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Emily B Caudill  
REGULATIONS COMPILER

1 KENTUCKY LOTTERY CORPORATION

2 (Amendment)

3 202 KAR 3:020. Procurement procedures.

4 RELATES TO: KRS 154A.060(2)(a), 154A.120

5 STATUTORY AUTHORITY: KRS 154A.050(1)(d)9, 154A.120(1)

6 NECESSITY, FUNCTION, AND CONFORMITY: KRS 154A.120(1) authorizes the Kentucky  
7 Lottery Corporation to promulgate an administrative regulation[regulations] establishing its  
8 procurement procedures. This administrative regulation establishes the procurement procedures of  
9 the Kentucky Lottery Corporation [~~in a manner consistent with KRS Chapter 154A and will apply in~~  
10 ~~lieu of the Kentucky Model Procurement Code, unless otherwise specifically indicated.~~]

11 Section 1. Procurement Procedures. The procurement procedures of the Kentucky Lottery  
12 Corporation are established in the ["]Kentucky Lottery Corporation Procurement Procedures["].  
13 These procedures shall apply in lieu of the Kentucky Model Procurement Code, unless otherwise  
14 specifically indicated.

15 Section 2. Incorporation by Reference.

16 (1) "Kentucky Lottery Corporation Procurement Procedures", May 14, 2021, [4/23/99] is  
17 incorporated by reference.

18 (2) This material may be inspected, copied, or obtained, subject to applicable copyright  
19 law, [from the General Counsel] at the [Offices of the] Kentucky Lottery Corporation, 1011 West Main  
20 Street, Louisville, Kentucky 40202-2623, Monday through Friday, 8 a.m. to 5 p.m. This material  
21 may also be viewed on the Kentucky Lottery Corporation's Web site at www.kylottery.com.

This is to certify that the chief executive officer has reviewed and recommended this administrative regulation which was adopted by the Kentucky Lottery Corporation Board of Directors on May 14, 2021, as required by KRS Chapter 154A.050(d).

APPROVED BY AGENCY:

DocuSigned by:  
*Mary Harville*  
7041353ACBDE4E7...

7/13/2021

\_\_\_\_\_  
Mary R. Harville, President & CEO

\_\_\_\_\_  
Date

DocuSigned by:  
*Jennifer Luhrs*  
8117AF3BA996422...

7/13/2021

\_\_\_\_\_  
Jennifer K. Luhrs, General Counsel  
& Corporate Secretary

\_\_\_\_\_  
Date

**PUBLIC HEARING AND PUBLIC COMMENT PERIOD:** A public hearing on this administrative regulation shall be held on September 22, 2021, at 10:00 a.m., at the Kentucky Lottery Corporation, 1011 West Main Street, Louisville, Kentucky 40202-2623. Individuals interested in being heard at this hearing shall notify this agency in writing by 5 workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through September 30, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

**CONTACT PERSON:** Jennifer Luhrs, Vice President, General Counsel & Corporate Secretary, Kentucky Lottery Corporation, 1011 West Main Street, Louisville, Kentucky 40202-2623, phone: (502) 560-1579; fax: (502) 560-1532, email: [jennifer.luhrs@kylottery.com](mailto:jennifer.luhrs@kylottery.com).

## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

202 KAR 3.020

Contact Person: Jennifer Luhrs, Vice President, General Counsel & Corporate Secretary; phone: (502) 560-1579; email: jennifer.luhrs@kylottery.com

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation, through the Materials Incorporated by Reference, establishes the Kentucky Lottery Corporation Procurement Procedures.

(b) The necessity of this administrative regulation: KRS 154A.120(1) authorizes the Kentucky Lottery Corporation to promulgate administrative regulations establishing its procurement procedures.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 154A.120(1) further provides that the administrative regulations shall be designed to provide for the purchase of supplies, equipment, services, and construction items in such a manner as to provide the greatest long-term benefit to the Commonwealth, the greatest integrity for the corporation, and the best products and services for the public.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation establishes the Kentucky Lottery Corporation Procurement Procedures in a manner consistent with KRS 154A.120(1) and will apply in lieu of the Kentucky Model Procurement Code, unless otherwise specifically indicated.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: See Summary of Changes to the Materials Incorporated by Reference.

(b) The necessity of the amendment to this administrative regulation: The changes are necessary to update the procurement procedures and to comply with the Commonwealth's Red Tape Reduction Initiative.

(c) How the amendment conforms to the content of the authorizing statutes: The amended administrative regulation establishes the Kentucky Lottery Corporation Procurement procedures in a manner consistent with KRS 154A.120(1) and will apply in lieu of the Kentucky Model Procurement Code, unless otherwise specifically indicated.

(d) How the amendment will assist in the effective administration of the statutes: The amended regulation continues to be designed to provide for the purchase of supplies, equipment, services, and construction items in such a manner as to provide the greatest long-term benefit to the Commonwealth, the greatest integrity for the corporation, and the best products and services to the public as required by KRS 154A.120(1).

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This amended regulation will affect the Kentucky Lottery Corporation and the vendors doing business and seeking to do business with the Corporation.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional action will be required by the vendors doing business or seeking to do business with the Corporation.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): No additional cost will be incurred by the Corporation or by the vendors doing business or seeking to do business with the Corporation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): The increase in the Corporation's small purchase limit will make it easier for vendors seeking to do business with the Corporation.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: There will be no initial cost to implement the amended administrative regulation by the Corporation or its vendors.

(b) On a continuing basis: There will be no ongoing costs to implement the amended administrative regulation by the Corporation or its vendors on a continuing basis.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Not applicable.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change, if it is an amendment: Not applicable.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No fees were established.

(9) TIERING: Is tiering applied? Tiering was not applied. The amended administrative regulation only applies to the Corporation and vendors doing business or seeking to do business with the Corporation.

## FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

202 KAR 3:020

Contact Person: Jennifer Luhrs, Vice President, General Counsel & Corporate Secretary; phone: (502) 560-1579; email: jennifer.luhrs@kylottery.com.

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? This amended regulation will only affect the Kentucky Lottery Corporation and the vendors doing business and seeking to do business with the Corporation.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 154A.120(1) authorizes the Kentucky Lottery Corporation to promulgate administrative regulations establishing its procurement procedures.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? The amended administrative regulation will not directly generate any additional revenue for the state or local governments during the first year.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? The amended administrative regulation will not directly generate any additional revenue for the state or local governments for subsequent years.

(c) How much will it cost to administer this program for the first year? There will be no initial cost to administer the amended administrative regulation by the Corporation or its vendors for the first year.

(d) How much will it cost to administer this program for subsequent years? There will be no initial cost to administer the amended administrative regulation by the Corporation or its vendors for subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation. Not Applicable.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

## SUMMARY OF CHANGES TO MATERIAL INCORPORATED BY REFERENCE

1) List a summary of each item amended in the material incorporated by reference [KRS 13A.224-13A.2267].

2) Continue listing items until summary is complete.

3) Include # of pages for each item.

