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Donna Little
REGULATIONS COMPILER

STATEMENT OF EMERGENCY
200 KAR 5:365E

This emergency administrative regulation is being promulgated in order to facilitate the timely implementation of House Bill 408, which passed during the 2015 Session of the Kentucky General Assembly. Among other statutes, HB 408 amended KRS 45A.183 to allow the use of a new alternative construction delivery method, Construction Manager-General Contractor, in state construction projects. The amendment to KRS 45A.183 is effective June 24, 2015.

The Construction Manager-General Contractor alternative offers an efficient and cost-effective delivery method for state construction projects. Implementing this regulation as an emergency will make this procurement method available as soon as the authorizing legislation takes effect. This emergency administrative regulation shall be replaced by an ordinary administrative regulation being filed with the Administrative Regulations Compiler contemporaneously with this emergency administrative regulation. The ordinary administrative regulation is identical to this emergency administrative regulation.

6/16/15
Date

Steven L. Beshear, Governor

June 16, 2015
Date

Lori Flanery, Secretary
Finance and Administration Cabinet

1 FINANCE AND ADMINISTRATION CABINET

2 Office of the Secretary

3 **(Emergency)**

4 200 KAR 5:365E. Alternative project delivery methods for capitol construction.

5 RELATES TO: KRS 45A.030, 45A.085, 45A.180, 45A.183, 45A.690-45A.725

6 STATUTORY AUTHORITY: KRS 45A.180, 45A.183

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 45A.180 requires the Secretary of

8 the Finance and Administration Cabinet to promulgate administrative regulations for the

9 implementation of as many recognized alternative methods of management of construction

10 contracting as he may determine to be feasible. This administrative regulation implements the

11 provisions of KRS 45A.180 and 45A.183 relating to alternative construction delivery methods.

12 Section 1. Definitions. (1) "Alternative construction delivery method" means a delivery

13 method other than design-bid-build.

14 (2) "Chief purchasing officer" is defined in KRS 45A.030(3).

15 (3) "Construction manager-agency" is defined in KRS 45A.030(5).

16 (4) "Construction management-at-risk" is defined in KRS 45A.030(6).

17 (5) "Construction manager-general contractor" as defined in KRS 45A.030(7).

18 (6) "Design-bid-build" is defined in KRS 45A.030(11).

19 (7)[~~(6)~~] "Design-build" is defined in KRS 45A.030(12).

20

1 Section 2. Use of Alternative Construction Delivery Methods. (1) An alternative construction
2 delivery method may be deemed appropriate for a competitive process consistent with KRS
3 45A[~~negotiation pursuant to KRS 45A.085~~] upon issuance of a written determination by the
4 chief purchasing officer that due to the nature, detail, or circumstances of a project, it is not
5 appropriate to solicit competitive bids using the conventional design-bid-build delivery method
6 and an alternative construction delivery method is justified. The determination shall include a
7 description of facts justifying use of an alternative construction delivery method, and shall state
8 whether the method to be used shall be one of "construction management-at-risk," "design-
9 build," "construction manager-general contractor," or "construction manager-agency."
10 (2) The criteria for determining the utilization of a specific alternative delivery method
11 for a particular project shall include, factors such as the dollar scope of the project, the
12 anticipated schedule of the project, the type of project, and the overall complexity of the project.
13 Section 3. (1) If it has been determined that it is not appropriate to solicit competitive bids
14 using the conventional design-bid-build delivery method, action to deliver a capital construction
15 project using a specific alternative construction delivery method shall commence by solicitation
16 of written proposals as provided herein[~~in accordance with KRS 45A.085(2) and 200 KAR~~
17 ~~5:307~~]. A copy of the request for proposals shall be transmitted to the Capital Projects and Bond
18 Oversight Committee staff.
19 [~~(2) The criteria for determining the utilization of a specific alternative delivery method for a~~
20 ~~particular project shall include, factors such as the dollar scope of the project, the anticipated~~
21 ~~schedule of the project, the type of project, and the overall complexity of the project. The~~
22 ~~Finance and Administration Cabinet, in conjunction with the user agency, shall determine the~~

