



1 FINANCE AND ADMINISTRATION CABINET

2 Office of the Secretary

3 (Amended After Comments)

4 200 KAR 5:355. Public-private partnership delivery method.

5 RELATES TO: KRS 45A.030, 45A.077, 45A.085, 45A.090, 45A.180, 45A.183, 45A.190,
6 45A.435, 45A.550-45A.554, 61.878, 65.025, 65.028

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

8 NECESSITY, FUNCTION, AND CONFORMITY: KRS 45A.035 authorizes the Secretary of
9 the Finance and Administration Cabinet to promulgate administrative regulations for the imple-
10 mentation of the Kentucky Model Procurement Code (KRS Chapter 45A). KRS 45A.077 re-
11 quires the secretary to promulgate administrative regulations setting forth the criteria to
12 be used in determining when a public-private partnership is to be used for a particular
13 project. KRS 45A.085 authorizes the secretary to promulgate administrative regulations con-
14 cerning contracts awarded by competitive negotiation. KRS 45A.180 requires the secretary to
15 promulgate administrative regulations for the implementation of as many recognized alternative
16 methods of management of construction contracting as are determined to be feasible. This ad-
17 ministrative regulation establishes guidelines pursuant to KRS 45A.077 and KRS
18 65.028[45A.030] relating to public-private partnerships for entities requesting to utilize this pro-
19 curement delivery method.

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

21 (2) "Capital project" is defined by KRS 45.750(1)(f), except that for purposes of this adminis-

1 trative regulation, capital project shall include all projects regardless of the size or scope of same.

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

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

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

8 (6)~~(5)~~ "Kentucky Local Government Public-Private Partnership Board" is established and
9 defined by KRS 65.028(11).

10 (7)~~(6)~~ "Local government" is defined by KRS ~~65.028(1)(c)~~~~[65.025(1)(b)]~~.

11 (8)~~(7)~~ "Private partner" is defined by KRS 45A.030(21) and KRS 65.025(1)(g).

12 (9)~~(8)~~ "Public-private partnership" is defined by KRS 45A.030(23).

13 ~~[(9) "Purchasing officer" is defined by KRS 45A.030(26).]~~

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

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

19 Section 2. Use of a Public-Private Partnership. (1) A public-private partnership may be uti-
20 lized for construction or financing of a capital project or the procurement of services if the head
21 of a governmental body or a local government issues a written determination that due to the na-
22 ture or circumstances of a capital project or services, a public-private partnership is the most ad-
23 vantageous method of awarding and administering a capital project or other contract.

1 (2) In determining whether the use of a public-private partnership is the most advantageous
2 method of awarding and administering a capital project or other contract, the head of a govern-
3 mental body or local government, or a person authorized in writing as his or her designee, shall
4 undertake an analysis of the proposed capital project or other contract to determine whether a
5 public-private partnership is the procurement method most advantageous to the governmental
6 body or local government that incorporates the **[following]** components established in this sec-
7 tion.[:]

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

- 10 1. The ability of the using agency or local government to allocate and control risks, responsi-
11 bilities, and rewards between itself and a private partner in a way that ultimately benefits the us-
12 ing agency or local government and the citizens it serves;
- 13 2. The timeliness of completion and efficiency of delivery of a capital project or other con-
14 tract via a public-private partnership as compared with other project delivery methods;
- 15 3. A determination that the tangible and intangible benefits to be gained by using a public-
16 private partnership equals or exceeds the cost of developing and maintaining a public-private
17 partnership;
- 18 4. The ability and expertise of the using agency or local government to measure and monitor
19 performance and operational controls;
- 20 5. The ability of the using agency or local government to capture and utilize incentives, effi-
21 ciencies, and expertise derived from the involvement of a private partner;
- 22 6. Whether the capital project or other contract would be developed or entered into in the ab-
23 sence of private sector involvement;

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

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

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

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

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

11 b. Operation and management costs;

12 c. Any payments the using agency or local government may be required to make to the private
13 partner; and

14 d. Maintenance costs;

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

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

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

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

23 (c) Privatization Analysis. Before award of a contract for a public-private partnership, the us-

1 ing agency and the cabinet shall satisfy all of the requirements of KRS 45A.550-45A.554 and
2 200 KAR 5:340~~[the administrative regulations promulgated thereunder]~~ related to privatiza-
3 tion of existing governmental services, if applicable.