4) A summary of the significant proposed substantive changes to the “Kentucky Lottery Corporation Procurement Procedures” is as follows:

a. The regulation was revised throughout to make updates, correct grammatical errors, and reflect current practices.

b. The definition of “Best Value” in Section II.C on page #3 was applied to Requests for Quotes, and the definition of “Disadvantaged Business” was updated.

c. The preference for Invitations for Bids over Requests for Proposals in Section III.C.1 on page #12 was deleted to reflect current public procurement best practices.

d. The Small Purchase limit in Section III.D.1 on page #14 was increased from \$20,000 to \$30,000 as authorized by KRS 45A.385.

e. Sole Source procurements pursuant to Section III.E.2 on page #16 must be verified by the vendor and the KLC user department.

f. Authorization to use Cooperative Purchasing agreements with other governmental or lottery entities in Section VIII.A on page #36 was revised to define the circumstances in which the use of such agreements is in the best interests of the KLC.

g. The Prohibition against Contingent Fees provision in Section X.C on page #42 was revised to incorporate recent statutory changes which allow contingent fees in some circumstances.

h. The Waivers from Contemporaneous Employment Prohibition provisions in former Section X.E on page #42 were deleted because they are already addressed by the KLC’s Code of Ethics (202 KAR 3:010).

# KENTUCKY LOTTERY CORPORATION

## PROCUREMENT PROCEDURES

Revised: April 23, 1999 & May 14, 2021  
Effective: To be determined~~December 16,~~

1999]



# KENTUCKY LOTTERY CORPORATION

## PROCUREMENT PROCEDURES

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## KENTUCKY LOTTERY CORPORATION PROCUREMENT PROCEDURES

### I. INTRODUCTION

#### A. Adoption of Procurement Procedures -

Pursuant to the provisions of KRS 154A.120, the Kentucky Lottery Corporation (“KLC”) is directed to conduct all procurements in accordance with procedures which are not inconsistent with the provisions of KRS Chapter 45A and Chapter 154A or, instead, adopt administrative regulations establishing its procurement procedures. These Procurement Procedures (“Procedures”) shall repeal and replace any and all other such similar or related procedures heretofore adopted by the KLC Board of Directors (“Board”). As required by KRS 154A.120, these Procedures are specifically designed to provide for the purchase of supplies, equipment, services, and construction items in a manner which will provide the greatest long-term benefit to the Commonwealth[state], ensure the greatest integrity for the KLC[Corporation], and result in the acquisition of the best services and products for the ultimate benefit of the public.

#### B. Effect of Kentucky Model Procurement Code -

Unless otherwise specifically indicated, these Procedures shall govern all procurement activities of the KLC, in lieu of the Kentucky Model Procurement Code (“Code”)(KRS Chapter 45A). However, the Code, the administrative regulations promulgated thereunder, and the Policies and Procedures of the Finance and Administration Cabinet may be used as a guide in interpreting these Procedures, except where expressly contradicted by these Procedures.

## II. GENERAL PROVISIONS

### A. Purposes -

The purposes of these Procedures are as follows:

- 1) to provide for increased public confidence in the procedures used by the KLC in making procurements;
- 2) to provide for the fair and equitable treatment of all persons who deal with the procurement system of the KLC;
- 3) to provide increased economy in KLC procurement activities by fostering effective competition; and
- 4) to provide safeguards for maintaining a procurement system of quality and integrity.

### B. Application -

These Procurement Procedures shall apply to all contracts for the procurement of supplies, services and construction entered into by the KLC after their date of adoption, unless the parties agree to their application to contracts entered into prior to the effective date, and to the disposal of surplus property. These Procedures shall apply to every expenditure of KLC funds irrespective of the source of such funds. However, these Procedures shall not apply to contracts or agreements between the KLC and the Commonwealth of Kentucky or other political subdivisions, governments, or other state lotteries, except as provided in Section VIII (Cooperative Purchasing), below. Nothing in these Procedures shall prevent the KLC from complying with the terms and conditions of any grant, gift, or bequest that is otherwise consistent with law.

### C. Definitions -

The following terms shall have the meanings set forth below whenever they appear in these Procedures, unless the context in which they are used clearly requires a different meaning or a different definition is prescribed for a particular section:

- 1) Best Value. A procurement in which the decision is based on the primary objective of meeting the specific business requirements of the KLC and best interests of the Commonwealth of Kentucky. These decisions shall be based on objective and quantifiable criteria that shall include price and that have been communicated to the Offerors as set forth in a Request for Quotes or an~~the~~ Invitation for Bids.
- 2) Blind Trust. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.
- 3) Brand Name or Equal Specification. A specification limited to one or more items by manufacturers' names or catalogue numbers to describe the standard of quality, performance, and other salient characteristics needed to meet KLC requirements, and which provides for the submission of equivalent products.
- 4) Brand Name Specification. A specification limited to one or more items by manufacturers' names or catalogue numbers.
- 5) Business. Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity, including publicly traded entities, through which business is conducted.
- 6) Change Order. A written order or modification to an existing purchase order signed and issued by the Director of Purchasing or an authorized designee, directing the contractor to make changes which the "Changes" clause of the contract authorizes the KLC to order without the consent of the contractor.
- 7) Contract Modification. Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract, whether accomplished by mutual action or without the consent of the contractor.
- 8) Confidential Information. Any information which is available to an employee only because of the employee's status as an employee of the KLC, which is not a matter of public knowledge or available to the public on request.



- 9) Construction. The process of building, altering, repairing, improving, or demolishing any structure or building owned by the KLC, or other improvements of any kind to any real property owned by the KLC. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.
- 10) Contract. All types of KLC agreements, regardless of what they may be called, for the procurement or disposal of supplies, equipment, services, or construction items.
- 11) Contractor. Any person having a contract with the KLC.
- 12) Conviction. The result of criminal trial which ends in a judgment of guilty, including an entry of a plea of guilty or nolo contendere or an Alford Plea, or entry into a pretrial criminal diversion program.
- 13) Cost Analysis. The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.
- 14) Cost Data. Factual information concerning the cost of labor, material, overhead, and other cost elements which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.
- 15) Cost-Reimbursement Contract. A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of these Procedures, and a fee or profit, if any.
- 16) Direct or Indirect Participation. Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.
- 17) Disadvantaged Business. A business which is owned and controlled by a majority of persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages, as certified by the Tri State~~[Kentuckiana]~~ Minority Supplier Development Council (TSMSDC~~[KMSDC]~~), the National Minority Supplier Development Council (NMSDC)~~[Metropolitan Sewer District (MSD)]~~, the Kentucky

Cabinet for Economic Development [~~Small and~~Minority and Women Business Enterprise Certification Program]~~[Division]~~, the Small Business Administration (SBA), or any other entity accredited for certification by the Commonwealth of Kentucky. Disadvantaged Businesses are not limited to business owned and controlled by minority groups; however, a business which is owned and controlled by fifty-one (51) percent or more of females or persons of African American, Hispanic American, Asian Pacific American, Subcontinent Asian American~~[Islander]~~, or Native American~~[Indian or Alaskan native]~~ heritage shall be presumed to be a Disadvantaged Business.

- 18) Employee. An individual drawing a salary or wages from the KLC, whether elected or not, any non-compensated individual performing personal services for the KLC, and any non-compensated individual serving as an appointed official of the KLC.
- 19) Financial Interest.
  - a) Ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive more than five thousand dollars (\$5,000.00) per year, or its equivalent;
  - b) Ownership of five per cent (5%) of any property or business; or
  - c) Holding a position in a business such as officer, director, trustee, partner, employee, or the like, or holding any position of management.
- 20) Invitation for Bids (IFB). All documents, whether attached or incorporated by reference, utilized for soliciting competitive sealed bids.
- 21) Person. Any business, individual, union, committee, club, other organization, or group of individuals.
- 22) Personal Services. Those services provided by licensed professionals, businesses or persons in a specialized or technical

area who utilize professional skill and judgment, including, but not limited to, actuaries, accountants, attorneys, advertising or public relations firms, ~~{computer}~~consultants, physicians, architects, engineers and land surveyors.