1 ~~appropriate project delivery method prior to the development of preliminary specifications and~~
2 ~~the issuance of any project solicitations.~~]
3 (2)[~~(3)~~] A solicitation of proposals for competitive negotiation shall state:
4 (a) That the purchasing agency proposes to enter into competitive negotiation with
5 responsible offerors;
6 (b) The date, hour, and place that written proposals shall be received;
7 (c) The type of alternative delivery method involved and the associated requirements;
8 (d) A description of the services sought and the procurement procedures to be followed;
9 (e) Specifications, or the location where specifications may be obtained;
10 (f) The specific qualitative and pricing evaluative factors, with associated scoring values or
11 weights, to be considered in determining the proposal most advantageous to the commonwealth,
12 with qualifications and price to be weighted at not less than twenty-five (25) percent and fifty
13 (50) percent respectively;
14 (g) The level or quantity of information required from each offeror to allow for equitable
15 evaluation;
16 (h) The proposed method of award of contract;
17 (i) Other information as may be desirable or necessary to reasonably inform potential
18 offerors of technical, performance, and any other data and requirements of the procurement;
19 (j) The existence of a funding limitation, if determined to be in the best interest of the
20 commonwealth;
21 (k) The amount of the funding limit, if it is determined by the Director of the Division of
22 Contracting and Administration that disclosure of the amount of the funding limit will promote
23 competition and will be in the best interest of the commonwealth; and

(l) The level or amount of stipends, if any, to be provided and to whom, contingent upon funding limitations. Stipends shall only be provided if adequate funds are available over and above the required project costs.

(4) If a funding limit has been established, proposals that exceed the funding limit may be rejected.

Section 4. (1) Procedures for the manner in which proposals will be evaluated shall be established by the purchasing officer per the requirements of the competitive negotiation for each procurement and shall be set forth in the request for proposals. The purchasing officer may request offerors to submit written clarification or explanation of their proposals, and the proposal of any offeror who fails to respond or to request an extension of time to respond within the time requested may be rejected.

(2) Proposals shall be evaluated based upon factors stated in the request for proposals. Numerical rating systems shall be used.[~~All evaluation documentation, scoring, and summary conclusions shall be in writing and made a part of the file records for the procurement.~~]

Section 5. The Director of the Division of Contracting and Administration shall appoint an evaluation committee of scoring and nonscoring (technical) members with membership comprised of personnel from the Finance and Administration Cabinet and the user agency for which the project is being constructed. The Director of the Division of Contracting and Administration shall determine, in writing, the number of committee members based upon the financial scope and technical complexity of the subject project, with no less than four (4), nor more than seven (7), scoring members.

Section 6. Interim preproposal meetings may[~~shall~~] be conducted with potential offerors to allow for questions and clarifications regarding project plans and specifications provided as a

1 part of the request for proposals. A written confirmation of all information presented in these
2 meetings shall become an official addendum to the procurement documents and provided to all
3 potential offerors. The number of preproposal meetings shall be determined by the Director of
4 the Division of Contracting and Administration and stated in the request for proposals.

5 Section 7. All written proposals received by the procurement agency in response to a
6 solicitation shall be kept secure and unopened by the purchasing officer until the date and hour
7 established for opening the proposals. Proposals not clearly marked as such may be opened for
8 identification purposes, and shall be appropriately identified with reference to the particular
9 procurement and resealed until the time for opening proposals.

10 Section 8. At the close of the proposal submission deadline, all proposals received shall be
11 opened by the purchasing officer. The purchasing officer shall examine each written proposal
12 received for general conformity with the terms of the procurement. If, after examination of the
13 written proposals initially submitted, it is determined, in writing, that no acceptable proposal has
14 been submitted, all proposals may be rejected and new proposals may be solicited on the basis of
15 the same, or revised terms, or the procurement may be abandoned.

16 Section 9. If, after solicitation of proposals to enter into competitive negotiations, only one
17 (1) proposal responsive to the solicitation is received, the purchasing officer may commence
18 negotiations with the single offeror and any resulting contract entered into with that offeror shall
19 be deemed to have been competitively negotiated and awarded in accordance with KRS 45A.085
20 and this administrative regulation. The terms and conditions of the contract shall not in any
21 material respect deviate in a manner detrimental to the purchasing agency from the terms and
22 conditions specified in the solicitation for proposals.

