

# Public Purchasing and Contracting

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Technology issues dominated the legislative changes affecting public purchasing and contracting in the 1999 session. Although the General Assembly made no major legislative changes in this area, the trend over the past several years has been toward an increased accommodation in the laws governing public contracting of electronic commerce and other technology-driven innovations in contracting.

## **Information Technology and Electronic Commerce**

### **State Procurement of Information Technology**

The legislature has established within the Department of Commerce a centralized Office of Information Technology Services (ITS) to be headed by a State Chief Information Officer. S.L. 1999-434 (S 222). The new office will be responsible for developing a centralized approach to planning for and investing in information technology, subject to approval by the Information Resources Management Commission. In addition ITS will be responsible for procurement of all information technology for state agencies except The University of North Carolina and its constituent institutions. G.S. 143B-472.51(a)(1). The new law, which becomes effective January 1, 2000, requires ITS to “integrate technological review, cost analysis, and procurement for all information technology needs of . . . State agencies in order to make procurement and implementation of technology more responsive, efficient, and cost effective.” G.S. 143B-472.54. Specifically ITS is authorized to procure information technology using the best value procurement method set forth in G.S. 143-135.9. Under this method, a contract is awarded based on evaluation of several factors in addition to price, including total cost of ownership, technical merit of the proposal, and the contractor’s past performance and expected future performance in conformity with the proposal. Under the new law, all state agencies will be required to purchase from contracts for information technology established by ITS. G.S. 143B-472.56.

The new law is a bit unclear about the extent to which the competitive bidding requirements in G.S. 143-52 apply to information technology procurement. Although nothing in the new law exempts these purchases from the statutory bidding requirements,<sup>1</sup> one provision authorizes ITS to “purchase or . . . contract for, *by suitable means* in conformity with G.S. 143-135.9, [best value information technology procurements]. . . .” G.S. 143B-472.55(1). Another provision requires contracts that exceed an established benchmark to be approved by the State Board of Award after review and approval by the State Budget Director. The best value evaluation could be considered to be an alternative method of procurement, or it might simply be viewed as the evaluation that is a part of, rather than a substitute for, the otherwise applicable competitive procedures. Given this ambiguity, it is possible that ITS will develop alternative procedures for procurement of information technology under its new authority.

Provisions in the new law also require state agencies to encourage the use of small, minority, physically handicapped, and women contractors in information technology purchases and to report to ITS and to the Department of Administration as required under G.S. 143-48(b). G.S. 143B-472.58. The new law also contains specific prohibitions on financial interests by state officials involved in information technology procurement and requires anticollusion statements by bidders on information technology contracts.

### Electronic Payment

The legislature amended several existing laws to specifically authorize public agencies at the state and local levels to receive payments electronically. S.L. 1999-434 (S 222) modifies G.S. 147-86.22(b), which authorized, but did not require, the State Controller to establish policies to allow payment by credit card. As revised, this law now *requires* the controller to establish policies that allow accounts to be paid by electronic payment. *Electronic payment* is defined as “[p]ayment by charge card, credit card, debit card, or by electronic funds transfer. . . .” G.S. 147-86.20(2a). In addition to state agencies, the revised statute makes the new policies applicable to debts owed to a community college; a local school administrative unit; an area mental health, developmental disabilities, and substance abuse authority; and the Administrative Office of the Courts as well as to debts payable to or through the office of a clerk of superior court or a magistrate. The law requires, as it did before this change, that an agency allowing payment by electronic means must receive the full amount of the account receivable that is due. Thus the law authorizes the agency to require the debtor to pay any fee incurred by the agency attributable to the electronic payment process. The law also allows such fees to be paid out of the General Fund and the Highway Fund if this is determined to be economically beneficial to the state.