- 23) Price Analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.
- 24) Pricing Data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offered or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and sub-contract prices.
- 25) Procurement. The buying, purchasing, renting, leasing, or otherwise acquiring of any supplies, equipment, services, or construction items. It also includes all functions that pertain to the obtaining of any supply, equipment, service, or construction item, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- 26) Related Party. An employee's spouse, cohabitant, or any parent, parent-in-law, brother, sister, brother- and sister-in-law, or any child of the employee.
- 27) Qualified Products List. An approved list of supplies, equipment, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the KLC has determined will meet the applicable specification requirements.
- 28) Request for Proposals (RFP). All documents, whether attached or incorporated by reference, utilized for soliciting competitive sealed proposals.
- 29) Responsible Bidder or Offeror. A person who has the capability in all respects to perform fully the contract requirements and the tenacity, perseverance, experience, integrity, reliability, capacity,

facilities, equipment, and credit which will assure good faith performance.

- 30) Responsive Bidder or Offeror. A person who has submitted a bid or proposal which conforms in all material respects to the requirements set forth in the solicitation~~[invitation for bids]~~.
- 31) Services. The furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.
- 32) Specification. Any description of the physical or functional characteristics or of the nature of a supply, equipment, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, equipment, service, or construction item for delivery.
- 33) Supplies. All property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.

D. Conduct of Purchasing Activity -

The Director of Purchasing, acting as the direct designee of the President, shall serve as the central procurement officer for the KLC. Consistent with the provisions of these Procedures, the Director of Purchasing may also adopt, with the approval of the President and the Board, operational guidelines governing the internal procurement functions of the KLC. Except as otherwise provided in these Procedures, the Director of Purchasing, or his or her designee, shall:

- 1) Procure or supervise the procurement of all supplies, equipment, services, and construction needed by the KLC;
- 2) Sell, lease or otherwise dispose of surplus property by public auction, competitive sealed bidding, or other appropriate method, provided that no KLC employee or Board Member shall be entitled to purchase such surplus property except through public auction or competitive

sealed bidding. When disposing of surplus property, the KLC may utilize the services of the Surplus Property Branch of the Finance and Administration Cabinet;

- 3) Establish and maintain programs for the inspection, testing and acceptance of supplies, equipment, services, and construction items; and
- 4) Establish and maintain a program for direct purchasing through the Finance and Administration Cabinet under existing state contracts for supplies, equipment, ~~and~~ services, and construction items, where such is in the best interests of the KLC.

With the approval of the President, the Director of Purchasing may delegate authority to purchase or dispose of certain supplies, equipment, services or construction items to other corporate officials or employees, where such delegation is deemed appropriate for the effective procurement or disposal of those items.

E. Role ~~of the~~~~[Of The]~~ Board -

Pursuant to KRS Chapter 154A, the Board shall exercise its oversight authority to monitor the implementation and operation of these Procedures, but except as specifically provided herein, the Board shall not exercise direct authority over the recommendation for award or administration of any particular contract due to the appellate jurisdiction vested in the Board under KRS 154A.090. However, as required by KRS 154A.050(1)(b), the Board shall approve all major lottery-specific procurements, and it may also approve the award of all contracts in excess of certain dollar amounts as may be set by the Board from time to time. No such contracts shall take effect until approved by the Board, unless the emergency procurement provisions of Section III(E), below, apply.

F. Written Determinations/Finality -

Every determination required under these Procedures shall be in writing and based upon written findings of the individual making the determination. The determinations and written findings shall be retained in an official contract file as maintained by~~[in the office of]~~ the Director of Purchasing. Determinations, so made, shall be final and conclusive, unless they are clearly erroneous, arbitrary, capricious or contrary to law.

G. Public Access To Procurement Information -

Pursuant to the provisions of KRS 154A.040, all procurement records of the corporation shall be deemed open records and subject to inspection by the public, unless any such record:

- 1) Is excluded from inspection under KRS 61.870 to 61.884, pursuant to KRS 61.878;
- 2) Involves a trade secret or other legally protectable intellectual property or confidential proprietary information of the KLC, or that of a vendor or retailer who has requested confidentiality for such records; or
- 3) If disclosed, could impair or adversely impact the security of the KLC in the operation of the lottery or its vendors or retailers.

The provisions of the Kentucky Open Records Act (KRS 61.870, et. seq.) shall apply to the procurement records of the Corporation, with the exception that appellate jurisdiction over questions related to access to the records of the Corporation is vested solely in the Jefferson Circuit Court, pursuant to KRS 154A.040(2).

### III. SOURCE SELECTION AND CONTRACT FORMATION

#### A. Methods of Source Selection -

Unless otherwise authorized by these Procedures, all KLC contracts shall be awarded by competitive sealed bidding, pursuant to Section III (B) (Competitive Sealed Bidding), except as provided in:

- 1) Section III (C) (Competitive Negotiation);
- 2) Section III (D) (Small Purchases); or
- 3) Section III (E) (Non-~~competitive~~~~[Competitive]~~ Negotiation).

#### B. Competitive Sealed Bidding -

##### 1. Invitation ~~for~~~~[For]~~ Bids -

An Invitation ~~for~~~~[For]~~ Bids ("IFB") shall be issued and shall include specifications and all contractual terms and conditions applicable to the procurement.

##### 2. Public Notice -

Adequate public notice of the IFB shall be given a reasonable time, not less than seven (7) calendar days, prior to the date and time established therein for the opening of bids. At a minimum, such~~[Such]~~ notice may include posting on the Internet, which includes the KLC website, or publication in a newspaper or newspapers of general circulation, and it shall state the place, date and time of bid opening. For the purposes of these Procedures, it is hereby determined by the KLC that newspapers of general circulation within the Commonwealth are presently the Louisville Courier-Journal and the Lexington Herald-Leader.

##### 3. Bid Opening -

Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the IFB. The amount of each bid and such other relevant information as the Director of

Purchasing deems appropriate, together with the name of each bidder, shall be recorded, and the record on each bid shall be open to public inspection after bid evaluation has taken place.

4. Bid Acceptance and Bid Evaluation -

Bids shall be unconditionally accepted without alteration or correction, except as authorized by these Procedures. Bids shall be evaluated based on the requirements set forth in the IFB, which may include, but not be limited to, criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs and total or life-cycle costs. The IFB shall set forth the evaluation criteria to be used, and no criteria may be used in bid evaluation that are not set forth in the IFB.

5. Correction or Withdrawal ~~of~~ Bids; Cancellation of Awards -

Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes, may be permitted where appropriate. Mistakes discovered before bid opening may be modified or withdrawn by written, ~~or~~ telegraphic, or electronic notice received ~~by~~ the KLC office ~~designated in the IFB~~ prior to the time set for bid opening. After bid opening, corrections in bids shall be permitted only to the extent that the bidder can show by clear and convincing evidence that a mistake of a non-judgmental character was made, the nature of the mistake, and the bid price actually intended. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interests of the KLC or fair competition shall be permitted. In lieu of bid correction, a low bidder alleging a material mistake of fact may be permitted to withdraw its bid if:

- a) The mistake is clearly evident on the face of the bid document, but the intended correct bid is not similarly evident; or
- b) The bidder submits evidence which clearly and convincingly demonstrates that a mistake was made.

All decisions to permit the correction or withdrawal of bids, or to cancel awards on contracts based on bid mistakes, shall be



supported by a written determination made by the Director of Purchasing.

