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Public Purchasing and Contracting

North Carolina's local school systems are under pressure to build new schools quickly and to minimize the costs of new construction. The most significant legislation in the public contracting area this year, summarized below, provides flexibility for local school units in the financing and construction of school facilities. The legislature has authorized schools to contract with private developers to finance, construct, operate, and maintain school facilities using a capital lease arrangement that allows schools to pay for the new facilities over time. Though the legislation applies only to local school units, cities and counties will likely follow with interest local school projects undertaken using this new approach and may be expected to request similar authority if the projects are successful.

This chapter also summarizes several other changes to the state's construction contract bidding and licensing laws, as well as changes affecting state Department of Transportation contracts.

School Capital Lease Authority

Billed as a "public/private partnership" for schools, the capital lease legislation [S.L. 2006-232 (S 2009)] adds new provisions in G.S. Chapter 115C allowing local school administrative units to enter into capital leases of real or personal property for school buildings or school facilities. The new provisions, codified in G.S. 115C-531 and G.S. 115C-532, address the financing, bidding, and property issues in capital lease projects.

Under G.S. 115C-531(a), a capital lease may be used for projects involving existing buildings or for construction of new schools. The lease may be for a period of up to forty years (including renewal periods) from the date the local school unit expects to take occupancy of the property that is the subject of the lease. Projects constructed under the capital lease statute are exempt from the provisions of G.S. 115C-521(c) and (d), which include requirements that school building projects be under the control of the local school administrative unit and that they be built on property

owned in fee simple by the administrative unit. Capital lease projects under the new statute are considered continuing contracts for capital outlay under G.S. 115C-441(c1) and require approval by the board of county commissioners. The statute provides, however, that capital leases are not a pledge of the taxing power or the full faith and credit of the local board of education or the board of county commissioners. As is the case for installment purchase contracts under existing G.S. 160A-20 and G.S. 115C-528, the law prohibits nonsubstitution clauses in capital lease agreements and deficiency judgments in any action for breach of the contractual obligation under a capital lease entered into under this section. The statute requires Local Government Commission approval if the contract falls within specified provisions of G.S. 159-148 that apply when the contract is for a period of five years or more (including renewals) and obligates the unit for more than $500,000 over the full term of the contract.

The new legislation also authorizes a "build-to-suit" capital lease governed by G.S. 115C-532, under which a private developer may be responsible for the construction, operation, and management of the school facility. The statute requires the local board of education to adopt a resolution approving the use of a build-to-suit capital lease upon ten days' notice. The statute sets forth specific findings that the board must make in the resolution and specific information that must be included in the notice of the meeting at which the resolution will be considered. A nonexclusive list of additional services that may be included in a build-to-suit capital lease agreements is set forth in G.S. 115C-532(h).

Local boards of education are authorized to enter into "predevelopment agreements" under G.S. 115C-532(f) in advance of a build-to-suit capital lease. These agreements must be approved by the board of county commissioners and may include provisions for site selection, acquisition and preparation, and building programming and design.

Construction, repair, or renovation work undertaken by a private developer for a capital lease project is exempt from the bidding requirements in Article 8 of G.S. Chapter 143 unless the project is estimated to cost $300,000 or more, in which case the statute requires the private developer to solicit bids from prime contractors for construction or repair work and to comply with the minority participation requirements that apply to public projects under G.S. 143-128.2. The private developer may also use a construction manager at risk, who would be subject to the same requirements for bidding and minority participation. Existing requirements for the selection and use of licensed architects and engineers, as well as for state review of design and specifications, apply to capital lease projects. The local board of education may require the private developer to provide a performance and payment bond for construction work and may require a bond or "other appropriate guarantee" to cover any other guarantees, products, or services to be provided by the private developer. A private developer must provide a letter of credit in an amount not less than 5 percent of the total cost of improvements for the benefit of those who supply material or labor to the project.

The applicability of the lien laws to capital lease projects on property owned by a private developer was the subject of significant discussion during the legislative process. As amended by the technical corrections act [S.L. 2006-259 (S 1523) Section 54(a)], the pertinent provision in the new law, G.S. 115C-531(i), states that the lien laws apply to private property interests in a capital lease project.

The authority provided in these statutes became effective July 18, 2006, and expires July 1, 2011.

Other Changes Affecting Public Contracting Procedures

Guaranteed Energy Savings Contracts

State law provides specific contract and financing authority as well as procurement procedures for performance contracts, under which a contractor guarantees energy savings in an amount equal to the financed cost of energy saving improvements. [*See* G.S. Chapter 143, Article

3B, Part 2.] These laws were amended by S.L. 2006-190 (S 402) to include in the scope of authorized contracts measures designed to conserve water or "other utilities" or to capture lost revenue. Specific improvements may include faucets with automatic or metered shut-off valves, leak detection equipment, water meters, water recycling equipment, and wastewater recovery systems. [G.S. 143-64.17(i).] "Savings" may now include reduction in water costs, stormwater or other utility fees, and other utility or operating costs including increased water meter accuracy and captured lost revenues. The effect of these changes is to expand the types of improvements that may be implemented and financed through performance contracts under the authority and procedures established in these statutes.

