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Public Purchasing and Contracting

Changes affecting the bidding procedures for public construction projects continue to dominate the legislative agenda in the public contracting area. The legislature increased the dollar threshold at which formal bidding of construction contracts is required, after having increased the informal bid threshold in 2005. New laws about Department of Insurance approval of project plans, retainage on payments due to contractors, and certification of historically underutilized businesses for public contracts will also affect the public construction process. Several bills that were introduced but not passed focused on illegal immigrants, including some that would have required verification of individuals' immigration status as a precondition of contracting with public agencies. The legislature enacted a new exception authorizing local governments to purchase from federal contract vendors. Finally, as is typical in every session, the legislature approved several local exemptions to the state bidding requirements.

Public Construction Contracts

Increase in the Formal Bid Limit for Construction or Repair Contracts

A bill designed to improve efficiency in state capital facilities projects included a provision increasing the dollar threshold at which formal bids are required for public construction or repair work. Effective July 1, 2007, S.L. 2007-446 (H 73) amends G.S. 143-129 to increase from \$300,000 to \$500,000 the formal bidding threshold for construction or repair contracts. This threshold was last increased from \$100,000 to \$300,000 in 2001. The range for informal bidding, as provided in G.S. 143-131, is from \$30,000 to the formal limit. Thus, informal bidding procedures now apply to construction or repair work costing from \$30,000 to \$500,000. Another effect of the new law is that the advertisement and sealed bids requirements in G.S. 143-129 and the three-bid requirement in G.S. 143-132 will not apply to contracts costing below \$500,000. The

formal and informal bid thresholds for the purchase of apparatus, supplies, materials, and equipment were not changed.

Dollar thresholds in several other statutes that affect public construction remain at \$300,000. For example, performance and payment bonds are required under G.S. 143-129 and G.S. 44A-26 for projects that exceed \$300,000. Bidding methods and procedures for building construction under G.S. 143-128 apply to projects costing over \$300,000. Minority participation requirements for building construction under G.S. 143-128.2 apply to projects costing \$300,000 or more. This statute includes requirements for minority outreach and documentation of good faith efforts by units of government and bidders. A separate provision in the informal bidding statute, G.S. 143-131(b), sets out less detailed requirements for minority participation on building construction projects costing between \$30,000 and \$500,000 (the new formal limit). Building construction projects costing between \$300,000 and \$500,000 are now subject to both statutes. In practice, the more stringent requirements in G.S. 143-128.2 should be used for building construction projects in this range.

Finally, it is important to note that local governments legally may and often do establish formal or informal bid limits that are *lower* than the statutory limits. Some local governments continue to conduct informal bids for contracts costing below \$30,000 (the current starting point for informal bidding), in many cases retaining the \$5,000 threshold that was previously the statutory minimum. Similarly, some local governments continue to conduct formal bids at \$50,000 or \$100,000, under local policies. Despite this most recent increase in the threshold, some local governments will probably continue to use lower thresholds for formal and informal bidding. Since requirements for bonds, advertisement, three bids, and other aspects of formal bidding are not required by state law for contracts below \$500,000, local governments should always provide guidance for staff and for bidders about what standards and procedures will apply under local policies that require bidding at lower levels.

Other provisions of S.L. 2007-446 require the State Building Commission to study and modify as necessary the state construction process to improve efficiency, reduce delays, and provide accountability for state capital improvement projects.

New Restrictions on Retainage

G.S. 143-134.1 governs when payments must be made to prime contractors on public construction contracts and when prime contractors must make payment to subcontractors. Effective for contracts entered into on or after January 1, 2008, S.L. 2007-365 (S 1245) amends the statute's provisions concerning retainage (funds retained from payments due contractors for liquidated damages and to secure completion of work at the end of a project). The revised statute now prohibits retainage on public construction projects that cost less than \$100,000 in total. For other projects the owner may retain no more than 5 percent per periodic payment owed to the prime contractor until the project is 50 percent complete. At 50 percent completion no further retainage is allowed as long as performance is satisfactory. Release of all retainage is required upon beneficial occupancy of the project or when a certificate of substantial completion is issued. Public agencies may, however, retain up to 2.5 times the value of remaining work in order to secure completion or correction of that work. The statute also provides for "line-item" release of retained funds for subcontractors who complete their work before 50 percent completion of the project.

Public agencies may comply with retainage provisions under federal contracts or grants that conflict with those in the statute, but bid documents for these contracts must specify when federal preemption applies. The statute also provides that the release of retainage on payments does not affect any warranties and that public agencies may allow contractors to bid on bonded contracts with and without retainage on payments.

An important provision in the new statute, G.S. 143-134.1(e), allows a public agency to withhold greater amounts of retainage for "unsatisfactory job progress, defective construction not remedied, disputed work, or third-party claims filed against the owner or reasonable evidence that

a third-party claim will be filed.” This provision preserves the legitimate use of retainage to secure performance or preserve funds in case of nonperformance by contractors.

