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KENTUCKY DEPARTMENT OF EDUCATION

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MEMORANDUM No. 44

TO: Design Professionals providing services to
Kentucky's Public Schools

FROM: Greg Dunbar, AIA, Manager
District Facilities Branch

DATE: June 3, 2019

RE: House Bill 26 – Changes to KRS 45A.385, KRS 45A.430, KRS 45A.435 & KRS 424.260

House Bill 26 has been signed by the Governor and will become law on June 27, 2019. It revised several statutes that impact **702 KAR 4:160 Capital Construction Process** as follow:

Section 1. **KRS 45A.385 is amended to read as follows:**

The local public agency may use small purchase procedures for any contract for which a determination is made that the aggregate amount of the contract does not exceed **thirty thousand**~~[twenty thousand]~~ dollars **(\$30,000)**~~[\$20,000]~~ if small purchase procedures are in writing and available to the public.

Commentary: This statute applies to districts operating under KRS 45A Kentucky Model Procurement Code. KRS 45A.345 states “Aggregate amount” means the total dollar amount during a fiscal year of items of like nature, function, and use the need for which can reasonably be determined at the beginning of the fiscal year. Items the need for which could not reasonably be established in advance or which were unavailable because of a failure of delivery need not be included in the aggregate amount.

KRS 162.070 requires boards of education to publically advertise when contracting for the erection of new school buildings, additions and repairs to old buildings, except additions or repairs not exceeding seven thousand five hundred dollars (\$7,500.00). **KRS 162.070 takes precedence over KRS 45A.385 due its specificity regarding school boards and construction.**

The practice of separating a larger project with a construction cost in excess of the “aggregate amount” threshold into individual “bid packages” of amounts under the threshold but with a total exceeding the threshold is not compliant with KRS 162.070.

Section 2. **KRS 45A.430 is amended to read as follows:**

(1) Bidder security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the local public agency to exceed **one hundred thousand** [~~twenty-five thousand~~] dollars (**\$100,000**)[~~(\$25,000)~~]. Bidder's security shall be a bond provided by a surety company authorized to do business in this Commonwealth, or the equivalent in cash, in a form satisfactory to the local public agency. Nothing herein prevents the requirement of such bonds on construction contracts under **one hundred thousand** [~~twenty-five thousand~~] dollars (**\$100,000**)[~~(\$25,000)~~] when the circumstances warrant.

(2) Bidder's security shall be in an amount equal to at least five percent (5%) of the amount of the bid.

(3) When the invitation for bids requires that bidder security be provided, noncompliance requires that the bid be rejected, provided, however, that the local public agency may set forth by regulation exceptions to this requirement in the event of substantial compliance.

(4) After the bids are opened, they shall be irrevocable for the period specified in the invitation for bids, provided that, if a bidder is permitted to withdraw his bid before award because of a mistake in the bid as allowed by law or regulation, no action shall be had against the bidder or the bidder's security.

Commentary: This change impacts the following documents:

KDE Version of AIA A701-1997 Instructions to Bidders Article 4 Bidding Procedures, paragraph 4.2 Bid Security. Please incorporate the attachment titled "KDE Directions" to this document for projects to be bid after July 1, 2019.

KDE Version of AIA A201 – 2007 General Conditions of the Contract for Construction, Article 11 Insurance and Bonds, Paragraph 11.4 Performance Bond and Payment Bond, subparagraph 11.4.1. Please incorporate the attachment titled "KDE Directions" to this document for projects to be bid after July 1, 2019.

KDE Version of AIA A232 – 2009 General Conditions of the Contract for Construction, CMA Edition Article 11 Insurance and Bonds, Paragraph 11.4 Performance Bond and Payment Bond, subparagraph 11.4.1. Please incorporate the attachment titled "KDE Directions" to this document for projects to be bid after July 1, 2019.

This statutory revision provides a substantial increase to the bid bond threshold, however, it provides the flexibility to set a lower threshold. We recommend that districts and their design professionals exercise discretion in using the new limit based on the scope/nature of the project and the financial stability of the contractors in the pool of potential bidders and establish a lesser amount if deemed appropriate.

KDE Form of Proposal – A revised document (modifying page 11 of 11 only) will be posted on the KDE School Facilities Construction webpage.

Section 3. **KRS 45A.435 is amended to read as follows:**

(1) When a construction contract is awarded in an amount in excess of **one hundred thousand** [~~twenty-five thousand~~] dollars (**\$100,000**)[~~(\$25,000)~~], the following bonds shall be furnished to the local public agency, and shall become binding on the parties upon the award of the contract:

(a) A performance bond satisfactory to the local public agency executed by a surety company authorized to do business in this Commonwealth, or otherwise supplied, satisfactory to the local public agency, in an amount equal to one hundred percent (100%) of the contract price as it may be increased; and (b) A payment bond satisfactory to the local public agency, executed by a surety company authorized to do business in this Commonwealth, or otherwise supplied, satisfactory to the local public agency, for the protection of all persons supplying labor and material to the

contractor or his subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent (100%) of the original contract price.

(2) Nothing in this section shall be construed to limit the authority of the local public agency to require a performance bond or other security in addition to those bonds, or in circumstances other than specified in subsection (1) of this section, including, but not limited to, bonds for the payment of taxes and unemployment insurance premiums.

Commentary: 702 KAR 4:160 Capital Construction Process requires compliance with KRS 45A.435. However, neither 702 KAR 4:160 nor the KDE Version of AIA A701 Instructions to Bidders establish a contract threshold amount requiring performance and payment bonds, therefore, no changes to this regulation or A701 are required. **KDE will review performance and payment bonds received after July 1, 2019 based on the higher amount.**

Section 4. **KRS 424.260 is amended to read as follows:**

(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 **thirty thousand** [~~twenty thousand~~] dollars (\$30,000)[~~(\$20,000)~~] without first making newspaper advertisement for bids. This subsection shall not apply to the transfer of property between governmental agencies as authorized in KRS 82.083(4)(a).

(2) If the fiscal court requires that the sheriff or county clerk advertise for bids on expenditures of less than **thirty thousand** [~~twenty thousand~~] dollars (**\$30,000**)[~~(\$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.

Commentary: KRS Chapter 424 Legal Notices is frequently known as “Bid Law.” A conflict exists between the threshold amount contained in “Bid Law” and **KRS 162.070 Contracts for buildings, improvements, and materials to be let on competitive bidding – When advertisement not required.** KRS 162.070 requires boards of

education to publically advertise when contracting for the erection of new school buildings, additions and repairs to old buildings, except additions or repairs not exceeding seven thousand five hundred dollars (\$7,500.00). **KRS 162.070 takes precedence over KRS 424.260 due its specificity regarding school boards and construction.**

The practice of separating a larger project with a construction cost in excess of the “aggregate amount” threshold into individual “bid packages” of amounts under the threshold but with a total exceeding the threshold is not compliant with KRS 162.070.

If you have any questions regarding the above, please contact me at your convenience.

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Attachment: KDE Directions on
**Kentucky Department of Education Version of
AIA Document A701 – 1997
Instructions to Bidders**
Dated June 3, 2019