

KRC Concerns With House Bill 247

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The overarching concern of the Kentucky Resources Council with respect to HB 247 is that contracts for the purchase or sale of electricity or natural gas by a municipal utility should be transparent, and that the ratepayers should have assurance, through competitive bidding *or otherwise*, that the terms of the purchase or sale represent the lowest available purchase and highest available sales prices. These specific concerns are further addressed below:

I. The intent v. the effect of HB 247

House Bill 247 proposes to add a 13th exemption to the requirements for competitive negotiation in the Model Procurement Code (MPC) for any “contract [] for the purchase or sale of wholesale electric power or natural gas.” The bill would also amend KRS Chapter 424 to exempt from publication, contracts or agreements for sale of natural gas or electricity, while current law exempts from publication *only* the purchase of wholesale electric power by a municipal utility for resale to customers pursuant to KRS Chapter 96.

The MPC applies to all “local public” agencies that have adopted the Code, and with certain enumerated exceptions, requires that a local public agency (LPA) contract or purchase through competitive negotiation. The only instances in which a LPA may avoid the obligation to competitively negotiate is where there is a “written determination” made “that competition is not feasible” **and** where one of the 12 current exceptions are met.

A LPA is defined as KRS 45A.345(11) to mean:

(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.

In order to understand the actual effect of HB 247, it is necessary to look at the MPC and regulation of municipal utilities more broadly.

The proposed amendment to KRS 45A.380 would amend a statute that speaks to “noncompetitive negotiation,” as contrasted with “competitive negotiation.” HB 247 would add to the exceptions to the requirement for local public agencies to competitively negotiate for a contract or purchase. “Competitive negotiation” is available to a local public agency *only* where it has first been demonstrated 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.

Thus, Unless one of these criteria apply, a LPA *cannot* enter into a contract or make a purchase through competitive negotiation, but must instead utilize the process outlined in KRS 45A.365, which requires that “[a]ll contracts or purchases shall be awarded by competitive sealed bidding, which may include the use of a reverse auction, 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.365 further provides that the award of the contract or purchase shall be “on the basis of the lowest bid price or the lowest evaluated bid price. If the latter is used, the objective measurable criteria to be utilized shall be set forth in the invitation for bids.”

In sum, if the intent of HB 247 is to exempt the purchase and sale of electricity and natural gas by local public agencies from competitive bidding, the bill is ineffective, since as written the effect of amending KRS 45A.380w would be to exempt local public agencies from the obligation to competitively negotiate a contract or purchase, but would not appear to exempt those local public agencies from the underlying obligation to competitively bid and to select the lowest bid, unless it could be demonstrated that competitive sealed bidding does not apply.

Parenthetically, there is nothing about a contract for the purchasing or selling electricity or natural gas that would not seem to be amenable to the KRS 45A.365 competitive bidding process.

II. Current Law Already Allows Exception From the MPC For Voluntary Group Purchases Of Electricity By Municipal Utilities

The “purchase of wholesale electric power by municipal utilities” is already exempted from the requirement that the contract or purchase be awarded by a competitive sealed bidding. KRS 96.901(1), which is referenced in the KRS 45A.365(1) exception, provides that a municipal utility operating under KRS Chapter 96 *already has the authority* to participate in a voluntary “group purchasing program” for power purchases where the purchase of that power “can affect the economy or efficiency of the utility’s operations[.]” Such voluntary group purchases are exempted from the MPC requirements. Thus, to the extent that a group of municipal utilities determine that cooperative purchasing of electric power is in the best interest of the ratepayers because they will provide “economy or efficiency,” they can already do so without competitive bidding.

Similarly, the current exemption in KRS 424 from publication of bids for expenditure of more than \$30,000 *already* exempts the purchase of wholesale electric power that is for resale to municipal utility customers. Thus if a municipality has not adopted the Model Procurement Code, it is exempted from the requirement for newspaper bids prior to contracting. Competitive bidding has been viewed as a mechanism for assuring that the public is getting the “best deal” when local governments and their agencies obligate their constituents in purchasing goods or services. The requirement to purchase at “least cost” is embedded in PSC-regulation of investor-owned and cooperative utilities. The

MPC competitive bid requirements assure the same accountability for municipal utilities.

Municipal utilities operating under KRS Chapter 96 have the authority, to enter into cooperative agreements with other municipalities or with rural electric cooperatives under KRS 96.890, providing that they:

may also enter into cooperative agreements with any rural electric cooperative corporation or other municipality or board for a connection for cooperative service upon such terms and conditions as may be mutually agreed upon between any such municipality or board and any such rural electric cooperative corporation or other municipality or board. Such agreements may provide, but not by way of limitation, for exchange of electric service, the cooperative use of transmission lines and other facilities, and the common use or exchange of other service or facilities.