4 (d) Local Government Public-Private Partnerships Subject to Review by the Kentucky Local
5 Government Public-Private Partnership Board. If the total contractual value of a proposed pub-
6 lic-private partnership between a local government and a private partner equals or exceeds thirty
7 (30) percent of the general fund revenues received by the local government in the immediately
8 preceding fiscal year, the local government shall submit the proposed public-private partner-
9 ship agreement~~[contract]~~ to the cabinet and the Department for Local Government for evalua-
10 tion and presentation to the Kentucky Local Government Public-Private Partnership Board in ac-
11 cordance with KRS 65.028(12) or 65.028(16).

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

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

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

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

7 (5) **A valid unsolicited proposal shall:**

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

10 **(b) Be prepared without government supervision, endorsement, direction or direct gov-**
11 **ernment involvement; and**

12 **(c) Include sufficient detail to permit a determination that government support would be**
13 **worthwhile and that the proposal could benefit the using agency or local government's con-**
14 **stituency.**

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

19 (a) Include a cover letter with the proposal, notifying the governmental body or local govern-
20 ment that exempt information is contained in the proposal;

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

23 (c) Submit a second copy of the proposal from which the trade secrets, financial records, or

1 other information that would be exempt from public disclosure pursuant to KRS 61.878 or other
2 applicable law have been redacted.

3 ~~(7)~~~~(6)~~ Except for each portion of an unsolicited proposal that contains trade secrets, finan-
4 cial records, or other information that would be exempt from public disclosure pursuant to KRS
5 61.878 or other applicable law, all unsolicited proposals shall be available for public inspection
6 after the latter of:

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

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

11 (c) The date of the award of ~~[After]~~ a contract by a~~[has been awarded if the]~~ governmental
12 body or local government following~~[elects to undertake]~~ an open, competitive procurement
13 process conducted pursuant to KRS 45A.077(12)(c) or KRS 65.028(17)(c).

14 Section 4. Other considerations. (1) The using agency and the cabinet or local government
15 shall retain discretion in determining the relative weight to ascribe to each of the criteria set forth
16 in Section 2 of this administrative regulation, giving due consideration to the size and nature of
17 the capital project or other contract as well as the previous experience of the using agency or lo-
18 cal government, if any, in utilizing public-private partnerships under similar circumstances.

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

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

1 Section 5. Professional Assistance. The using agency and the cabinet are authorized to retain
2 any professional services deemed necessary by the using agency or the cabinet to enable an ade-
3 quate review and evaluation of a public-private partnership proposal, including those involving
4 local government that shall be approved by the Kentucky Local Government Public-Private Part-
5 nership Board in accordance with KRS 65.028(12) or 65.028(16), if the necessary expertise to
6 perform the review or evaluation within the using agency or the cabinet is inadequate or unavail-
7 able. The cost of any professional service, including the cost of any study performed, shall be
8 borne by the private partner if possible. If it is deemed necessary **by the using agency or local**
9 **government** for the governmental body to bear a portion of the cost of the professional services
10 needed to assist with the evaluation set forth in this administrative regulation, then the cost
11 **may[shall]** be paid by the using agency or local government.

200 KAR 5:355

Signature Page

APPROVED:

 Deputy Secretary
for: 10-14-2016
Date

William M. Landrum III, Secretary
Finance and Administration Cabinet

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 200 KAR 5:355

Contact Person: Judy Piazza
Phone Number: 502-782-5701
Email: Judith.Piazza@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: It provides guidance for the procurement of the public-private partnership delivery method for capital projects for state and local entities.

(b) The necessity of this administrative regulation: KRS 45A.077(3) directs the Finance and Administration cabinet to promulgate an administrative regulation setting forth the criteria to be used in determining when a public private partnership is to be used for a particular capital project on or before December, 31, 2016.

(c) How this administrative regulation conforms to the content of the authorizing statutes: It provides the parameters required by statute for a state or local government entity to submit a proposal to be approved as a public private partnership for capital projects.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: It provides the parameters required by statute for a state or local government entity to submit a proposal to be approved as a public private partnership for capital projects.

