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September 25, 2023

**OAG 23-07**

- Subject:*
1. Whether the Finance and Administration Cabinet (“FAC”) may require the Department of Fish and Wildlife Resources (“Department”) to provide multiple vendor quotes before the Department may utilize the statewide master procurement agreements.
  2. Whether the Department’s contracts for architectural, engineering, or engineering-related services count toward the Department or FAC’s \$300,000 price contract limit.
- Requested by:* Rich Storm, Commissioner  
Department of Fish and Wildlife Resources
- Written by:* Aaron J. Silletto, Assistant Attorney General  
Office of Civil and Environmental Law
- Syllabus:*
1. FAC may not require the Department to provide multiple vendor quotes as a condition of using the statewide master procurement agreements.
  2. The Department has its own \$300,000 price contract limit.

### *Opinion of the Attorney General*

The Department’s two questions relate to its procurement authority and its relationship with FAC.<sup>1</sup> In 2022, the General Assembly granted greater independence and procurement authority to the Department. *See* 2022 Senate Bill 217 (“SB 217”).<sup>2</sup> The General Assembly clarified the extent of that authority earlier this year. *See* 2023 Senate Bill 241 or (“SB 241”).<sup>3</sup> The language of SB 217 and SB 241, as well as the legislature’s intent in passing them, are critical to the questions presented here.

#### **I. Statewide Master Procurement Agreements**

FAC negotiates master agreements in order to provide certain goods and services to all state agencies at a set price. *See* KRS 45A.045(3); KRS 45A.300. FAC recently began requiring state agencies to obtain quotes from a minimum of three approved vendors before FAC will permit an agency to purchase under a master agreement.<sup>4</sup> FAC has imposed this three-quote requirement on the Department.

With SB 217 and SB 241, the General Assembly empowered the Department to “conduct all procurements necessary for the performance of its duties in accordance with the procurement procedures outlined in KRS Chapter 45A, [KRS Chapter 150], and the administrative regulations promulgated under [KRS Chapter 150].” KRS 150.0242(1). In fact, KRS 150.0242(1) now states that “the department shall not be subject to any provision of KRS Chapter 45A that requires the approval of any Finance and Administration Cabinet official for the [D]epartment to proceed with any aspect of the procurement process.” *Id.* And KRS Chapter 45A now says that FAC “shall not exclude the Department . . . from, or interfere with the [D]epartment’s participation in contracts available to multiple state agencies for the procurement of goods or services.” KRS 45A.300(7).

FAC’s three-quote requirement subjects one aspect of the Department’s procurement process—*i.e.*, the use of statewide master procurement agreements—to FAC approval. For example, if the Department determines that it requires a specific

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<sup>1</sup> The history of the Department’s relationship with FAC, which led the General Assembly to grant the Department greater procurement autonomy, is recounted in fuller detail in OAG 23-05.

<sup>2</sup> 2022 Ky. Acts ch. 197.

<sup>3</sup> 2023 Ky. Acts ch. 139.

<sup>4</sup> A typical example of such a contract provision states, “It will be the responsibility of the agencies utilizing this Master Agreement to obtain quotes from a minimum of three (3) awarded dealers. The agencies [*sic*] approved quote and approved SPR1 shall be submitted to OPS.Reporting@ky.gov. The Commonwealth Buyer or OPS Representative will amend the Master Agreement to add a Commodity Line for the model/quantity based upon the approved quote/SPR1. Once the contract modification is completed the Commonwealth Buyer or OPS Representative will identify the appropriate Commodity Line for the agency to issue the Delivery Order (DO).” Master Agmt. No. MA 758 2300000795, Section III.

make and model of pickup truck, FAC will not allow the Department to purchase that truck under a master agreement unless the Department first provides at least three bids. This three-quote requirement “interfere[s]” with the Department’s use or participation in “contracts available to multiple state agencies for the procurement of goods or services.” KRS 45A.300(7). It also conflicts with KRS 150.0242(1), which affirms that FAC approval is not required for the Department “to proceed with any aspect of the procurement process.”

Perhaps the three-quote requirement serves as a gatekeeping function for the use of master agreements. But no matter. In SB 217 and SB 241, the General Assembly deprived FAC of this sort of function when it comes to the Department’s use of those agreements. In short, the Cabinet may not do indirectly what the law specifically prohibits the Cabinet from doing. *See also* KRS 45A.060 (stating that the Cabinet Secretary must “maintain a close and cooperative relationship with” the Department).

## II. Architectural, Engineering, and Engineering-Related Services

The Department wishes to negotiate price contracts for architectural, engineering, and engineering-related services under KRS 45A.837. KRS 45A.837(2)(c)<sup>5</sup> provides:

The commissioner of the Department for Facilities Management, the commissioner of the Department of Fish and Wildlife Resources, or the commissioner of the Department of Highways may select firms to perform work under price contract for small projects for which the architectural, engineering, or engineering-related fees do not exceed one hundred fifty thousand dollars (\$150,000). However, no firm that has received more than three hundred thousand dollars (\$300,000) in price contract fees in any one (1) fiscal year in the contract discipline being awarded shall be selected to work under a price contract unless the secretary of the Finance and Administration Cabinet, the secretary of the Transportation Cabinet, or the commissioner of the Department of Fish and Wildlife Resources makes a written determination that the selection is in the best interest of the Commonwealth and the determination is confirmed by the appropriate cabinet’s or department’s selection committee established by KRS 45A.810.