A parallel provision contained in the same act creates a new statute authorizing local governments, public hospitals, or public authorities to accept electronic payment for any tax, assessment, rate, fee, charge, rent, interest, penalty, or other receivable owed to it. S.L. 1999-434, Section 5; G.S. 159-32.1. The statute authorizes local governments to pay fees associated with the use of electronic payments and to impose a surcharge upon those who make payment electronically. Conforming changes were made in the laws governing tax collection, which already allowed payment by credit card, to allow electronic payment. G.S. 105-357(b).

The use of electronic payment and implementation of any surcharge may be complicated by the fact that the major credit card companies prohibit the merchant from passing along to the customer the fee charged by the credit card company. This issue is discussed further in Chapter 16 (Local Taxes and Tax Collection).

It is interesting to note that several of the agencies listed under G.S. 147-86.22(b) that are subject to the policies and procedures for electronic payment established by the State Controller would also be considered local governments. Arguably local school units and area mental health authorities could use the authorization under G.S. 159-32.1 to establish their own policies and

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1. The law does amend G.S. 143-56 to clarify that information technology purchases are not subject to approval by the Department of Administration, but it is unclear whether this also creates an exemption from the bidding procedures themselves.

procedures for accepting electronic payment. The specific inclusion of these units in the state statute, however, suggests that the better interpretation is that they are subject to state procedures.

Finally, the act amends the public records law (G.S. 132-1.2) to require public agencies to protect the confidentiality of account numbers used in electronic payments. S.L. 1999-434, Section 7; G.S. 132-1.2(2).

### **Best Value Procurement for Local Governments**

Last year the General Assembly enacted G.S. 143-135.9 (“Best Value” information technology procurements). This law requires the state to use a “best value” method of evaluating proposals for the purchase of information technology. It also authorizes “government-vendor partnerships” and “solution-based solicitations”—all terms that are defined in the statute.<sup>2</sup> A provision in the technical corrections bill, S.L. 1999-456 (H 162), Section 39, authorizes (but does not require) local governments to use the procurement methods described in G.S. 143-135.9. It does not appear that the methods in G.S. 143-135.9 replace the competitive bidding procedures in G.S. 143-129, nor does the legislation explicitly create an exception to those procedures. The methods described in the best value procurement statute are thus probably best viewed as methods that can be used in addition to or as part of any applicable competitive bidding process for the purchase of information technology.

### **Electronic Advertisement for State Procurement**

State law has previously required the Division of Purchase and Contract to publish a “Purchase Directory” containing information on contracting requirements and opportunities. G.S. 143-345.8. The legislature amended that law in S.L. 1999-417 (S 283) to replace the publication with an electronic advertisement. (The competitive bidding statute, G.S. 143-52, was amended several years ago to authorize advertisement by electronic means.) Printed copies of information contained in the electronic advertisement must be made available upon request.

### **Other State Purchasing Procedures**

The legislature also made several changes in the procedures for purchasing by state agencies and local school units.

### **Small and Medium-Sized Businesses**

S.L. 1999-407 (S 284) amends G.S. 143-48 to require tracking by state agencies and local school units of bids received from small and medium-sized businesses. The act requires the Department of Administration to encourage participation by these businesses in state procurement, to compile information on their participation in state contracts, to study methods of improving participation, and to report to the legislature by April 15, 2000. The act does not define what constitutes a small or medium-sized business.

### **Board of Award/Bid Protests**

The Board of Award (Board) has functioned as the awarding agency for state contracts that are subject to the sealed bid process. The composition and functions of the Board were previously

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2. This legislation is summarized in Frayda S. Bluestein, “Public Purchasing and Contracting,” Chapter 21 in *North Carolina Legislation 1998* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1999).

established by administrative regulation but have now been codified in G.S. 143-52.1. S.L. 1999-434, Section 13 (S 222). The Board is responsible for making recommendations to the Secretary of Administration, for contracts under that department, or to the Secretary of Commerce, for information technology contracts under the Office of Information Technology Services, described earlier. The Board consists of three members appointed by the Advisory Budget Commission and chosen from the membership of the commission and the Council of State.