6. Award -

The contract or a purchase order issued in lieu of a contract, in a form acceptable to the KLC, shall be awarded with reasonable promptness by appropriate written notice to the responsible and responsive bidder whose bid offers the best value to the KLC. In the case of tie bids where no collusion is suspected, preference shall be given to disadvantaged businesses or to bidders whose principal place of business is located in Kentucky.

7. Multi-Step Sealed Bidding -

When it is considered impractical to initially prepare a purchase description to support an award based on price, an IFB may be issued requesting the submission of unpriced offers or product samples, where appropriate. The submission may be followed by an IFB limited to those bidders whose offers have been determined to be technically acceptable under the criteria set forth in the first solicitation.

C. Competitive Negotiation -

1. Conditions for~~For~~ Use -

When the Director of Purchasing determines, in writing, that the use of Competitive Sealed Bidding is either not practicable or not advantageous to the KLC, a contract may be awarded by competitive negotiation. Provided, however, that contracts for personal services under Section III (F), below, or for major lottery-specific procurements, as defined in KRS 154A.010(4), may be solicited by competitive negotiation without the need for such a written determination.

2. Request for~~For~~ Proposals -

Proposals issued under this source selection method shall be solicited through a Request for~~For~~ Proposals (“RFP”).

3. Public Notice -

Adequate public notice of the RFP shall be given in the same manner as provided in Section III (B)(2) above (Competitive Sealed Bidding, Public Notice) or in a manner deemed most appropriate for major lottery-specific procurements when the unique nature of such supplies or services may limit the pool of potential offerors.

4. Receipt of Proposals -

No proposal shall be handled so as to permit disclosure of the identity of any offeror or the contents of any proposal to competing offerors during the process of negotiation. A Register of Proposals shall be prepared containing the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the supply or service offered. The Register of Proposals shall be available for public inspection only after contract award or cancellation of the solicitation.

5. Evaluation Factors -

The RFP shall state the relative importance of price and all other evaluation factors to be considered by the KLC.

6. Evaluation Committees -

In the event that the RFP calls for the establishment of an evaluation committee, said committee shall be appointed by the President, who shall not be a voting member of the committee. The committee shall evaluate proposals strictly in accordance with the evaluation factors set forth in the RFP, and they shall not discuss their deliberations with any individual who is not a member of the committee. Upon the completion of their deliberations, the committee shall report to the President in writing, setting forth their recommendation for award of the particular contract. In the event that the President disagrees with the report of the evaluation committee, the President may send the report back to the Committee, setting forth, in writing, his or her specific concerns and requesting further evaluation, or the President may cancel the solicitation. Further operating procedures for evaluation committees shall be promulgated by the Director of Purchasing as internal operating procedures authorized hereunder.

7. Discussion with Responsible Offerors and Revisions to Proposals -

As provided in the RFP, discussions may be conducted with responsible offerors who submit proposals determined to be

reasonably susceptible of being selected for award. The discussions shall be conducted for the purpose of clarification to assure full understanding of, and conformance to, the solicitation requirements, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, except that discussions may be held with only the best qualified offeror. If compensation cannot be agreed upon with the best qualified offeror, negotiations may be conducted with the other offeror or offerors, in the order of their respective qualification ranking. In conducting discussions, there shall be no disclosure of the identify of competing offerors or of any information derived from proposals submitted by competing offerors.

8. Award -

Contract award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the KLC, taking into consideration the price and evaluation factors set forth in the RFP. No other factors or criteria shall be used in the evaluation process. The contract files shall contain the basis on which the award is made.

D. Small Purchases -

1. General -

Any contract for supplies, services, or construction not reasonably estimated to exceed thirty~~twenty~~ thousand dollars (\$30,000.00~~[20,000]~~) may be made in accordance with small purchase procedures authorized by this section. Contract requirements shall not be artificially divided so as to constitute a small purchase under this section. Whenever possible, small purchases shall be solicited from disadvantaged businesses, and, in cases of tie bids where no collusion is suspected, preference shall be given to disadvantaged businesses or to bidders whose principal place of business is located in Kentucky.

2. Internal Operational Guidelines and Record Keeping -

Subject to the approval of the President and the Board, the Director of Purchasing shall adopt internal operational guidelines for making small purchases of supplies, equipment, services, or construction items not reasonably estimated to exceed thirty~~twenty~~ thousand

dollars (~~\$30,000.00~~~~[20,000]~~). Such guidelines shall provide for obtaining adequate and reasonable competition for the supply, equipment, service or construction item being purchased. Further, the guidelines shall require preparation and maintenance of written records adequate to document the competition obtained, properly account for the funds expended, and facilitate an audit of all purchases made under this Small Purchases section.

To ensure adequate competition, the small purchases operational guidelines shall contain the following minimal requirements:

- a) For small purchases costing ~~less than~~ five thousand dollars (~~\$5,000.00~~) or less, procurements may be obtained from any available qualified source of supply;
- b) For small purchases costing more than five thousand dollars (~~\$5,000.00~~) but less than ten thousand dollars (~~\$10,000.00~~), procurements may be made after informally obtaining, whenever possible, three (3) or more price quotations, either by phone or in writing, from qualified sources of supply; and
- c) For small purchases costing ten thousand dollars (~~\$10,000.00~~) or more but less than ~~thirty~~~~[twenty]~~ thousand dollars (~~\$30,000.00~~~~[20,000]~~), procurements may be made only after obtaining, whenever possible, three (3) or more written price quotations from qualified sources.

E. Non-Competitive Negotiation -

1. General -

A contract may be made by non-competitive negotiation (without competitive bidding or competitive negotiation) for sole source procurements or where competition is not feasible, as determined by the Director of Purchasing and approved by the President, or the authorized designee of either, in writing, prior to contract award, or where emergency conditions exist and have been so declared by the President pursuant to KRS 154A.120(2).

2. Sole Source Procurement -

Sole source procurement involves a situation where there is only one (1) known vendor for a specific supply or service, usually occasioned by the unique nature of the requirement, the supplier, or existing market conditions, as verified by the vendor and the KLC user department.

3. Competition not Feasible -

Insofar as it is practical, no less than three (3) suppliers shall be solicited to submit written or oral quotations whenever it is determined that competition is not feasible. Competition may be deemed not feasible, and competitive bids will not be required, in the following situations:

- a) Contractual services where no meaningful price competition exists, such as media services, and electrical, energy or other publicly regulated utility services;
- b) Instances where rates are fixed by law or ordinance;
- c) Subscriptions to books or periodicals;
- d) Commercial items purchased for resale;
- e) Interests in real property other than leases;
- f) Licensed professionals, speakers, expert witnesses or performing artists;
- g) Media buys; and
- h) Advertising and advertising production.

4. Emergency Procurements -

The President may make or authorize others to make emergency procurements when an emergency condition is found to exist. For the purposes of these Procedures, an emergency condition is a situation which creates a threat or impending threat to public health, welfare or safety, or a threat of serious disruption to KLC operations, such as may arise by reason of fires, floods, tornadoes, other natural

or man-caused disasters, epidemics, riots, enemy attacks, sabotage, explosions, labor disputes or disruptions, power failure, energy shortages, transportation emergencies, equipment failures or similar unexpected events which adversely affect the operations of the KLC. The existence of the emergency condition creates an immediate and serious need for supplies, equipment, services or construction items which cannot be met through normal procurement methods and the absence of which would seriously threaten the proper functioning of the KLC, the preservation or protection of its property, or the health and safety of any person. Competition, to the extent feasible in each such situation, shall be sought by the authorized corporate officer conducting the procurement, and the grounds for the emergency situation shall be fully set forth in writing by the President or the Director of Purchasing. Such explanation shall include the name of the vendor, along with other price quotations obtained, if any, and a written determination justifying the selection of the particular vendor, which shall be filed with a record of all such emergency purchases made during each fiscal year. The record shall be made available to the Board and to the public at the next regularly scheduled meeting of the Board.