Unlike the voluntary group purchases, however, such cooperative agreements are *not* exempted from compliance with the competitive bidding requirements of the Model Procurement Code, nor would they appear to be exempted from the newspaper advertisement and bidding requirements of KRS 424.

Both the MPC requirement for sealed competitive bids with awards to the lowest qualifier bid, and the limited “voluntary group agreement” exception for municipal utilities, require that the decision be grounded in least cost, in the case of the former, or in greater economy or efficiency, in the latter. There is no comparable requirement in the proposed changes of HB 247, which would significantly **broaden** the exceptions that currently allow voluntary agreements for purchase of electricity and electricity purchase at resale without competitive bidding.

KRC has significant concerns with (a) expanding the current exceptions to allow a municipal utility *and* any other entity falling within the definition of a “local public agency” from competitive negotiation for wholesale purchase and sale of natural gas and sale of electricity, and (b) providing no standard by which

the actions of the municipal utility or other entity would be determined to be prudent.

III. HB 247 and KyMEA

KRC's concerns regarding the broadening of existing exceptions in order to allow municipal utilities to avoid transparent and competitive bidding for wholesale sales of electricity, and for wholesale purchases and sales of natural gas, and exempting such transactions from competitive negotiation without imposing any standards to guide such purchases and sales in order to assure the best outcome for ratepayers, is compounded where the Kentucky Municipal Energy Agency is concerned.

The Kentucky Municipal Energy Agency (KyMEA) is an entity purportedly created by an Interlocal Cooperation Agreement pursuant to KRS 65.210 – 300. According to the 2015 Interlocal Agreement, the KyMEA is a “Joint Public Agency” having, among other powers, the power to issue and sell bonds and to exercise the power of eminent domain, and whose purpose is coordinating all aspects of the provision of electric services to the retail customers of its member-municipalities including power supply, dispatch, construction, permitting, operating, financing and even owning electric power supply projects or resources. The Interlocal Agreement confers on the KyMEA the authority to enter into binding contracts with its own members with respect to power and capacity purchases.

KRC's concerns regarding transparency and the accountability to municipal ratepayers are heightened since unless regional wastewater authorities, the formation of which is explicitly provided for by statute and is subject to significant public scrutiny, the Kentucky Revised Statutes do not provide specifically for the creation of a new “joint public agency” by and comprised of municipalities and municipally-owned utility systems. There are significant unanswered questions of law concerning whether the creation of a new “agency” by cities and their utilities is permissible, since the Interlocal Cooperation Act allows for agreements among local governments but does not appear to sanction creation of a new public agency by those municipalities that is not otherwise authorized by law.

Additionally, it does not appear from the 2015 Interlocal Agreement that the Department of Local Government reviewed and approved the agreement as required by KRS 65.260(2).

Beyond this, there does not appear to be an obligation in the 2015 Interlocal Agreement requiring that the purchase of electricity or natural gas by KyMEA on behalf of members be undertaken based on the lowest cost, or that such sales be based on demonstrable benefits to member utilities in terms of efficiency or economy.

Another question is raised concerning the participation of several municipal utilities in the 2015 Interlocal Agreement creating the KyMEA. KRS 96.560 through 96.900 are intended to be the entire body of law concerning municipal utilities operating pursuant to those laws, and KRS 96.890 allows only cooperative *agreements* “with any rural electric cooperative corporation or other municipality or board for a connection for cooperative service[.]” It does not appear to empower such utilities to enter into agreements creating a new public agency and delegating to that authority the power to bind individual utilities and other members to power and other purchase agreements.

KRC’s fundamental concerns regarding any purchase or sale of electricity or natural gas by a municipality or on behalf of a municipality by a municipal utility or a collection of municipal utilities, is that the transactions be open and transparent, and that there be standards for assuring accountability in such transactions in order to protect ratepayers. KRC is open to exploring more limited language that would allow municipal utilities to purchase electricity in the market under appropriate standards and without individual competitive bids, or which would allow municipal utilities to voluntarily aggregate natural gas purchases similarly to what KRS Chapter 96 provides with respect to electricity.

KRC believes, however, that safeguards must be in place to protect ratepayers, and that in lieu of competitive bidding for purchases and sales, those standards must be embedded in the statutes before any exceptions from competitive bidding and publication are created or enlarged.