries of the local public agency;
- (9) The contract is for the purchase of supplies which are sold 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 afford a purchase at savings to the local public agency.
Effective: April 9, 1980

45A.420(1) allow for cooperative ventures between public agencies to make purchases but ALL parties to the agreement must comply with the Model Procurement Code:

45A.420 Cooperative purchasing -- Price agreements with Commonwealth.

- (1) Any local public agency may enter into an agreement for cooperative purchasing with any other local public agency. When the contracting local public agency contracts for supplies, services or construction pursuant to KRS 45A.365, 45A.370, 45A.375, or 45A.380, all other parties to the agreement shall be deemed to have complied with the provisions of those sections.

45A.420(2) allows purchases from the state price contracts:

- (2) Nothing in KRS 45A.345 to 45A.990 shall deprive a local public agency from negotiating with vendors for supplies where such supplies are the subject of a price agreement with the Commonwealth of Kentucky provided, however, that no contract executed under this section would authorize a price higher than is

contained in the price agreement with the Commonwealth of Kentucky for such specific supplies.

45A.420(3) allows for some purchasing outside the state price contracts but, limits such purchases not to exceed \$2,500.00:

- (3) *Nothing in KRS 45A.345 to 45A.990 shall deprive a local school district from acquiring supplies outside of price agreements with the Commonwealth of Kentucky if the supplies meet the same specifications as the contract items and the supplies are purchased at a lower price than is contained in the price agreement with the Commonwealth of Kentucky for such specific supplies and **the purchase does not exceed two thousand five hundred dollars (\$2,500).***
Effective: July 15, 1996

From what little I know about the HPS and UK bidding offers, I do not see how they comply with either the general bidding statute or the Model Procurement Code in providing goods and services to public school districts in Kentucky. Some bidding has to occur under either of the purchasing statutes unless the purchases meet one or more of the exemptions in the purchasing statutes.

If HPS and UK can show me how they comply with either the general bid statute or the Model Procurement Code, I would be glad to reconsider my opinion.

Let me know if you or the board members have any questions or need additional information.

With kindest personal regards,

Sincerely,



Timothy Crawford

TC/mcv