F. Personal Service Contracts -

Procurement of personal services may be obtained by any of the methods referred to above. Such contracts shall be subject to the provisions of KRS 45A.695, except that the President of the KLC, in lieu of the Secretary of the Finance and Administration Cabinet, may declare an emergency procurement for personal services as authorized by KRS 154A.120(2).

G. Types of Contracts -

1. General Authority -

Subject to the limitations of this section, any type of contract which is appropriate to a given procurement and will promote the best interests of the KLC may be used by the Director of Purchasing; provided, however, that the use of a cost-plus-a-percentage-of-cost contract is prohibited. Furthermore, except for reimbursement of expenses incidental to a personal service contract, a cost reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the KLC than any other type, or that it is impracticable to obtain the supply, equipment, service or construction item required except

under such a contract. A price analysis, as appropriate, shall be conducted prior to the award of any such contract, other than those awarded pursuant to competitive sealed bidding. A written record of such cost analysis or price analysis shall be made a part of the contract file.

2. Multi-Term Contracts -

- a) A contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the KLC; provided that the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and that sufficient funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and budgeting of funds therefor.
- b) Prior to the utilization of a multi-term contract, it shall be determined in writing by the Director of Purchasing that estimated requirements cover the period of the contract and are reasonably firm and continuing, and that such contract will serve the best interests of the KLC by encouraging effective competition or otherwise promoting economies in KLC procurement.
- c) When funds are not budgeted or otherwise made available to support continuation of contract performance in a subsequent fiscal period, the contract shall be canceled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any funds available for such purposes.

3. Multiple Source Contracting -

A multiple source award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror. Such an award may be made when award to two (2) or more bidders or offerors for similar products is necessary for appropriate cost savings, adequate delivery, or service or product compatibility. Any multiple source award shall be made in accordance with the provisions of Section III in regard to competitive

sealed bidding, competitive negotiation, small purchases or non-competitive negotiation, as applicable. Multiple source awards shall not be made when a single award will meet the KLC's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such award shall be limited to the least number of suppliers necessary to meet the KLC's valid requirements. The Director of Purchasing shall make a written determination setting forth the reasons for a multiple source award which shall be made a part of the procurement file, and if made prior to the issuance of a solicitation the KLC shall reserve the right to make such an award and the criteria for same shall be stated in the solicitation.

H. Cancellation of IFB or RFP -

An IFB, an RFP, or any other solicitation document may be canceled, or all bids or proposals may be rejected, if it is determined in writing by the Director of Purchasing that such action is taken in the best interests of the KLC, and such action is approved by the President.

I. Procurement Reports -

1. Report of Non-Competitive Procurements -

The Director of Purchasing shall promptly report to the Board on all contracts made pursuant to non-competitive negotiation, including sole source, not feasible to solicit, and emergency contracts, under Section III(E), above, during the period next preceding the Board's regularly scheduled meeting. This report shall: name each contractor; state the amount and type of each contract; describe the supplies, services or construction item purchased under each such contract; and include as attachments copies of all determinations and findings required to be made by these Procedures and internal policies of the KLC.

2. Quarterly Reports -

The Director of Purchasing shall prepare a ~~quarterly~~ report on at least a quarterly basis summarizing all instances where correction or withdrawal of bids or cancellation of a solicitation or an award has taken place under Section III (B)(5) or Section III (H), above, and



provide the report to the Board at its next regularly scheduled meeting.

3. Retention -

Reports required under this section shall be retained for a period of three (3) years and shall be delivered to the Board and made available to the General Assembly and the public upon request. The Director of Purchasing shall also prepare all other procurement reports as directed by the Board and the President.

#### IV. VENDOR REQUIREMENTS

##### A. Responsibility of Bidders and Offerors -

###### 1. Written Determination -

A written determination of the responsibility of a bidder or offeror shall be made in accordance with the provisions of KRS 154A.600 by the Director of Purchasing, who may conduct a reasonable inquiry to determine the responsibility of a bidder or offeror in that official's discretion. The failure of a bidder or offeror to promptly supply information in connection with such an inquiry may be grounds for a determination of non-responsibility with respect to such potential vendor.

###### 2. Compliance -

A written determination of the responsibility of a bidder or offeror shall not be made until the Director of Purchasing has been provided with a sworn statement that the bidder or offeror is in compliance with the provisions of KRS 154A.160 and the campaign finance laws of the Commonwealth, as applicable.

###### 3. Confidentiality -

Except as otherwise provided by law and KRS 154A.040, information furnished by a bidder or offeror pursuant to this section may not be disclosed outside of the KLC without the prior written consent of the bidder or offeror.

##### B. Pre-qualification of Vendors -

The Director of Purchasing may provide for pre-qualification of vendors as responsible, prospective providers of particular types of supplies, equipment, services, or construction items. Such pre-qualification shall not be made until a prospective vendor has provided the Director of Purchasing with a completed Vendor Application and appropriate sworn statements stating that the vendor is in compliance with the provisions of KRS 154A.160 and the campaign finance laws of the Commonwealth, as applicable. Solicitation mailing lists of potential vendors for such supplies, equipment, services or construction items shall include, but shall not be limited to, all

such pre-qualified vendors. Pre-qualification shall not prevent a written determination between the time of bid opening or receipt of offers and the making of an award that a pre-qualified vendor is not responsible, or that a vendor who is not qualified at the time of bid opening or receipt of offers is responsible.

C. Cost or Pricing Data -

A prospective contractor under a cost reimbursement contract shall submit cost or pricing data and shall certify that, to the best of the contractor's knowledge and belief, the cost and pricing data submitted was accurate, complete and current as of a mutually determined specified date, prior to the date of:

- a) The pricing of any negotiated contract where the total contracted price is expected to exceed fifty thousand dollars (\$50,000.00); or
- b) The pricing of any change order or contract modification, which is expected to exceed twenty-five thousand dollars (\$25,000.00), or such lesser amount in either instance as may be prescribed by the Director of Purchasing.

Any contract, change or modification thereto, under which a certificate is required hereunder shall contain a provision that the price to the KLC, including profit or fee, shall be adjusted to exclude any significant sums by which the Director of Purchasing finds that such price was increased because the contractor furnished cost or pricing data, as of the date agreed upon between the parties, which was inaccurate, incomplete or not current.

The requirements of this section need not be applied to contracts where the negotiated price is based on: adequate price competition; established catalog or market prices of commercial items sold in substantial quantities to the general public; prices set by law or regulation; or, in exceptional cases where it is determined in writing by the Director of Purchasing, with the approval of the President, that the requirements of this section may be waived, and the reasons for such waiver are set forth in writing.

D. Bid And Performance Bonds On Supply Or Service Contracts -

In addition to performance bonds which are required of all major lottery-specific vendors by KRS 154A.600(5), bid bonds or other security may be

requested for supply or service contracts as the Director of Purchasing deems advisable, with the approval of the President, to protect the KLC's interests.

Any such bonding requirements shall be set forth in the solicitation. Bid or performance bonds shall not be used as a substitute for determination of a bidder's or offeror's responsibility.