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<sup>5</sup> KRS 45A.837(2)(c) was amended by two different bills enacted in 2023. SB 241 gave the Department the same contracting authority as the Department of Highways, and House Bill 360 doubled the dollar amounts of contracting authority provided to the three agencies covered by the statute.

Under this statute, three departments of state government may select firms to perform construction or engineering work under a price contract—the Department of Fish and Wildlife Resources; the Department for Facilities Management,<sup>6</sup> an agency within FAC; and the Department of Highways, an agency within the Transportation Cabinet. Each of the three departments is authorized to use such contracts “for small projects for which the architectural, engineering, or engineering-related fees do not exceed one hundred fifty thousand dollars (\$150,000).”

The question then becomes how to construe the statutory requirement that “no firm that has received more than three hundred thousand dollars (\$300,000) in price contract fees in any one (1) fiscal year in the contract discipline being awarded shall be selected to work under a price contract.” Specifically, the Department asks whether it may award price contracts up to \$300,000 per firm per fiscal year without the Commissioner making the required determination, or instead, whether its price contracts are aggregated with FAC’s contracts for purposes of the statutory cap.

“When dealing with a question of statutory construction, we begin with the plain text.” *Commonwealth v. Shirley*, 653 S.W.3d 571, 577 (Ky. 2022). “All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature.” KRS 446.080(1). “The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect.” *Jefferson Cnty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012) (quoting *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009)). Legislative intent is derived “from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.” *Commonwealth v. Wright*, 415 S.W.3d 606, 609 (Ky. 2013). When a statute is plain and unambiguous on its face, we are not at liberty to construe the language otherwise. *Whittaker v. McClure*, 891 S.W.2d 80, 83 (Ky. 1995). “The statute must be read as a whole and in context with other parts of the law. All parts of the statute must be given equal effect so that no part of the statute will become meaningless or ineffectual.” *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005). It must be presumed that the General Assembly did not intend an absurd result. *Commonwealth, Cent. State Hosp. v. Gray*, 880 S.W.2d 557, 559 (Ky. 1994).

The \$300,000 cap on price contracts appears ambiguous. KRS 45A.837 does not state expressly whether the cap applies to all price contracts across all three departments, or if each of the three departments has a separate \$300,000 cap. Given the lack of clarity in the text, this Office turns to legislative intent. The intent of the

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<sup>6</sup> KRS 45A.837(2)(c) refers to the “Department for Facilities Management.” However, a 2005 law changed the name of the Department for Facilities Management to the Department for Facilities and Support Services. See 2005 Ky. Acts ch. 85 §§ 1, 5 (amending KRS 12.020 and KRS 42.014). The pre-2005 name is used here because that is how KRS 45A.837 refers to that department.

General Assembly in enacting KRS 45A.837 was to provide a more expeditious route to awarding architectural, engineering, and engineering-related services contracts for “small projects” than would otherwise be the case under KRS 45A.800 to 45A.835. *See* KRS 45A.810(2) (exempting contracts under KRS 45A.837 from certain requirements regarding architectural services selection committees and engineering and engineering-related services selection committees); KRS 45A.825(12) (exempting contracts under KRS 45A.837 from contractor prequalification requirements). And SB 241 amended KRS 45A.800 to 45A.838 to give the Department greater autonomy from FAC when contracting for architectural, engineering, and engineering-related services, just as the Transportation Cabinet already had. *See* SB 241 §§ 5–11 (amending KRS 45A.800 to 45A.838).

Thus, the legislature’s intent is clear: to remove the Department from FAC’s purview and allow the Department to make its own procurement decisions. If the Department for Facilities Management and the Department of Highways could, by each awarding \$150,000 price contracts to the same firm, exhaust the \$300,000 cap, it would require the Department of Fish and Wildlife Resources to engage in the slightly more cumbersome process of submitting its contract with that firm to the Department’s engineering and engineering-related services selection committee. *See* KRS 45A.837(2)(c) (requiring contracts above the \$300,000 cap to be approved by the Commissioner’s determination that the contract is in the Commonwealth’s best interest “and the determination is confirmed by the . . . department’s selection committee established by KRS 45A.810”). Such a construction of KRS 45A.837 would not further the General Assembly’s manifest purpose.

The better construction of KRS 45A.837, which furthers the legislative intent, is that the three departments each have a \$300,000 cap. In other words, there is not a single cap per contractor per fiscal year. Rather, *each department* may award price contracts for small projects totaling \$300,000 per contractor per fiscal year, without the Commissioner of the Department or the Secretary of the Finance and Administration Cabinet or the Transportation Cabinet having to make any additional determination and submit the contract to a selection committee.

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