In 1997 the legislature authorized state agencies to increase up to \$25,000 the bid value benchmark in G.S. 143-35.1, which is the threshold at which competitive, sealed bids must be obtained. Universities obtained authority to increase the benchmark up to \$250,000, subject to the approval of the Board of Governors under G.S. 116-31.10. In S.L. 1999-400 (S 968) the legislature amended G.S. 143-53(a)(1) to specify that protests on contracts valued at \$25,000 or more must be reviewed and decided by the Division of Purchase and Contract. The law also requires the division to adopt rules and criteria for review of and decisions on protests on contracts of less than \$25,000 when awarded by another agency.

The state has the authority to waive competitive bidding requirements under G.S. 143-53(a)(5). In S.L. 1999-400 the legislature specifies that requests for waivers of competition are subject to review by the Secretary of the Department of Administration if the expenditure exceeds \$10,000. The new provision also authorizes the levy of a fee for review of a waiver application. G.S. 143-57 was also amended to require that for emergency purchases of over \$10,000, a report on the circumstances and need for the purchase must be made promptly to the Division of Purchase and Contract.

### **Procurement Card Pilot Program**

States and local governments across the country have increasingly used procurement cards to streamline the purchasing process. In 1997 the legislature established a pilot program to allow certain selected state agencies, local school units, community colleges, and universities to implement a procurement card system. This same provision prohibited the use of procurement cards by agencies, school units, community colleges, and constituent institutions that were *not* selected to participate in the pilot program. Section 24 of the 1999 Appropriations Act, S.L. 1999-237 (H 168), continues the pilot program and extends the limitation on use of procurement cards by nonparticipating agencies to August 1, 2000. The Legislative Research Commission has been authorized to study the pilot program, including its effectiveness and efficiency, costs and benefits, impact on accounting, budgeting, and purchasing records, how to identify “real savings,” and the feasibility of statewide implementation of the program. Section 2.1(1)(e), S.L. 1999-395 (H 163).

Cities and counties, many of which have independently established procurement card programs, are not affected by this limitation.

## **Construction Contracting**

### **Guaranteed Energy Savings Contracts**

North Carolina local governments, local school units, and community colleges have authority under Chapter 143, Article 3B, Part 2, to enter into “guaranteed energy savings contracts.” Under these agreements, improvements to public facilities may be made and financed based on a commitment by the provider that the energy savings resulting from the improvements will pay for the cost of the improvements over the term of the contract. The statute authorizing these contracts limited the duration of contracts to a term of eight years. In S.L. 1999-235 (S 56) the legislature increased the allowable contract term to twelve years and repealed the sunset provision that would have required the law to expire on June 30, 1999. The new law also modifies the definition of *energy conservation measure* in G.S.143-64.17(1) to include services related to the operation of a facility, and it modifies the language of this section to specify that all measures must provide

anticipated energy savings. The changes are effective for contracts entered into on or after July 1, 1999.

### **Local Bidding Exemptions for Construction Projects**

In the 1999 session the legislature followed a common pattern of authorizing several local modifications allowing exemptions from aspects of the competitive bidding requirements for construction projects. These acts often create exemptions to particular requirements to deal with circumstances affecting particular projects. Examples of such exemptions this year include those for Transylvania County [S.L. 1999-53 (H829), authorizing negotiation instead of competitive bidding for particular project], Dare County [S.L. 1999-40 (H 872)], and Johnston County Schools [S.L. 1999-102 (S 705), authorizing a "Unitary System Approach" model school plan and negotiation rather than competitive bidding for specified projects]. Increasingly these local acts authorize new methods or approaches to major construction projects. As such they can be viewed as areas of experimentation that, if successful in these limited trials, could become models for wider application.