1 Section 10. The purchasing officer shall hold separate any pricing information before
2 forwarding all conforming proposals to the appropriate, designated evaluation committee for
3 qualitative evaluation. Pricing information shall be kept separate and secure until it is combined
4 with the evaluation committee aggregate qualitative scoring to achieve the final score for the
5 procurement process as set forth in the request for proposals.

6 Section 11. Proposals shall not be subject to public inspection until the procurement
7 process has been completed and a contract awarded to the highest scoring, responsible offeror
8 submitting the proposal determined to be the most advantageous to the commonwealth, based
9 upon the pricing and qualitative evaluation factors set forth in the solicitation.

10 Section 12. Discussions with offerors by any member of the evaluation committee relative to
11 the procurement shall be discouraged except during the selection committee interview process.
12 Any ex parte communications between offerors and members shall be documented by each
13 member with a written summary of all discussions setting forth both the dates and the general
14 substance of the discussions. Verbatim records of the discussion shall not be required. The
15 written summaries shall become part of the procurement file.

16 Section 13. An awarded contract utilizing an alternative project delivery method shall be
17 submitted to the Government Contract Review Committee for review in accordance with KRS
18 45A.690 to 45A.725.

200 KAR 5:365

Signature Page

APPROVED:

Lori Hudson Flanery
Lori Flanery, Secretary
Finance and Administration Cabinet

June 16, 2015
Date

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 200 KAR 5:365E

Contact Person: Doug Hendrix
Phone Number: 502-564-6660

(1) Provide a brief summary of:

(a) What this administrative regulation does: It provides for a new alternative construction delivery method, Construction Manager-General Manager.

(b) The necessity of this administrative regulation: KRS 45A.180(1) directs the Finance and Administration Cabinet ("FAC") to promulgate regulations regarding the determination to use an alternative construction delivery method for state construction contracts. KRS 45A.183(1(2)(a)(effective June 24, 2015) requires the FAC to use administrative regulations promulgated pursuant to KRS 45A.180 in the use of the Construction Manager-General Manager alternative delivery method.

(c) How this administrative regulation conforms to the content of the authorizing statutes: The amended regulation sets forth the criteria and requirements for the determination anduse of the Construction Manager-General Manager alternative delivery method.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: It provides prospective bidders guidance on the response to solicitations using the Construction Manager-General Manager alternative delivery method in accordance with the procedures used in existing alternative delivery methods allowed by statute.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amendment adds the definition of "Construction Manager-General Manager." This will allow the FAC to use the existing administrative procedures set forth in the regulation for this new alternative delivery method.

(b) The necessity of the amendment to this administrative regulation: The regulation must be amended to meet the requirements of KRS 45A.180 and 45A.183.

(c) How the amendment conforms to the content of the authorizing statutes: The amendment sets forth the procedure on the use of this new alternative delivery method.

(d) How the amendment will assist in the effective administration of the statutes: The amendments give FAC flexibility to use an additional alternative delivery method which may reduce construction costs on some projects.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: The amendments will impact prospective bidders for construction contracts but should have minimal impact.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Prospective bidders must comply with the filing requirements for bids, but these requirements are not new and apply to existing alternative delivery methods. Prospective bidders should be familiar with these procedures.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): No additional costs compared to responses to

solicitations for existing alternative delivery methods.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): No benefits or detriments will accrue to the prospective bidders. This is simply a new construction method.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: No additional costs.

(b) On a continuing basis: No additional costs.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: N/A

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No increase in fees or funding.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No

(9) TIERING: Is tiering applied? (Explain why or why not) Tiering is not applied; the amended regulation should have no additional impact on governments or small businesses.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 200 KAR 5:365E

Contact Person: Doug Hendrix
Phone Number: 502-564-6660

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Universities and counties.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 45A.183.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. None

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None

(c) How much will it cost to administer this program for the first year? No additional costs.

(d) How much will it cost to administer this program for subsequent years? No additional costs.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):
Expenditures (+/-):
Other Explanation: