



1 **FINANCE AND ADMINISTRATION CABINET**

2 Office of the Secretary

3 (New Administrative Regulation)

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

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

7 NECESSITY, FUNCTION, AND CONFORMITY: KRS 45A.035 authorizes the Secretary  
8 of the Finance and Administration Cabinet to promulgate administrative regulations for the  
9 implementation of the Kentucky Model Procurement Code (KRS Chapter 45A). KRS 45A.085  
10 authorizes the secretary to promulgate administrative regulations concerning contracts awarded by  
11 competitive negotiation. KRS 45A.180 requires the secretary to promulgate administrative  
12 regulations for the implementation of as many recognized alternative methods of management of  
13 construction contracting as are determined to be feasible. This administrative regulation  
14 establishes guidelines pursuant to KRS 45A.030 relating to public-private partnerships for entities  
15 requesting to utilize this procurement delivery method.

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

17 (2) "Capital project" is defined by KRS 45.750(1)(f), except that for purposes of this  
18 regulation, capital project shall include all projects regardless of the size or scope of same.

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

20 (4) "Governmental body" is defined by KRS 45A.030(17).

21 (5) "Kentucky Local Government Public-Private Partnership Board" is established and

1 defined by KRS 65.028(11).

2 (6) "Local government" is defined by KRS 65.025(5)(1)(c).

3 (7) "Private Partner" is defined by KRS 45A.030(21) and KRS 65.025(1)(g).

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

5 (9) "Purchasing officer" is defined by KRS 45A.030(26).

6 (10) "Using agency" is defined by KRS 45A.030.

7 Section 2. Use of a Public-Private Partnership. (1) A public-private partnership may be utilized  
8 for construction or financing of a capital project or the procurement of services if the head of a  
9 governmental body or a local government(s) issues a written determination that due to the nature  
10 or circumstances of a capital project or services, a public-private partnership is the most  
11 advantageous method of awarding and administering a capital project or other contract.

12 (2) In determining whether the use of a public-private partnership is the most advantageous  
13 method of awarding and administering a capital project or other contract, the head of a  
14 governmental body or local government(s), or a person authorized in writing as his or her designee,  
15 shall undertake an analysis of the proposed capital project or other contract to determine whether  
16 a public-private partnership is the procurement method most advantageous to the governmental  
17 body or local government(s) that incorporates the following components:

18 (a) Qualitative considerations. The using agency shall evaluate the potential public-private  
19 partnership utilizing the following criteria:

20 1. The ability of the using agency or local government(s) to allocate and control risks,  
21 responsibilities, and rewards between itself and a private partner in a way that ultimately benefits  
22 the using agency or local government(s) and the citizens it serves;

23 2. The timeliness of completion and efficiency of delivery of a capital project or other contract

1 via a public-private partnership as compared with other project delivery methods;

2 3. A determination that the tangible and intangible benefits to be gained by using a public-  
3 private partnership equals or exceeds the cost of developing and maintaining a public-private  
4 partnership;

5 4. The ability and expertise of the using agency or local government(s) to measure and monitor  
6 performance and operational controls;

7 5. The ability of the using agency or local government(s) to capture and utilize incentives,  
8 efficiencies, and expertise derived from the involvement of a private partner;

9 6. Whether the capital project or other contract would be developed or entered into in the  
10 absence of private sector involvement;

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

13 8. The urgency of need for the capital project or services by the governmental body or local  
14 government(s).

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

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

20 a. Financing, design, and construction costs;

21 b. Operation and management costs;

22 c. Any payments the using agency or local government(s) may be required to make to the  
23 private partner; and

1 d. Maintenance costs;

2 2. The allocation of risks and contingencies between the using agency or local government(s)  
3 and the private partner;

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

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

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

10 (c) Privatization Analysis. Before award of a contract for a public-private partnership, the  
11 using agency and the cabinet must satisfy all of the requirements of KRS 45A.550-45A.554 and  
12 the administrative regulations promulgated thereunder related to privatization of existing  
13 governmental services, if applicable.

