

## CHAPTER 41

## ( SB 169 )

AN ACT relating to public-private partnerships.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 65.028 is amended to read as follows:

- (1) As used in this section:
  - (a) "Best value" has the same meaning as in KRS 65.025;
  - (b) "Cabinet" means the Finance and Administration Cabinet;
  - (c) "Local government" means a city, county, charter county, urban-county government, consolidated local government, ~~or~~ unified local government, *or local school district* of the Commonwealth;
  - (d) "Private partner" has the same meaning as in KRS 65.025; and
  - (e) "Public-private partnership" has the same meaning as in KRS 65.025.
- (2) A public-private partnership delivery method may be utilized by a local government as provided in this section and administrative regulations promulgated thereunder. Contracts using this method shall be awarded by competitive negotiation on the basis of best value, and shall in all cases take effect only if executed by the legislative body of the local government, *which in the case of a school district shall be the local board of education*. The provisions of KRS 65.025(2) to (4) shall not apply to public-private partnerships utilized by local governments.
- (3) A local government utilizing a public-private partnership shall continue to be responsible for oversight of any function that is delegated to or otherwise performed by a private partner.
- (4) A public-private partnership shall not be used to circumvent any requirements or restrictions placed upon any local government pursuant to any provision of the Kentucky Revised Statutes.
- (5) All public-private partnership agreements executed by a local government or any of its agencies under this section shall be approved by the legislative body of the local government, *which in the case of a school district shall be the local board of education*, at a public meeting, and shall include at a minimum the following provisions:
  - (a)
    1. Property owned by a local government shall not be sold, conveyed, or disposed of in any way at any time; and
    2. Leases issued by a local government to any party shall not be transferred in any way by that party;
 

without the specific and express written consent of the legislative body, *which in the case of a school district shall be the local board of education*, of the local government;
  - (b) Require the private partner to provide or cause to be provided performance and payment bonds on the design and construction portion of the agreement as required under KRS 45A.435 and maintenance bonds, warranties, guarantees, and letters of credit in connection with the private partner's other activities under the agreement, in the forms and amounts satisfactory to the local government and in amounts necessary to provide adequate protection to the local government;
  - (c) Review and approval of plans and specifications for the project by the local government;
  - (d) Inspection of the project by the local government to ensure that the private partner's actions are acceptable to the local government in accordance with the agreement;
  - (e) Maintenance of public liability insurance or self-insurance, in form and amount satisfactory to the local government and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the project;
  - (f) Reimbursement to be paid to the local government for services provided by the local government;
  - (g) Filing of appropriate financial statements by the private partner on a periodic basis;

- (h) Policies and procedures governing the rights and responsibilities of the local government and the private partner in the event the public-private partnership agreement is terminated or there is a material default by the private partner. These policies and procedures shall include conditions governing assumption of the duties and responsibilities of the private partner by the local government, and the transfer or purchase of property or other interests of the private partner by the local government;
  - (i) Any fees or payments as may be established by agreement of the private partner and the local government;
  - (j) A detailed description of all duties and requirements of the private partner;
  - (k) The ability of a private partner or partners to quickly respond to the needs presented in the request for proposal, and the importance of economic development opportunities represented by the qualifying project. In evaluating proposals, preference shall be given to a plan that includes the involvement of small businesses as subcontractors, to the extent that small businesses can provide services in a competitive manner, unless any preference interferes with the qualification for federal or other funds; and
  - (l) Any other information necessary to properly address the life cycle of the agreement, including the disposition of assets if or when the public-private partnership agreement is terminated or otherwise concludes.
- (6) (a) On or before December 31, 2016, the secretary of the Finance and Administration Cabinet shall promulgate administrative regulations setting forth criteria to be used by a local government employing a public-private partnership for a particular project, and establishing a process for public-private partnership procurement undertaken by local governments consistent with this section. Prior to submission of the proposed administrative regulations pursuant to the regulatory process required by KRS Chapter 13A, the proposed administrative regulations shall be approved by the Kentucky Local Government Public-Private Partnership Board established by subsection (11) of this section.
- (b) The secretary shall consult with design-builders, construction managers, contractors, design professionals including engineers and architects, and other appropriate professionals during the development of these administrative regulations.
  - (c) The secretary shall have the authority to contract with a consultant, pursuant to KRS 45A.695, to assist the cabinet and the Kentucky Local Government Public-Private Partnership Board with the review process required in subsection (12) of this section. The secretary may, through administrative regulation, impose a reasonable fee on the private partner to defray the cost of the review required in subsection (12) of this section, including any expenses or fees incurred in contracting with a consultant.
  - (d) If the secretary fails to timely promulgate administrative regulations pursuant to this subsection, local governments may then act pursuant to this section including compliance with the process outlined in subsection (12) of this section, in the absence of administrative regulations.
- (7) A request for proposal for a local government project utilizing a public-private partnership shall include at a minimum:
- (a) The parameters of the proposed public-private partnership agreement;
  - (b) The duties and responsibilities to be performed by the private partner or partners;
  - (c) The methods of oversight to be employed by the local government;
  - (d) The duties and responsibilities that are to be performed by the local government and any other partners to the contract;
  - (e) The evaluation factors and the relative weight of each to be used in the scoring of awards; and
  - (f) Other information required by a local government to evaluate the proposals submitted by respondents and the overall proposed public-private partnership.
- (8) A private entity desiring to be a private partner shall demonstrate to the satisfaction of the local government that it is capable of performing any duty, responsibility, or function it may be authorized or directed to perform as part of the public-private partnership agreement.
- (9) When a request for proposal for a project utilizing a public-private partnership is issued, the local government shall transmit a copy of the request for proposal to the cabinet and to the Department for Local Government.

- (10) A request for proposal or other solicitation may be canceled, or all proposals may be rejected, if it is determined in writing that the action is taken in the best interest of the local government and approved by the legislative body, *which in the case of a school district shall be the local board of education.*
- (11) (a) There is established within the cabinet the Kentucky Local Government Public-Private Partnership Board, composed of eleven (11) members as follows:
1. The secretary of the cabinet, or the secretary's designee;
  2. Two (2) individuals appointed by the Kentucky League of Cities, both of whom shall have experience in municipal financial operations;
  3. Two (2) individuals appointed by the Kentucky Association of Counties, both of whom shall have experience in county financial operations, one (1) to be recommended by the Kentucky County Judge/Executive Association and one (1) to be recommended by the Kentucky County Magistrates and Commissioners Association;
  4. The commissioner of the Department for Local Government, or the commissioner's designee;
  5. The executive director of the Office of Financial Management within the cabinet, or the executive director's designee;
  6. The Auditor of Public Accounts, or the Auditor's designee;
  7. One (1) citizen member appointed by the Governor, who shall have experience and knowledge in local government debt and financial operations; and
  8. Two (2) members of the Kentucky General Assembly, one (1) appointed by the President of the Senate and one (1) appointed by the Speaker of the House of Representatives, each of whom shall serve in a nonvoting ex officio capacity and shall not be considered for purposes of determining a quorum.
- (b) Members of the board shall begin their terms on August 1, 2016, and shall serve for a term of four (4) years.
- (c) Board members appointed under paragraph (a)2. and 3. of this subsection may send a designee with similar experience to meetings for which they are unavailable.
- (d) Vacancies occurring in the term of any member shall be filled in the same manner as the original appointment.
- (e) The members of the board shall receive no compensation for their services.
- (f) The secretary of the cabinet, or the secretary's designee, shall serve as chair of the board and the members shall elect a vice chair from among the membership of the board. The vice chair may preside over meetings of the board in the absence of the chair.
- (g) The board shall meet at least once per year, and as needed for the timely consideration of proposed projects. A majority of the members of the board shall constitute a quorum.
- (h) The secretary of the cabinet shall be responsible for providing staff support and maintaining complete records of the board's actions and proceedings, as public records open to inspection.
- (12) (a) Upon the initial issuance of a public-private partnership agreement having a total contractual value that equals or exceeds thirty percent (30%) of the general fund revenues received by the local government in the immediately preceding fiscal year, the local government shall submit the agreement to the cabinet for the sole purpose of making an evaluation to the Kentucky Local Government Public-Private Partnership Board of the following:
1. Whether the agreement meets the requirements of subsection (5) of this section;
  2. An analysis of the overall project's economic and financial viability within the scope of available or proposed financing arrangements and expected revenues; and
  3. Whether the agreement adheres to the procurement process required by subsection (2) of this section.

Public-private partnership agreements having a total contractual value that is less than thirty percent (30%) of the general fund revenues received by the local government in the immediately preceding fiscal year shall not be required to be submitted to the cabinet or the Kentucky Local Government Public-Private Partnership Board.

- (b) The local government shall submit any information required by the cabinet, relating to the agreement and its procurement, to enable the cabinet to conduct this evaluation.
  - (c) The cabinet shall acknowledge receipt of the agreement within thirty (30) days, and after evaluation thereof shall, within ninety (90) days of its receipt, forward the results of its evaluation separately to each individual member of the Kentucky Local Government Public-Private Partnership Board. The full board shall meet within sixty (60) days of the issuance of the cabinet's evaluation to consider the evaluation provided by the cabinet and approve or disapprove the proposed agreement. If the board disapproves the project, the board shall provide specific reasons for its disapproval. If the board approves the project, the cabinet shall return the agreement to the local government legislative body, ***which in the case of a school district shall be the local board of education***, for final execution thereof. No public-private partnership agreement issued by a local government that is subject to evaluation by the cabinet and review and approval by the Kentucky Local Government Public-Private Partnership Board pursuant to paragraph (a) of this subsection shall take effect unless and until it is approved by the Kentucky Local Government Public-Private Partnership Board pursuant to this subsection and is found by the board to meet the requirements of this section and to be economically viable as provided in this subsection.
  - (d) If an agreement is not approved by the board, the local government submitting the agreement may modify the agreement and resubmit it for reconsideration in accordance with this section.
- (13) The Commonwealth shall bear no liability for public-private partnership agreements approved pursuant to subsection (12) of this section.
  - (14) Upon approval and execution of a public-private partnership agreement, the local government shall transmit a copy of the agreement to the Department for Local Government.
  - (15) The Auditor of Public Accounts may periodically review public-private partnership agreements executed by a local government pursuant to this section, and any actions undertaken by private partners and local governments thereunder, to evaluate compliance with the agreement and this section.
  - (16) Multiple local governments, acting in accordance with KRS 65.210 to 65.300, may jointly enter into a public-private partnership pursuant to this section. Public-private partnership agreements involving multiple local governments shall only be required to be submitted to the cabinet for evaluation and to the Kentucky Local Government Public-Private Partnership Board for review and approval, as provided by subsection (12) of this section, if the total contractual value equals or exceeds thirty percent (30%) of the combined general fund revenues received in the immediately preceding fiscal year by all local governments participating in the agreement.
- (17) (a) A person or business may submit an unsolicited proposal to a local government, which may receive the unsolicited proposal.
  - (b) Within ninety (90) days of receiving an unsolicited proposal, a local government may elect to consider further action on the proposal, at which point the local government shall provide public notice of the proposal pursuant to KRS Chapter 424 or electronically on the ~~website~~<sup>[Web site]</sup> of the local government, and shall:
    1. Provide specific information regarding the proposed nature, timing, and scope of the unsolicited proposal, except that trade secrets, financial records, or other records of the person or business making the proposal shall not be posted unless otherwise agreed to by the local government and the person or business; and
    2. Provide for a notice period of at least thirty (30) days and no more than ninety (90) days for the submission of competing proposals.
  - (c) Upon the end of the notice period provided under paragraph (b)2. of this subsection, the local government may consider the unsolicited proposal and any competing proposals received. If the local government determines it is in the best interest of the local government to implement some or all of the concepts contained within the unsolicited proposal or competing proposals received by it, the local government may begin an open, competitive procurement process to do so pursuant to this section.

- (d) An unsolicited proposal shall be deemed rejected if no written response is received from the local government within ninety (90) days after submission, during which time the governmental body has not taken any action on the proposal under paragraph (b) of this subsection.

**Signed by Governor March 21, 2023.**