

## Water Districts and Municipal Utilities Must Consider Residence of Bidder in Contract Selection Process

In the 2010 Regular Session, the Kentucky Legislature enacted [Senate Bill 45](#) that requires public agencies to give a preference to Kentucky resident bidders in contracts over nonresident bidders who are registered in a state that gives or requires a preference to bidders from that state.<sup>1</sup> The stated purpose of the Act is to equalize competition for state and local government contracts with states that provide preferences to their residents.<sup>2</sup> The Act applies to all “public agencies,” which includes water districts and municipal utilities.<sup>3</sup> It requires all Kentucky residents receive a preference that is equal to the preference given or required by the state of the non-resident bidder.<sup>4</sup>

The Act defines a resident bidder as any “individual, partnership, association, corporation, or other business entity that, on the date the contract is first advertised or announced as available for bidding” is authorized to transact business in the Commonwealth and filed Kentucky corporate income taxes, made payments to the Kentucky unemployment insurance fund and maintained a Kentucky workers’ compensation policy in effect.

The Finance and Administration Cabinet has promulgated [200 KAR 5:400](#) to implement the Act. The regulation requires a resident bidder to submit with its bid or response to bid solicitation a notarized affidavit affirming that it meets the criteria for a resident bidder. The regulation provides that the residence of a non-resident contractor will be determined by the principal office listed in the bidder’s certificate of authority to transact business in Kentucky, or if the bidder is not required to have a certificate, its mailing address.

[200 KAR 5:400](#) requires a water district and municipal utility to identify the residence of each bidder after all responsible and responsive bidders to a solicitation

---

<sup>1</sup> Senate Bill 45 does not revise the statutory requirement as to when a contract for goods or services must be bid. [KRS 424.260\(1\)](#) requires that a water district or municipal utility advertise in a newspaper for bids for any contract or agreement for materials, supplies, equipment or contract services that involves an expenditure of more than \$20,000.

<sup>2</sup> [KRS 45A.492\(2\)](#).

<sup>3</sup> [KRS 45A.490\(2\)](#) states that “‘public agency’ has the same meaning as in KRS 61.805.” [KRS 61.805\(2\)\(c\)](#) defines “public agency” to include “[e]very county and city governing body, council, school district board, special district board, and municipal corporation.”

<sup>4</sup> [KRS 45A.494\(1\)](#).

have been scored and ranked.<sup>5</sup> The water district or municipal utility must then give to all responsive and responsible resident bidders a preference equal to the preference given or required by the state of the highest evaluated nonresident bidders and then rescored and re-ranked to account for any applicable preferences.<sup>6</sup> Resident bidders only are given preference against nonresident bidders residing in a state that gives a preference to bidders from that state.<sup>7</sup> No preference is applied against nonresident bidders that do not give a preference against Kentucky bidders.<sup>8</sup> If procurement determination results in a tie between a resident bidder and a nonresident bidder, the water district or municipal utility must select the resident bidder.<sup>9</sup> No preference is to be given between nonresident bidders.<sup>10</sup>

[KRS 45A.494\(6\)](#) requires the Finance and Administration Cabinet to maintain for all public agencies a list of states that give to or require a preference for their own resident bidders, including details of the preference given to such bidders. The Cabinet has not yet developed such a list. In the interim, water districts and municipal utilities may wish to consider using the list that the State of Oregon has developed.<sup>11</sup>

---

<sup>5</sup> 200 KAR 5:400, Section 4(1).

<sup>6</sup> 200 KAR 5:400, Section 4(2) and (3).

<sup>7</sup> 200 KAR 5:400, Section 4(4).

<sup>8</sup> *Id.*

<sup>9</sup> 200 KAR 5:400, Section 4(5).

<sup>10</sup> 200 KAR 5:400, Section 4(6).

<sup>11</sup> See [http://procurement.oregon.gov/DAS/SSD/SPO/reciprocal\\_detail.shtml](http://procurement.oregon.gov/DAS/SSD/SPO/reciprocal_detail.shtml) (last visited Feb. 19, 2011).