Construction Plan Review Process

Upon recommendation of the House Select Committee on Public School Construction, the legislature increased the size threshold at which state approval of plans for construction projects is required. S.L. 2007-303 (H 735) amends G.S. 58-31-40(b) to increase from 10,000 to 20,000 square feet the size threshold for buildings that are to be used by a county, city, or school district and that must be preapproved by the Commissioner of Insurance as to fire safety.

Historically Underutilized Businesses

For several years the state has been moving toward uniform certification of minority-owned firms as part of its program to encourage the use of these firms in state and local public construction projects. Though the definitions have not changed, the statutes establishing this program now refer to these firms as “historically underutilized businesses.” In S.L. 2007-392 (S 320), the legislature reaffirmed and strengthened its commitment to establishing statewide certification, enacting G.S. 143-48.4 and amending G.S. 143-128.4. The Secretary of Administration is authorized to develop and administer a program for the certification of historically underutilized businesses doing business with state departments, agencies, and institutions and political subdivisions of the state by creating a database of those certified businesses and by adopting rules and procedures for their certification. Beginning July 1, 2009, state and local entities must use only historically underutilized businesses identified in the database for minority business purposes.

State law has not previously required local governments to certify historically underutilized businesses, though some units have established certification requirements and procedures in order to verify that firms are legally eligible to be counted toward participation goals and efforts required under state laws [see G.S. 143-128.2 and G.S. 143-131(b)]. Local government units will have an opportunity to participate in the development of the statewide certification standards and must conform their own programs to those standards or rely on the state’s process when it is finalized. Apparently, beginning July 1, 2009, local governments will be required to consider only state-certified firms when applying the state requirements for outreach to and participation by historically underutilized businesses.

Financial Assistance for Small Businesses

S.L. 2007-441 (H 1181) creates the Small Business Contractor Act, Part 20 of Article 10 of G.S. Chapter 143B, to provide financial assistance to financially responsible small businesses that are unable to receive assistance from other sources. The act creates the eleven-member North Carolina Small Business Contractor Authority within the Department of Commerce to oversee the financial assistance, including making loans and guaranty payments from the newly created Small Business Contract Financing Fund. To qualify for assistance, the applicant (1) must be a North Carolina resident or be incorporated in the state, (2) must have its principal place of business in North Carolina, (3) must be a small business controlled by individuals with a reputation for financial responsibility, and (4) has to have been unable to obtain financing or bonding through an authorized company. The act also creates the Small Business Surety Bond Fund to pay authority expenses related to the provision of bonding assistance. Upon application, the authority may guarantee a surety for losses incurred under a bid bond, payment bond, or performance bond on an applicant’s contract, of which the majority of the funding is provided by a government agency, up to the lesser of 90 percent of the surety’s losses or \$900,000. The authority may also execute and perform bid, performance, and payment bonds as a surety for the benefit of an applicant in connection with a contract that is majority government funded. In deciding whether to issue a guaranty or bond, the authority must determine that the contract for which a bond is sought to be

guaranteed or issued has a substantial economic impact. New G.S. 143B-472.112 makes it a Class 2 misdemeanor to knowingly make or cause to be made any false statement or report in an application or document submitted to the authority or to make or cause to be made any false statement or report to the authority for the purpose of influencing the action of the authority on an application.

Local Exemptions from Bidding Requirements

As is typical, the legislature granted local exemptions from bidding requirements for specific projects. These include S.L. 2007-1 (H 33), increasing the force account limit in G.S. 143-135 to \$800,000 for several Catawba County landfill projects; S.L. 2007-44 (S 417), increasing the force account limit in G.S. 143-135 to \$2,152,500 for several Town of Wilkesboro water and sewer projects; S.L. 2007-35 (H 506), exempting a joint Burke County/Western Piedmont Community College renovation project from certain bidding requirements; S.L. 2007-48 (H 443), authorizing Cherokee County to use the design-build method of construction for a justice center project; and S.L. 2007-135 (S 513), granting the City of Wilmington, New Hanover County, and a water and sewer authority an increase in the force account limit in G.S. 143-125 to \$800,000 and an exemption from the bidding requirements for a sewer project.

Several general exemptions from bidding requirements were also granted: S.L. 2007-76 (H 1227) exempts New Hanover Regional Medical Center from all statutory bidding requirements, subject to specified limitations; and S.L. 2007-131 (H 1456) exempts regional solid waste management authorities from all statutory bidding requirements, subject to specified limitations. S.L. 2007-312 (S 403) authorizes the City of Charlotte to use various alternative design and construction methods for water and wastewater treatment plant projects and exempts the city from otherwise applicable design and construction contract bidding procedures for these types of projects. In addition, S.L. 2007-158 (S 579) authorizes the City of Charlotte to use electronic bidding and reverse auctions for construction or repair contracts in the formal range. (General law restricts the use of these bidding options to purchase contracts.) The city also received specific authority in S.L. 2007-205 (H 513) to use federal procurement procedures for federally funded transit projects.