E. Right To Inspect/Right To Audit -

1. Right To Inspect -

The KLC, by and through its designated representatives, may inspect the plant or place of business of a contractor or any subcontractor under any contract awarded or to be awarded by the KLC.

2. Right To Audit -

The KLC may audit the books and records of any person who has submitted cost or pricing data under these Procedures at any time until the period of time for record retention set forth in Subsection 3 of this section has expired. The right to audit hereunder shall only extend to those books and records reasonably connected with the cost or pricing data submitted to the KLC, and such books and records shall be maintained by the contractor or subcontractor for the time period specified herein.

3. Audit of Negotiated Contracts -

The KLC shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price type contract; provided, however, that this subsection shall not limit the right to audit as set forth in Subsection 2 of this section. Such books and records shall be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract, and by the subcontractor for a period of three (3) years from the date of final payment under the applicable subcontract.

F. Reporting Of Anti-Competitive Practices -

When for any reason collusion is suspected among any bidders or offerors, a written notice of the facts giving rise to such suspicions shall be transmitted to the Attorney General by the President or the Director of Purchasing. All documents involved in the procurement in which collusion is suspected shall be retained until the Attorney General gives notice that they may be released, and all such documents shall be made available to the Attorney General or a designee of such officer upon request.

## V. SPECIFICATIONS

### A. Maximum Practicable Competition -

All specifications shall be drafted so as to promote overall economy for the purposes intended and to encourage the maximum practicable competition in satisfying the procurement needs of the KLC, and they shall not be unduly restrictive. The policy enunciated in this Section applies to all specifications, including, but not limited to those prepared for the KLC by architects, engineers, designers, draftsmen, and others providing personal services as defined herein.

### B. Standard Specifications -

The Director of Purchasing shall have responsibility for issuing and maintaining all standard specifications for supplies, services and construction required by the KLC. The Director of Purchasing shall prepare, issue and revise such standard specifications to conform to all technical and scientific advances pertaining thereto, and shall establish guidelines for drafting specifications.

### C. Brand Name or Equal Specifications -

Brand name or equal specifications may be used by the Director of Purchasing when the nature of the product or the KLC's requirements make the use of such a specification suitable for a particular procurement or the use of same is in the KLC's best interests. Brand name or equal specifications shall seek to designate as many different brands as are practicable as "or equal" references, and shall further state that substantially equivalent products to those designated will be considered for award. Where a brand name or equal specification is used in a solicitation, it shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and essential characteristics desired and is not intended to limit or restrict competition.

### D. Brand Name Specification -

Since the use of a brand name specification is restrictive of product competition, it may be used only when the Director of Purchasing makes a written determination that only the identified brand name item or items will satisfy the KLC's needs. The Director of Purchasing shall seek to identify

sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable under the circumstances. If only one source can supply the requirement, the procurement shall be made through the use of a sole source procurement pursuant to Section III (E)(2) above.

## VI. CONTRACT ADMINISTRATION

### A. Administration Of Contract Clauses -

#### 1. Contract Clauses -

All KLC contracts for supplies, services and construction shall include provisions necessary to define the responsibilities and rights of the parties to the contract. The Director of Purchasing may issue clauses appropriate for supplies, services and construction contracts addressing, among other, the following subjects:

- a) The unilateral right of the KLC to order in writing changes in the work within the scope of the contract;
- b) The unilateral right of the KLC to order in writing temporary stopping of the work or delaying performance that does not alter the scope of the contract;
- c) Variations occurring between estimated quantities of work in the contract and actual quantities;
- d) Defective pricing;
- e) Liquidated damages;
- f) Specified excuses for delay or non- performance;
- g) Termination of the contract for default;
- h) Termination of the contract in whole or part for the convenience of the KLC;
- i) Suspension of work on a construction project ordered by the KLC; and
- j) Site conditions differing from those indicated in a construction contract.



2. Price Adjustments -

- a) Adjustments in price resulting from the use of contract clauses required by Subsection 1 of this section shall be computed in one or more of the following ways:
  - i) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - ii) By unit prices specified in the contract or subsequently agreed upon;
  - iii) By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified by the contract or subsequently agreed upon;
  - iv) In such other manner as the contracting parties may mutually agree; or
  - v) In the absence of agreement by the parties, by a unilateral determination by the KLC of the costs attributable to the events or situations under such clauses with adjustment of profit or fee as computed by the KLC, as accounted for in accordance with cost principles adopted hereunder and subject to remedies available to contractors.
- b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section IV (C) (Cost or Pricing Data).

3. Standard Clauses and Their Modification -

The Director of Purchasing, with the approval of the President, may establish standard contract clauses for use in KLC contracts. If the Director of Purchasing establishes any standard clauses addressing the subjects set forth in Subsection 1 of this section, such clauses may be varied in any given contract, provided that any such

variations are supported by appropriate determinations and that notice of material variations are set forth in the IFB or RFP.

B. Cost Principles -

The Director of Purchasing may adopt guidelines, with the approval of the President, setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, and any such cost principles may be modified by a particular contract. If no new cost principle guidelines are adopted, the KLC shall utilize the cost principles developed by the Finance & Administration Cabinet and contained in 200 KAR 5:317.

## VII. REMEDIES

### A. Bid Protests -

#### 1. Right To Protest -

Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest, in writing, to the President. A protest with respect to an IFB or RFP shall be submitted prior to the opening of bids or the closing date for proposals, unless the aggrieved person did not know or could not have reasonably learned of the facts giving rise to such protest prior to bid opening or the closing date for proposals. The protest shall be submitted within fourteen (14) calendar days after such aggrieved person knows or should have known of the facts giving rise thereto. Any aggrieved person shall be deemed to have knowledge of the KLC record relating to a particular procurement within fourteen (14) calendar days after being notified of the award of a contract.

#### 2. Effect Of Protest -

In the event of a timely protest under this section, the Director of Purchasing shall not proceed further with the solicitation or award of the contract until all administrative and judicial remedies have been exhausted, or until the President makes a written determination that the award of a contract without delay is necessary to protect the substantial interests of the KLC.

#### 3. Action by President and Right to Appeal -

The decision of the President shall be promptly issued in writing and shall be immediately furnished to the protesting party by hand delivery, telecopier, electronic mail, or by certified mail, return receipt requested. The decision shall recite the grounds relied on by the President in reaching the decision and shall inform the protesting party of all further appellate rights (including the rights set forth in Section VII(A)(4) below). The President's decision shall be final and conclusive, unless within ten (10) calendar days from the date of the protesting party's receipt of the decision, the protesting party delivers a written appeal to the Board at the KLC headquarters by hand

delivery, telecopier or by certified mail, return receipt requested, all pursuant to KRS 154A.090.

4. Board Appeal -

Upon receipt of an appeal, the Board shall promptly schedule a hearing for the protesting party which shall be held in accordance with KRS Chapter 13B. The decision of the Board shall be final and conclusive unless the decision is appealed as provided in Section VII(D) below and applicable law.

B. Contract Claims -

1. Decision Of The President -

All claims by a contractor against the KLC relating to and arising under a contract shall be submitted in writing to the President for a decision, and the contractor may request a conference with the President concerning the claim. Contract claims include, without limitation, disputes arising under a contract and those based upon breach of contract, mistake, misrepresentation or any other cause for contract modification or rescission.