The legislation also increases the maximum term for a contract under the statute from twelve to twenty years and increases the maximum aggregate principal amount payable by the state under financing contracts entered into under the performance contracting authority from $50 million to $100 million. [G.S. 142-63.]

Reciprocal Preference for Architectural, Engineering, Surveying, and Construction Management at Risk Contracts

State law [G.S. 143-64.31(a)] requires public agencies at the state and local level to use a qualification-based process, rather than a bid process, for selecting architects, engineers, surveyors, or construction managers at risk. (The use of construction managers at risk by North Carolina public agencies is governed by G.S. 143-128.1.) Though public agencies may exempt themselves from this process under G.S. 143-64.31, the process is otherwise considered to be mandatory.

S.L. 2006-210 (S 522) creates a "reciprocal preference" for North Carolina firms whose selection is governed by G.S. 143-64.31(a). The provision grants a preference to a resident firm over a nonresident firm "in the same manner, on the same basis, and to the extent that a preference is granted in awarding contracts for these services by the other state to its resident firms over firms resident in [North Carolina]." [G.S. 143-64.31(a1).] The statute defines *resident firm* as one that has paid North Carolina unemployment or income taxes and whose principal place of business is located in North Carolina.

A similar provision was previously included in the procurement laws that govern state agencies [*see* G.S. 143-59(b)].

Contracting for Engineering Services for Public Water Systems

Legislation amending G.S. 130A-317(d) clarifies that local governments may contract for engineering services to develop plans for construction or alteration of public water systems as required in that statute. [S.L. 2006-238 (H 1099).]

Local Exemptions from Bidding Requirements

As is typically the case each session, several local governments received exemptions from construction bidding requirements for particular projects. Under S.L. 2006-94 (H 2526), Clay County received authority to use the design-build method of construction for an indoor recreational facility, a sheriff's office building, and a county administration building. A Stokes County local act, S.L. 2006-50 (H 2343), authorizes the use of the design-build method for an emergency medical services station. The Fayetteville Public Works Commission obtained an exemption from the limitation in G.S. 143-135 (restricting the size of projects that can be constructed using the unit's own forces) for water and sewer line projects to serve newly annexed areas. The act, S.L. 2006-48 (H 2040), became effective June 30, 2006, and expires January 1, 2012.

Contractor Licensing Changes

The legislature made several minor changes in the laws governing contractor licensing. S.L. 2006-241 (H 2882) amends G.S. 87-10(c) to increase—from thirty to ninety days—the window of time during which an entity may continue to be licensed after an individual who took the licensing exam on behalf of the entity leaves. The act also makes conforming changes in the licensing laws to clarify the authority of a plumbing, heating, or electrical contractor to act as a prime contractor on a project under the conditions set forth in G.S. 87-1.1.

State Department of Transportation Contracts

A new statute, G.S. 136-66.8 [S.L. 2006-135 (H 1399)] authorizes local governments to enter into agreements with the state Department of Transportation to expedite transportation projects currently programmed in the Transportation Improvement Plan. Under agreements entered into under this statute, the local government is required to fund 100 percent of each project at current prices and will be reimbursed an appropriate share of funds at the amount provided for in the plan when the project is later funded from state and federal sources.

S.L. 2006-261 (H 1827) makes several changes in the licensing requirements for state transportation projects. A new statute, G.S. 136-28.14, creates an exemption from the contractor licensing requirements for (1) routine maintenance and repair of pavements, bridges, roadside vegetation and plantings, drainage systems, concrete sidewalks, curbs, gutters, and rest areas; and (2) installation and maintenance of pavement markings and markers, ground mounted signs, guardrails, fencing, and roadside vegetation and plantings. Another new statute, G.S. 87-1.2, incorporates this exemption into the chapter governing contractor licensing.

The state laws governing disadvantaged minority- and women-owned business participation in highway projects are substantially revised by S.L. 2006-261 (H 1827), Section 4. The changes remove from G.S. 136-28.4 the fixed statutory percentage goal for participation by specific groups and replace it with a more flexible requirement for regular analysis of data regarding availability and utilization of contractors and narrow tailoring of program components as warranted by these data. The statute now provides for the establishment of annual aspirational goals and specifies that contracts must be awarded on a nondiscriminatory basis. The law also establishes a Joint Legislative Commission on the Department of Transportation Disadvantaged Minority-Owned and Women-Owned Business Program as set forth in G.S. Chapter 120, Article 30. The commission will be responsible for monitoring the implementation and assessing the effectiveness of the program under G.S. 136-28.4 and for making recommendations to the legislature for improvements to the program.

Frayda S. Bluestein