University System Efficiency Measures

Pursuant to recommendations of the UNC President's Advisory Committee on Efficiency and Effectiveness (PACE), S.L. 2007-322 (H 749) makes a number of changes to statutes affecting construction and procurement by constituent institutions of the university system. The changes increase the scope of university discretion in contracting for construction repairs and renovation, including increased authority for the use of force account labor, and for leasing and acquisition of property.

Changes Affecting Purchasing and Other Public Contracts

Purchasing Exception for Federal (Including GSA) Contracts

S.L. 2007-94 (S 492) creates new G.S. 143-129(e)(9a) to provide an exception to the formal and informal bidding requirements for the purchase of apparatus, supplies, material, or equipment from contracts established by the United States or any federal agency. This exception allows local governments to purchase from federal contract vendors that are willing to extend to the local government the same prices, terms, and conditions as (or ones more favorable than those) established in the federal contract. Many federal contracts are awarded by the General Services Administration (GSA) and others are awarded by specific federal agencies, such as the Department of Transportation. Specific provisions of some federal contracts make them available

to local governments. The new exception is necessary for North Carolina local governments even when the contract itself is available to local governments because, without the exception, the local government would have to comply with state bidding requirements (informal or formal, depending upon the contract amount).

The wording of the exception allows a local government to contract with a vendor having a federal contract even if that contract does not contain terms allowing local government participation. The absence of a provision in a federal contract extending its terms to local governments does not prevent the vendor from separately contracting to sell the same items at the same or better prices, terms, and conditions. Like the “piggybacking” exception in G.S. 143-129(g) and the state contract exception in G.S. 143-129(e)(9), this exception does not create an obligation on the part of the vendor to extend the terms of the contract to local governments. Such an obligation would exist only if it is a part of the federal contract.

Like the exception for state contract purchases, this new exception overlaps with the piggybacking exception, which authorizes purchases from suppliers that have contracted with another public agency. Under the exception for federal contracts, however, the piggybacking exception’s limitations on the time of the original contract award and its requirements for public notice and local governing board approval do not apply.

School Equipment Lease-Purchase Authority

Local school units have limited authority under G.S. 115C-528(a) to finance the purchase of equipment using lease-purchase or installment-purchase contracts. In S.L. 2007-519 (H 705), the legislature added food service equipment to the list of items schools may purchase under this statute.

Use of Electronic Signatures

State and federal laws provide general authority for the use of electronic signatures and contracts in both public and private transactions. State law also creates more specific authority and procedures for the use of electronic signatures in public contracting. S.L. 2007-119 (S 211) amends G.S. 66-58.4, which deals with electronic transactions by public agencies, to specify that public agencies may *use* and *accept* electronic signatures.

There are no general requirements for local governing board approval of electronic contracting procedures, nor are there specific procedures for local implementation of electronic contracting. Two statutes that require local governing board approval in specific circumstances are (1) G.S. 143-129(b), authorizing the use of electronic *instead* of newspaper advertisements for formal bids; and (2) G.S. 159-28.1, authorizing the use of a facsimile signature rather than an original signature, which is required for the preaudit certificate under G.S. 159-28(a) for all written contracts.

Surplus Property

Cities, counties, local school units, and several other types of local government units are governed by procedures in Article 12 of G.S. Chapter 160A for the disposition of real or personal property. By statute and under constitutional restrictions, disposition of public property must be in exchange for something of value to the unit, whether in the form of cash or provision of services benefiting the local unit’s constituency. G.S. 160A-279 authorizes cities and counties to convey property to nonprofit organizations to which they have authority to appropriate funds. S.L. 2007-430 (H 1060) enacts new G.S. 160A-280 authorizing local governments to donate to another governmental unit in the United States, a sister city in another country, or a nonprofit organization any personal property that the governing board considers surplus, obsolete, or unused by the unit. In order for a city to be considered “a sister city” under the statute, there must be a

written agreement or memorandum of understanding between the donor city and the sister city “for the purposes of establishing a long term partnership to promote communication, understanding, and goodwill between peoples and to develop mutually beneficial activities, programs, and ideas.”

The new statute requires the local governing board to adopt a resolution authorizing a donation and to “post a public notice” at least five days before the resolution’s adoption. It is unclear how this statute relates to the existing authority in G.S. 160A-279, which allows conveyance of property only to those nonprofit organizations to which the city or county has authority to appropriate funds, requires compliance with the procedures in G.S. 160A-267 (including advertisement and a ten-day waiting period before completing a conveyance), and imposes restrictions to assure continued public use by the recipient as a condition of the conveyance. These restrictions are probably necessary to avoid violation of Article I, section 32, of the state constitution (the Privileges and Emoluments Clause), which requires consideration for the conveyance of public property.¹ While the new law clearly provides statutory authority for conveyances of property for use outside the local jurisdiction and the state, it is unclear whether these conveyances would be viewed as providing sufficient benefit to the constituency in the donor unit to satisfy the constitutional requirement for consideration.

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1. For a discussion of the interpretation of this constitutional provision in the context of local government property disposal, see DAVID M. LAWRENCE, LOCAL GOVERNMENT PROPERTY TRANSACTIONS IN NORTH CAROLINA 90–92 (2d ed. 2000).