2. Action by President and Right to Appeal -

The decision of the President shall be promptly issued in writing and shall be immediately furnished to the contractor by hand delivery, telecopier, electronic mail, or by certified mail, return receipt requested. The decision shall recite the grounds relied on by the President in reaching the decision and shall inform the contractor of all further appellate rights (including the rights set forth in Section VII(A)(4) above). The President's decision shall be final and conclusive, unless within ten (10) calendar days from the date of the contractor's receipt of the decision, the contractor delivers a written appeal to the Board at the KLC headquarters by hand delivery, telecopier or by certified mail, return receipt requested, all pursuant to KRS 154.090.

3. Board Appeal -

Appeals to the Board from contractors shall be handled in the method as set forth in Section VII(A)(4) (Bid Protest; Board Appeals) above.

C. Authority To Debar Or Suspend -

1. Procedures And Grounds For Debarment Or Suspension -

After reasonable notice to the person awarded the contract and reasonable opportunity for that person to be heard, the Director of Purchasing, after consulting with the President and the General Counsel, is authorized to debar a person or a related entity as defined in KRS 154A.010(6) for cause from consideration for award of KLC contracts. Unless KRS Chapter 154A requires a longer period, the debarment shall be for a period of not more than three (3) years. After consultation with the President and the General Counsel, the Director of Purchasing is authorized to suspend the person from consideration for award of KLC contracts if there is probable cause to believe that the person is engaged in any activity which may lead to debarment. The suspension shall be for a period not to exceed six (6) months. Causes for debarment include, but are not limited to:

- (a) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
- (b) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or honesty which currently, seriously, and directly affects responsibility as a KLC contractor;
- (c) Conviction under state or federal anti-trust statutes arising out of the submission of bids or proposals;
- (d) Violation of the contract provisions as set forth below, of a character which is regarded by the Director of Purchasing to be so serious as to justify debarment:

- (i) Deliberate failure without good cause to perform in accordance with the specifications or within the time limits provided in the KLC contract; or
  - (ii) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
- (e) Any other cause the Director of Purchasing determines to be so serious and compelling as to affect responsibility as a KLC contractor, including debarment by any other State Lottery or governmental entity for any cause listed herein; and
- (f) For violation of any provision of KRS Chapter 154A, any applicable provision of KRS Chapter 45A, and the ethical standards set forth at Section X hereof.

2. Decision To Debar Or Suspend -

The Director of Purchasing shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the debarred or suspended person involved of its rights concerning administrative or judicial review pursuant to KRS 154A.090.

3. Notice Of Decision/Finality -

A copy of the decision required by Subsection 2 above shall be mailed or otherwise furnished immediately to the debarred or suspended person. The decision of the Director of Purchasing shall be final and conclusive unless the debarred or suspended person appeals to the President as provided in Subsection 4, below.

4. Appeal to the President/Board -

Any person debarred or suspended by action of the Director of Purchasing shall have the right to appeal to the President within ten

(10) calendar days from the receipt of the Director's decision. An appeal must be submitted in writing to the President for a decision, and the debarred or suspended person may request an informal conference with the President. The President shall promptly ~~issue~~issued a decision in writing, and the decision shall state the reasons for the action taken. A copy of the decision shall be mailed or otherwise furnished immediately to the debarred or suspended person, and the decision of the President shall be final and conclusive unless within ten (10) calendar days an appeal is filed with the Board. Appeals to the Board shall be handled in the same manner as set forth in Section VII(A)(4), above.

D. Access to State Courts -

Any person aggrieved by a decision of the Board under this Section VII (Remedies) may appeal such decision within thirty (30) calendar days of its date of issuance to the Jefferson Circuit Court pursuant to KRS 154A.090 and KRS Chapter 13B.

E. Authority To Settle Bid Protests And Contract Claims -

The Director of Purchasing is authorized to settle any protest regarding the solicitation or award of a contract by the KLC, or any claim arising out of the performance of a KLC contract, prior to an appeal to the President or the commencement of an action in the Court of competent jurisdiction; provided that such authority shall only be exercised with the prior approval of the President~~[of the Corporation]~~ and within monetary limits approved by the Board.

F. Remedies For Solicitations Or Awards In Violation Of Law -

1. Prior To Bid Opening or Closing Date for Receipt of Proposals -

If prior to bid opening or the closing date for receipt of proposals, the Director of Purchasing, after consultation with the President and the General Counsel, determines that a solicitation or proposal is in violation of federal or state law or these Procedures, then the solicitation or proposal shall be canceled or revised to comply with such laws or Procedures.

2. Prior To Award -

If, after bid opening or the closing date for receipt of proposals but prior to award, the Director of Purchasing, after consultation with the President and the General Counsel, determines that a solicitation or proposed award of a contract is in violation of federal or state law or these Procedures, then the solicitation or proposed award shall be canceled.

3. After Award -

If, after an award, the Director of Purchasing, after consultation with the President and the General Counsel, determines that a solicitation or award of a contract was in violation of applicable law or these Procedures, then:

- a) If the person awarded the contract has not acted fraudulently or in bad faith:
  - (i) The contract may be ratified and affirmed, provided the violation was immaterial or insubstantial and it is determined that doing so is in the best interests of the KLC; or
  - (ii) The contract may be terminated and the person awarded the contract shall be compensated for the actual costs reasonably incurred under the contract, plus a reasonable profit, prior to the termination; or
- b) If the person awarded the contract has acted fraudulently or in bad faith, the contract may be declared null and void or voidable, if such action is in the best interests of the KLC.



## VIII. COOPERATIVE PURCHASING

### A. Authorization -

When determined to be in the best interest of the~~[The]~~ KLC, acting through the Director of Purchasing or the President (or his or her designee), may either participate in, sponsor, conduct or administer a cooperative purchasing agreement for the acquisition of any supplies, equipment, services or construction with any other governmental or state-sponsored lottery purchasing unit or any combination thereof, including, but not limited to, the National Association of State Procurement Officials (NASPO), the North American Association of State and Provincial Lotteries (NASPL) and the Multistate Lottery Association (MUSL), all in accordance with agreements entered into between or among the participants. Prior to utilizing a cooperative purchasing agreement, the Director of Purchasing shall determine, in writing, that it would not be feasible for the KLC to acquire the supplies, equipment, services or constructions items pursuant to standard procurement procedures and that the agreement being used was awarded, whenever practicable, in a manner substantially similar to these Procedures. Such cooperative purchasing activities may include, but are not limited to, joint contracts between the KLC or other governmental or state-sponsored lottery units, and access by such other units to open-ended KLC contracts.

### B. Utilization of State and Federal Contracts and Services -

The Director of Purchasing is hereby authorized and directed, where feasible, to obtain required supplies, equipment, services, or construction items pursuant to existing state or federal contracts, to the extent allowed by law, where it is in the best interests of the KLC to do so, price and other factors considered (including contracts with the state agencies set forth in KRS 45A.470). The Director of Purchasing is further authorized to compile and maintain information and data bases related to existing state and federal contracts for supplies and services commonly required by the KLC. Pursuant to KRS 154A.120, the KLC may also may utilize the services of the Finance and Administration Cabinet in its bidding and negotiation processes.

### C. Procedures Inapplicable -

Nothing in these Procedures shall limit the KLC from selling to, acquiring from or using any property belonging to another governmental entity or state-sponsored lottery independent of the requirements of Section III hereof (Source Selection and Contract Formation). Further, the KLC may enter into an agreement with any other governmental entity or state-sponsored lottery for the cooperative use of supplies or services independent of the requirements of Section III (Source Selection and Contract Formation) hereof, or pursuant to the provisions of KRS 45A.660 (Waiver of Requirements on Purchase from Government).

