



Contractors Beware: Does Kentucky's Model Procurement Code Apply to Your Project?

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For all of their associated benefits, public-sector construction contracts can also present a wide variety of practical and legal pitfalls. Prospective contractors are subject to the political whims and preferences of whichever public entity sponsors a given project. Additionally, contractors looking to perform public-sector work are also subject to various types of legislative enactments and regulations. One such enactment is the Kentucky Model Procurement Code ("the Code").

The Code was enacted by the Kentucky legislature in 1978 and became effective on January 1, 1979. The Code imposes heightened requirements and reviewing standards on every expenditure of public funds by the Commonwealth under any contract or like business agreement. Pursuant to the Code, government determinations about the expenditure of public funds shall be final unless they are clearly erroneous, arbitrary, capricious, or contrary to law. This includes such determinations related to competitive sealed bidding.

Importantly, however, the provisions of the Code apply to a *local* governmental agency only if the local agency in question chooses to adopt them. This peculiar outcome became clear in *Laurel Construction Co., Inc. v. Paintsville Utility Comm.*, 336 S.W.3d 903 (Ky. App. 2010). Despite the fact that a local agency received state funding to construct a \$200,000 water tower, the agency had not adopted the Code. Therefore, its provisions did not apply to the award of a construction contract.

When the Code does not apply, the standard of review is established by Kentucky common law. As noted by the Kentucky Supreme Court in *Pendleton Brothers Vending, Inc. v. Commonwealth of Kentucky Finance and Administration Cabinet*, 758 S.W.2d 24 (Ky. 1988):

The general rule in Kentucky if the Code is not involved is that absent a showing of fraud, collusion or dishonesty, a disappointed bidder as such has no standing to judicially challenge the award of a public contract to another bidder.

If the Code does not apply to a given contract, Kentucky law assumes that the government agency either awarded the contract to the lowest or the best bidder. Anyone who challenges the bid must make specific allegations of fraud or collusion in order to properly state a case. This is a difficult burden for plaintiffs to overcome. Kentucky municipalities are given wide discretion in the exercise of bid acceptance or rejection. Where municipalities reject a bid, Kentucky courts generally do not disturb their actions based on mere technicalities, even if made unwisely or under mistake.

Therefore, it is extremely important to ascertain whether or not a given municipality or local governmental agency has adopted the Code. If the Code does not apply to a project, local governments are afforded wide discretion when awarding bids, and courts will generally not overturn such awards.

Performing work on a public-sector contract can be a messy – but profitable – business. Thus, it is always wise to have a qualified attorney that you can call to help guide you through the process and ensure a successful and lucrative undertaking.