14 (d) Local Government Public-Private Partnerships Subject to Review by the Kentucky Local  
15 Government Public-Private Partnership Board. In the event the total contractual value of a  
16 proposed public-private partnership between a local government(s) and a private partner equals or  
17 exceeds thirty (30) percent of the general fund revenues received by the local government(s) in the  
18 immediately preceding fiscal year, the local government(s) shall submit the proposed contract to  
19 the cabinet and the Department for Local Government for evaluation and presentation to the  
20 Kentucky Local Government Public-Private Partnership Board in accordance with  
21 KRS 65.028(12) or 65.028(16).

22 Section 3. Submission of Unsolicited Proposals. (1) Persons, businesses, or other entities  
23 may submit unsolicited proposals for a capital project or other contract utilizing a public-private

1 partnership to a governmental body with a copy to the Secretary of the Finance and Administration  
2 Cabinet.

3 (2) Persons, businesses, or other entities wishing to submit an unsolicited proposal for a  
4 public-private partnership with a local government(s) shall submit such proposals to the local  
5 government(s) with a copy to the Department for Local Government. In the event the total  
6 contractual value of the proposed public-private partnership equals or exceeds thirty (30) percent  
7 of the general fund revenues received by the local government(s) in the immediately preceding  
8 fiscal year, the Department for Local Government with the assistance of the cabinet shall evaluate  
9 each proposal and present same to the Kentucky Local Government Public-Private Partnership  
10 Board in accordance with KRS 65.028(12) or 65.028(16).

11 (3) Proposals submitted pursuant to subsection (1) of this section shall be considered in the  
12 manner prescribed in KRS 45A.077(12) and evaluated pursuant to the criteria set forth in Section  
13 2 of this administrative regulation.

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

17 (5) All unsolicited proposals shall be submitted in a sealed envelope marked "unsolicited  
18 proposal." In the event an unsolicited proposal contains trade secrets, financial records, or other  
19 information that would be exempt from public disclosure pursuant to KRS 61.878 or other  
20 applicable law, persons, businesses, or other entities submitting unsolicited proposals shall:

21 (a) Include a cover letter with the proposal, notifying the governmental body or local  
22 government(s) that such information is contained in the proposal;

23 (b) Mark all portions of the proposal that contain such information as "confidential" or

1 "proprietary"; and

2 (c) Submit a second copy of the proposal from which the trade secrets, financial records, or  
3 other information that would be exempt from public disclosure pursuant to KRS 61.878 or other  
4 applicable law have been redacted.

5 (6) Except for the portion(s) of an unsolicited proposal which contain trade secrets, financial  
6 records, or other information that would be exempt from public disclosure pursuant to KRS 61.878  
7 or other applicable law, all unsolicited proposals shall be available for public inspection after the  
8 letter of:

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

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

13 (c) After a contract has been awarded in the event the governmental body or local  
14 government(s) elects to undertake an open, competitive procurement process pursuant to  
15 KRS 45A.077(12)(c).

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

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

23 (3) All performance and payment bonding requirements set forth in KRS 45A.190, 45A.435,

1 and any other statute or local ordinance, shall remain in effect for capital projects and other  
2 contracts using the public-private partnership project delivery method.

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

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Signature Page

APPROVED:

William M. Landrum III

William M. Landrum III, Secretary  
Finance and Administration Cabinet

12 Aug 2016  
Date

**PUBLIC HEARING AND PUBLIC COMMENT PERIOD:** A public hearing on this administrative regulation shall be held on September 22, 2016 from 10a.m. to 12p.m., in Room 382, Capitol Annex Building, Frankfort, Kentucky 40601. Individuals interested in being heard at this hearing shall notify this agency in writing at least five (5) workdays prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until the end of the day on September 30, 2016. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

Contact Person: Judy Piazza, Executive Director, Office of Legislative & Intergovernmental Affairs, Finance and Administration Cabinet, 392 Capitol Annex, Frankfort, Kentucky, 40601, (502) 782-5701 (telephone), (502) 564-9557 (fax), [Judith.Piazza@ky.gov](mailto:Judith.Piazza@ky.gov) (email).

## 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: N/A
  - (b) The necessity of the amendment to this administrative regulation: N/A
  - (c) How the amendment conforms to the content of the authorizing statutes: N/A
  - (d) How the amendment will assist in the effective administration of the statutes: N/A
- (3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: None.
- (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: N/A
  - (b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): N/A
  - (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): N/A
- (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? (Explain why or why not) 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 (+/-):

Other Explanation: