

Green River Regional Educational Cooperative
Kentucky Educational Development Corporation
Northern KY Cooperative for Educational Services



Ohio Valley Educational Cooperative
Southeast/Southcentral Educational Cooperative
West Kentucky Educational Cooperative

November 9, 2010

To: KPC Member Districts

From: Stan Riggs

Re: Attorney Opinion on use of bids from universities and others sources

In response to a member's concern, we requested the attached opinion from Tim Crawford, School Board Attorney, regarding school district use of bids from alternate sources such as the University of Kentucky (UK) and Hospital Purchasing Service (HPS). Mr. Crawford's opinion is that the UK bid and the HPS price contracts **do not** meet the requirements of the Model Procurement Code or the general bidding stature as required for school district purchases.

KPC strives to provide bid contracts to meet the vast majority of school purchase needs. All vendors who are willing to follow the KPC bid specifications are welcome to participate in the bidding process. In return, an approved KPC vendor has a bid contract that can be used by more than 160 Kentucky school districts plus many other agencies and non-profit organizations. We consider that a WIN-WIN for the vendor and the KPC members.

Please feel free to contact me regarding the attachments or any aspect of the KPC bidding process and services. Thanks for being a member of KPC.

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"Helping Make Our Schools Great!"

Crawford Law Offices, PLLC

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November 4, 2010

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:

I stand by the analysis and opinions expressed in my letter to KEDC dated April 10, 2009 (Exhibit A) and disagree with the analysis and opinions contained in the September 15, 2010 (Exhibit B) letter from Kenway Distributors' attorneys. Without rehashing my original letter, I will make a few points about Kenway's attorney's letter.

First, Item 6.22 of UK September 22, 2004 RFP is merely a condition of UK requests for bids. Item 6.22 does not control either the Model Procurement Code (MPC) or the general bidding statute. Neither does Item 6.22 grant exceptions to compliance with the legal requirement of the MPC nor the general bidding statute.

Second, UK may be an instrumentality of the state but, so are school districts. Also, the UK contract is not the Office of Material and Procurement Services in the Finance and Administration which is the office to which we commonly refer to as the place to purchase from the "state bid contract." The Office of Material and Procurement Services holds the state bid contract, not UK. The general bidding statute refers to this as the "state price contract."

Third, UK is not considered a "local public agency" under the MPC definition contained in KRS 45A.345(11) which is referenced on page 3 of Exhibit A.

Fourth, MPC Section KRS 45A.420(2) refers to "price agreement with the Commonwealth." The Office of Material and Procurement Services in the Finance and Administration holds the state price contract, not UK.

Fifth, MPC Section KRS 45A.380 also contains a separate requirement that the local finance designee put in writing and conclude that "competition is not feasible," not just that the items can be purchased at a savings.

Thus, I still do not see how the UK contract complies with either the MPC or the general bidding statute. Some bidding has to occur unless one of the exceptions under the MPC or general bidding statutes are available. I do not see how the UK contract is an available bidding exception to either the MPC or the general bidding statute.

Please let me know if you or the board have any questions or need additional information and with kindest personal regards,

Sincerely,



Timothy Crawford

TC/mcv

Enclosures (2)

EXHIBIT A

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April 10, 2009

Stan Riggs
Executive Director
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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

EXHIBIT B



S T O L L · K E E N O N · O G D E N
P L L C .

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September 15, 2010

Mr. Kenneth R. Crutcher
President
Kenway Distributors, Inc.
P.O. Box 9347
Louisville, KY 40209

Re: University of Kentucky Contract/Local School Board Purchasing

Dear Mr. Crutcher:

You have asked for our analysis of the authority for local school boards to purchase supplies based upon a contract that has been awarded to Kenway Distributors, Inc. ("Kenway") by the University of Kentucky. Specifically, Kenway presently holds a multi-year contract to supply janitorial supplies and equipment to the University, awarded pursuant to a Request for Proposal ("RFP") dated September 22, 2004 (the "UK Contract"). The UK Contract was entered into by UK pursuant to competitive negotiation as authorized by KRS 45A.085.

Item 6.22 of the RFP provided:

The Offeror's response to this RFP must state whether or not the Offeror will permit the use of this contract by other Universities, state agencies, public and private institutions in the Commonwealth of Kentucky. An answer to this issue must be submitted within the response period.

In response, and by letter dated October 22, 2004, Kenway stated that it would "permit the use of [the UK Contract] by other Universities, state agencies, public and private institutions in the Commonwealth of Kentucky."

ANALYSIS

Under KRS 164.225, the University of Kentucky is recognized as "an independent agency and instrumentality of the Commonwealth." Furthermore, the UK Contract is a "state

Mr. Kenneth R. Crutcher
September 15, 2010
Page 2

contract" subject to Kentucky's Procurement Code in that it involves the expenditure of public funds. See KRS 45A.020.

Kentucky's Model Procurement Code is set out in KRS 45A.345 to 45A.460. Under KRS 45A.420(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.

Furthermore, under KRS 45A.380, noncompetitive negotiation may be undertaken by a local public agency [including a local school board] when competition is not feasible upon the determination by the designee of the agency (i.e., the finance or purchasing officer of such agency) that "[t]he contract is for a sale of supplies at reduced prices that will afford a purchase at savings to the local public agency."

Therefore, we conclude that KRS 45A.420(2) may permit school boards operating under the Model Procurement Code to take advantage of favorable and reduced pricing under Kenway's contract with the University of Kentucky, upon appropriate determination by the school board's finance or purchasing officer that the contract pricing will afford the school board a savings. In such circumstances, the school board is not required to seek competitive bids.

Very truly yours,



J. Wade Hendricks

JWH/dvg

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