(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: Clarifies terms relating to local government participation in public-private partnerships.

(b) The necessity of the amendment to this administrative regulation: This amendment was necessary to correct an oversight in language realized during the public comment period.

(c) How the amendment conforms to the content of the authorizing statutes: The amendment adds a citation to the authorizing statute for local governments that was previously omitted.

(d) How the amendment will assist in the effective administration of the statutes: Clarifies the statutes that must be referenced when applying the provisions of the regulation.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: All state and local government entities may utilize the procurement provisions of this regulation if they chose.

(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: None.

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

(c) As a result of compliance, what benefits will accrue to the entities identified in question

(3): An additional method of procurement for capital projects.

(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: None.

(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? Tiering was not applied as all state and local government entities will be treated the same during evaluation and approval of a capital project utilizing the public-private partnership method of delivery.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 200 KAR 5:355

Contact Person: Judy Piazza
Phone Number: 502-782-5701
Email: Judith.Piazza@ky.gov

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? All units, parts or divisions of state or local government who chose to utilize the public-private partnership delivery method for the procurement of capital projects will be impacted by this administrative regulation.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 65.028 and 45A.077.

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 funds will be required as a result of this administrative regulation.

(d) How much will it cost to administer this program for subsequent year? None.

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

Revenues (+/-):

Expenditures

STATEMENT OF CONSIDERATION RELATING TO 200 KAR 5:355
Finance and Administration Cabinet
Office of the Secretary
(Amended After Comments)

I. The public hearing on 200 KAR 5:355, scheduled for September 22, 2016, at 10:00 a.m. at the Capitol Annex was held, and written comments were received prior to the public comment period ending September 30, 2016.

II. The following people submitted written comments regarding this administrative regulation:

<u>Name and Title</u>	<u>Agency/Organization/Entity, Other</u>
Lawrence E. LeClair	Director of Government Relations for National Association of Surety Bond Producers
Daniel Wanke	Manager, Regulatory and Governmental Affairs, The Surety & Fidelity Association of America
James W. Gardner	Attorney for Kentucky Municipal Utilities Association

III. The following people from the promulgating administrative body responded to the written comments:

Name and Title

Gwen R. Pinson, General Counsel, Office of General Counsel, Finance and Administration Cabinet.

IV. Summary of Comments and Responses

- (1) Subject Matter: Bonding Requirements in 200 KAR 5:355 to comply with Kentucky Model procurement code for public-private partnerships.
(a) Commenters: Lawrence E. LeClair and Daniel Wanke

Comments: Both the NASBP and the SFAA agree with the bonding requirements set forth in the regulation and applaud Kentucky and the Finance and Administration Cabinet for recognizing how important bonding is to public works projects. Both parties strongly support the regulation.

(b) Response: No response necessary.

(2) Subject Matter: Drafting changes needed to regulation.

(a) Commenters: James W. Gardner

Comments: 1. Add KRS 65.028(6) to the "Relates to" and "Statutory authority" section to clarify that the proposed regulation is meant to be applicable to local governments.

2. In Section 2(2)(a) add the phrase "or local government" following the phrase "the using agency".
3. Add the phrase "whichever is applicable" following the phrase "the using agency or local government" where referenced in the regulation.
4. Section 3 (6)(b) and (c) are confusing because they do not contain the reference to KRS 65.028(17). Was Section 3 intended to be applicable to local governments also?
5. In Section 3(5), the process for dealing with confidential information in unsolicited proposals exceeds the scope of the statute because non-confidential information in the proposal is not made public until after the contract is awarded.
6. The regulation is ambiguous as to whether the process for submission, review and approval of proposals that exceed 30% of general fund revenues to and by the Kentucky Local Government Public-Private Partnership Board apply to both RFP's and unsolicited proposals.

(b) Response: 1. The cabinet agrees with Mr. Gardner's comment and will include the citation for KRS 65.028(6) in an agency amendment.