D. Intergovernmental Agreements -

The Lottery may enter into an agreement for the joint or common use of warehousing facilities, or the lease or common use of capital equipment or facilities with any other governmental entity, state-sponsored lottery or association, or combination thereof, subject to such terms as may be agreed upon between or among the parties.

## IX. ASSISTANCE TO DISADVANTAGED BUSINESSES

### A. Statement Of Policy, Goals And Implementation -

#### 1. Policy -

It shall be the policy of the KLC to assist disadvantaged businesses in learning how to do business with the KLC in order to encourage their participation in the procurement process. The KLC will also encourage, to the extent permitted by law, procurement from disadvantaged businesses.

#### 2. Goals -

To the extent permitted by law, the Director of Purchasing, with the approval of the President and the Board, shall set forth goals for the participation of disadvantaged businesses in the procurement process and the award of contracts to such businesses for each fiscal year.

#### 3. Implementation -

The Director of Purchasing shall implement the policy set forth above through the issuance of internal operating guidelines pursuant to Section II (D) of these Procedures.

### B. Special Consideration To Disadvantaged Businesses -

To achieve the policy and the goals referred to above, the Director of Purchasing may, to the extent permitted by law and with the approval of the President and the Board, implement a policy for procurements made under the small purchases provisions contained in Section III(D), above, which gives special consideration to disadvantaged businesses. In addition, to the extent permitted by law, special consideration may be given to disadvantaged businesses when evaluating procurements made pursuant to the competitive bid and competitive negotiation provisions of Sections III(B) and (C), above, provided all the evaluation factors are fully set forth in the Invitation for Bids or Request for Proposals.

C. Special Publications And Assistance -

1. Special Publications -

The Director of Purchasing shall give special publicity to Procurement Procedures and issue special publications designed to assist identified disadvantaged businesses in learning how to do business with the KLC, and where feasible, provide appropriate staff to assist disadvantaged businesses in learning how to do business with the KLC.

2. Source Lists -

The Director of Purchasing shall compile, maintain and make available source lists of and disadvantaged businesses for the purpose of encouraging procurement from such businesses by the KLC.

3. Solicitation Mailing Lists -

To the extent deemed appropriate, the Director of Purchasing shall include disadvantaged businesses on solicitation mailing lists utilized by the KLC, and shall assure that disadvantaged businesses are solicited on each procurement for which they may be suited.

4. Training Programs -

The Director of Purchasing may develop special training programs to be conducted either by the KLC or with other governmental entities to assist disadvantaged businesses in learning how to do business with the KLC.

D. Discretionary Duties Of The Director Of Purchasing -

1. Bonding -

Notwithstanding any other provisions of these Procedures, the Director of Purchasing, with the approval of the President and to the extent permitted by law, may reduce the level or change the types of bonding normally required or accept alternative forms of security to

the extent reasonably necessary to encourage procurement from disadvantaged businesses.

2. Progress Payments -

The Director of Purchasing, with the approval of the President, may make such special provisions for progress payments as deemed reasonably necessary to encourage procurement from disadvantaged businesses.

E. Reports -

The Director of Purchasing, or his or her designee, shall report quarterly and annually to the President and the Board concerning the participation of disadvantaged businesses in the procurement process and the awarding of contracts to such businesses during the preceding quarter and fiscal year.

## X. ETHICS IN CONTRACTING

### A. Employee Conflict of Interest -

In addition to the restrictions contained in KRS Chapter 154A and the KLC's Code of Ethics (202 KAR 3:010), it shall be unethical for any KLC employee to participate directly or indirectly in a procurement~~[contract]~~ when the KLC employee knows that:

- 1) The KLC employee or a Related Party has a financial interest pertaining to the procurement~~[contract]~~; or
- 2) Any other person, business, or organization with whom the KLC employee or a Related Party is negotiating or has an arrangement concerning prospective employment is involved in a procurement~~[contract]~~.

A KLC employee or a Related Party who holds a financial interest in a disclosed blind trust shall not be deemed to have a conflict of interest regarding~~[with regard to]~~ matters pertaining to that financial interest.

### B. Gratuities And Kickbacks -

#### 1. Gratuities -

Except as provided in the KLC's Code of Ethics, it shall be unethical for any person to offer, give, or agree to give any KLC employee or former KLC employee, or for any KLC employee or former KLC employee, to solicit, demand, accept or agree to accept from another person, a bribe, commission, kickback, payment, gratuity, gift, favor, meal, entertainment or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or acting in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or any proposal therefor by the KLC.

2. Kickbacks -

It shall be unethical for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order.

3. Contract Clause -

The prohibition against gratuities and kickbacks prescribed herein shall be conspicuously set forth in every contract and solicitation therefor.

C. Prohibition Against Contingent Fees -

Except as provided by KRS 45A.717, it[is] shall be unethical for a person to be retained, or to retain a person, to solicit or to secure a KLC contract upon an agreement or understanding for commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.

D. Contemporaneous Employment Prohibited -

Except as provided in the KLC's Code of Ethics, it[is] shall be unethical for any KLC employee who is participating directly or indirectly in the procurement process to become or to be, while such a KLC employee, the employee of any person or vendor contracting with the KLC or a subcontractor, independent contractor, or agent of any person or vendor contracting with the KLC.

~~E. [Waivers from Contemporaneous Employment Prohibition and Other Conflicts of Interest~~

~~The Board of Directors may grant a waiver from the employee conflict of interest provision or the contemporaneous employment provision above, upon the written determination that:~~

- ~~1) The contemporaneous employment or financial interest of the KLC employee has been publicly disclosed; and~~

- ~~2) The KLC employee will be able to perform his or her procurement functions without actual or apparent bias or favoritism; and~~
- ~~3) The award will be in the best interest of the KLC.~~

~~F.]~~ Use of Confidential Information -

It shall be unethical for any employee or former employee to knowingly use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.

~~F[G].~~ Sanctions -

1. Employees -

Without limiting the disciplinary authority of the President or the Board, and without altering the at-will status of all KLC employees, the President may impose any one or more of the following sanctions on a KLC employee for violations of the ethical standards of this Section:

- (a) Oral or written warnings or reprimands;
- (b) Suspension with or without pay for specified periods of times; or
- (c) Termination of employment.

It is further provided that such sanctions as regards the President may be imposed by the Board of Directors.

2. Non-employees -

The President may impose any one or more of the following sanctions on a non-employee for violations of the ethical standards of this Section:

- (a) Written warnings or reprimands;
- (b) Termination of contracts; or



- (c) Debarment or suspension as provided in Section VII (Remedies).

G~~H~~. Recovery of Value Transferred or Received in Breach of Ethical Standards-

1. General Provisions -

The value of anything transferred or received in breach of the ethical provisions of these Procedures by a KLC employee or a non-employee may be recovered from both the KLC employee and the non-employee.

2. Recovery of Kickbacks -

Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by KLC and will be recoverable hereunder by the recipient. In addition, that amount may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

H~~I~~. Sanctions -

To the extent that violations of the ethical standards of conduct set forth in these Procedures constitute violations of the Kentucky Penal Code (KRS Chapters 500 through 534), they shall be punishable as provided therein. Suspected violations of these Procurement Procedures or any applicable provisions of the Kentucky Model Procurement Code shall be reported to the appropriate prosecutorial authorities. The above sanctions shall be in addition to the civil remedies set forth in these Procedures, and any other sanctions in existence on the effective date of these procedures.