One example is S.L. 1999-93 (H 880), which modifies G.S. 143-132, the statute that requires three bids on public construction projects. Under the statute, if three bids are not received after the first advertisement, the project must be advertised again. Following the second advertisement, a contract may be awarded even if fewer than three bids are received. Perhaps in response to limited competition for public construction work in some areas of the state, S.L. 1999-93 lowers the requirement on the first round of bidding to *two* bids. If fewer than two are received, the project is readvertised and a contract may be awarded on the second round even if only one bid is received. The provision applies only when the entire cost of construction or repairs is \$500,000 or less and only in Alamance, Beaufort, Currituck, Camden, Pasquotank, and Perquimans counties, as well as in the municipalities and local school administrative units within those counties.

A more dramatic modification was approved in S.L. 1999-207 (H 840), which provides authority for Onslow County to seek bids under *either* the separate-prime or the single-prime contracting system. Current law requires, for projects costing over \$500,000, that bids be received on a separate-prime basis or, in the alternative, on both the separate-prime *and* the single-prime system. G.S. 143-128. When bids are received both ways, the law requires that the contract be awarded to the lowest responsible bidder or set of bidders on the entire project. Last year the legislature allowed local school units, when receiving bids both ways, to award a contract to either the separate- or single-prime bidder or bidders, even if the chosen contractors were not the lowest responsible bidders overall. G.S. 143-128(d1). The Onslow County local act allows bidding either way, thus eliminating the requirement to receive bids on a separate-prime basis. It also extends to Onslow County many of the provisions of G.S. 143-128(d1), including the authority, when receiving bids both ways, to choose either the single- or separate-prime contractor for award, regardless of which is the lowest responsible bidder.

A separate component of S.L. 1999-207 authorizes unique procedures applicable only to the Charlotte/Mecklenburg schools. The act authorizes the school system to prequalify a limited number of contractors and to solicit bids only from some or all of those prequalified. G.S. 143-135.8 generally authorizes local governments to prequalify contractors, but this act appears to allow a specific and more restrictive process. The act requires a pool of at least five prequalified contractors, requires the unit to receive at least three bids, and requires readvertisement if fewer than three bids are received on the first round. The act identifies specific factors that may be considered in prequalifying bidders, including experience on the specific type of project, financial strength, and performance on past or current projects. The act requires the governing board to notify a bidder who fails to satisfy the prequalification requirements at least seven days prior to the bid opening.

The Charlotte/Mecklenburg schools act also authorizes use of a construction manager, to be selected in the same manner as an architect or engineer. (See G.S. 143, Article 3D) Although local governments probably have authority generally to hire a construction manager as a consultant to oversee a project, this act authorizes the use of a construction manager who assumes liability for

completion of the project—a very different type of contractual arrangement. The act specifies that if a construction manager is used for a project that is awarded on a separate-prime basis, the Board may combine the lowest responsible bidders for each category of work into a single contract to be administered by the construction manager.

A third alternative construction method, the design-build method, is also permitted under this act. Under a design-build contract, a single contract is awarded for the design and construction of the project. This method is not currently permitted under North Carolina public bidding statutes. The local act requires the Board to prequalify at least five design-build teams to bid on the project and requires that at least three bids be received. The request for proposals must be prepared by an architect and must contain design criteria that define the project scope, including preliminary design and performance specifications that are sufficiently detailed that bidders can respond and proposals may be evaluated and compared. Contracts must be awarded to the “best qualified team” taking into account the time of completion and cost as the major factors.

Finally, the act allows the Charlotte/Mecklenburg school system to “bundle” projects, that is, to award a single contract for multiple facilities and sites. The only limitation is that bundled projects must be for the same grade level (elementary, middle, or high school) unless the projects are part of a single campus.

Several of these alternative contracting methods, specifically construction management and design-build, have been the subjects of proposed statewide legislation in previous sessions.

### **Highway Projects**

The 1999 General Assembly made several changes to the bidding procedures for highway contracts. S.L. 1999-25 (S 51) increases the threshold for formal bidding under G.S. 136-28.1(b) from \$500,000 to \$800,000. The same act increases the threshold at which the Small Business Enterprise program applies for highway projects from \$300,000 to \$500,000. Under G.S. 136-28.10(a) competition for particular projects below this threshold may be restricted to Small Business Enterprises.

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