2. The cabinet agrees with Mr. Gardner's comment and will include the phrase in Section 2(2)(a) in the agency amendment.
3. While the cabinet appreciates Mr. Gardner's comment, the cabinet feels that the changes being made to the "relates to" and "statutory authority" sections sufficiently clarify that this regulation is intended to apply at both the state and local government levels and that the "or" between "using agency" and "local government" is sufficient to convey that the provisions apply to whichever is applicable.
4. This was an oversight and that cabinet agrees to add KRS 65.028(17) into the agency amendment.
5. While the cabinet appreciates Mr. Gardner's comment, Section 3 of the proposed regulation does not exceed the scope of the statute. Rather, the proposed regulation comports with the cabinet's general practice in regard to the release of actual proposals submitted in response to a solicitation. Mr. Gardner erroneously assumes that there would be no public notice of any portion of an unsolicited proposal until after the award of a contract pursuant to Section 3(6). If the agency or local government ends up awarding a contract as a result of an unsolicited proposal, however, there will have been at least two prior opportunities for public notice: (i) the posting of the description of the unsolicited proposal during the notice period provided for in KRS 45A.077(12)(b) and KRS 65.028(17)(b); and (ii) the

RFP that is issued after the notice period provided for in KRS 45A.077(12)(b) and KRS 65.028(17)(b).

6. While the cabinet appreciates Mr. Gardner's comment, we feel that Section 3(2) of the proposed regulation makes clear that the Kentucky Local Government Public-Private Partnership Board review process is applicable to unsolicited proposals as well as RFPs.

V. Summary of Statement of Consideration and Action Taken by Promulgating Administrative Body

The public hearing on this administrative regulation was not held, however written comments were received. 200 KAR 5:355 was amended after the cabinet received comments, ideas, and suggestions. After each comment above, if the regulation was amended, such is reflected in the response statement and noted below as to the location of the amendment in the regulation.

Page 1
RELATES TO
Line 5

After "45A.183", insert the following:
. 45A.190, 45A.435, 45A.550-45A.554, 61.878, 65.025, 65.028

Page 1
STATUTORY AUTHORITY
Line 6

After "45A.183" insert ". 65.028".

Page 1
NECESSITY, FUNCTION AND CONFORMITY
Line 9

After "(KRS Chapter 45A).", insert the following:
KRS 45A.077 requires 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.

Line 14
After "pursuant to" insert 45.077 and KRS 65.028.
Delete "45A.030".

Page 1
Section 1(4)
Line 21

After "(4)" insert "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."

Renumber remaining subsections accordingly.

Page 2

Section 1(6)

Line 3

After "is defined by", insert "KRS 65.028(1)(c)."

Delete "KRS 65.025(5)(1)(b)".

Page 2

Section 1(9)

Line 6

Delete definition for "(9) "Purchasing officer" is defined by KRS 45A.030(26)." in its entirety.

Renumber remaining subsections accordingly.

After "(10)" insert the following:

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.

Renumber the remaining section accordingly.

Page 2

Section 2(2)

Line 17

After "that incorporates the", delete "following".

After "components", insert "established in this subsection.".

Delete the colon.

Section 2(2)(a)

Line 19

After "the using agency" insert "or local government"

Page 3

Section 2(2)(b)1.a.

Line 21

After "Financing," insert "planning."

Page 5

Section 2(2)(c)

Line 2

Before "promulgated", insert "200 KAR 5:340"

Delete the following:

the administrative regulations promulgated thereunder

Page 5
Section 2(2)(c)
Line 8

After “proposed”, insert “public-private partnership agreement”
Delete “contract”

Page 5
Section 3(5)
Line 18

After “(5)” insert the following:

“A valid unsolicited proposal must:

(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.”

Renumber remaining subsections accordingly.

Page 6
Section 3(6)(b)
Line 12

After “(12)(b)2.” insert “or KRS 65.028(17)(b)2.”

Page 6
Section 3(6)(c)
Line 13

After “(c)” insert the following:

The date of the award of a

Delete “After a”

After “contract” insert “by a”

Delete the following:

has been awarded if the

After “government” insert “following”

Delete “elects to undertake”

Page 6
Section 3(6)(c)
Line 14

After “process” insert “conducted”

After “(c)” insert “or KRS 65.028(17)(c)”

Page 7

Section 5

Line 9

After "necessary" insert "by the using agency or local government"

Line 11

After "then the cost" insert "may"

Delete "shall"