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Purchasing and Contracting

The most significant legislative change in the purchasing and contracting field this session will allow local school units to make purchases using locally administered procedures under the same laws currently used by cities, counties, and other local governments—rather than through the Department of Administration. The transition to the new system is tied to a continuing requirement for schools to use the state’s E-Procurement system and to the process of establishing the technical capacity needed to operate the system through financial systems already in use by school systems throughout the state.

School Purchasing

New School Purchasing Procedures

Currently, G.S. 115C-522(a) requires local school administrative units to purchase all supplies, equipment, and materials in accordance with contracts made by the Department of Administration. This year, in S.L. 2003-147 (S 620), the legislature removed this requirement and made the purchases of local school units subject to Article 8 of Chapter 143. The effect of this change is to make purchasing requirements for schools the same as those for cities, counties, and other local governments. (Schools were already subject to Article 8 for construction and repair work.) This change will become effective no later than April 1, 2004, but may take effect earlier for some units, as described below.

The new law also establishes requirements for phasing in use of the state’s E-Procurement Service in local school administrative units. It deletes existing statutory provisions authorizing the state to mandate use of E-Procurement and adds new requirements for its future use in school purchasing.

To facilitate that use, the new law requires the State Board of Education to establish standards for determining when a local unit’s purchasing process becomes “E-Procurement compliant.”

Achieving compliance will involve efforts by both the school unit and the E-Procurement Service providers to make the technical and process changes necessary for the unit to be capable of making purchases through the system. The shift from purchasing through the Department of Administration to purchasing under the provisions in Article 8 of Chapter 143 becomes effective for each local school administrative unit on the day the Department of Public Instruction certifies that the unit is E-Procurement compliant, or on April 1, 2004—whichever occurs first.

Once they are certified as compliant, local school administrative units will be required to use the E-Procurement system for specified percentages of their purchases. As of the date that a unit is certified as E-Procurement compliant, the unit must expend at least 30 percent of its remaining unencumbered funds for the purchase of supplies, materials, computer software, and other tangible personal property for that fiscal year through the E-Procurement Service. The following year, the expenditure requirement increases to 35 percent, and in the second year following the certification year it rises to 40 percent. The act encourages units to spend at least 50 percent of its funds through E-Procurement during the year after certification and 70 percent in the second year.

The law also establishes a pilot program for four local school units, two of which use the ISIS computer system and two of which use the SunPac computer system, the two systems used by all but the two largest school administrative units in the state. The four units (Cabarrus, Edgecombe, Guilford, and Sampson counties) will work with the E-Procurement Service to become compliant on or before December 1, 2003. The Department of Public Instruction will be required to monitor and report on the progress of the pilot programs. The Charlotte-Mecklenburg and Wake County school systems must be compliant on or before July 1, 2004, and all remaining units must be compliant by January 1, 2005. The law directs the E-Procurement Service to assist units in interfacing their systems and providing training for employees on a regional basis.

Under the new law, the Department of Administration, through the Division of Purchase and Contract, will have the authority to provide services for and make contracts available to local school administrative units, and those units will have authority to make purchases from state contracts. The act amends G.S. 115C-522(a) to require the Secretary of the Department of Administration and the local school administrative units to establish a purchasing user group consisting of representatives from the department and purchasing and finance officers from local school units. The purpose of the user group is to provide for an efficient transition to the new purchasing procedures and to examine issues such as the new relationship between the department and the local school units, appropriate exchange of information, continued efficient use of E-Procurement, appropriate bid procedures, and other necessary technical assistance.

Finally, the law makes changes to various statutes to remove references to the Department of Administration's responsibility for and authority over purchasing by local school administrative units. The department retains its authority to develop, implement, and monitor a pilot program on reverse auctions for public school systems. The law amends G.S. 115C-522(a) to require the State Board of Education to adopt rules governing equipment standards for supplies, equipment, and materials related to student transportation. The State Board is also authorized to adopt guidelines for commodities that require safety features; any such commodity available on a statewide contract must meet those guidelines. The provision in G.S. 115C-264 that exempts from bidding requirements purchases of supplies and food for school food services is retained, as is the requirement in G.S. 143-48(b) to report on purchases from female-, minority-, and disabled-owned businesses.

The effective date provision of the new law as enacted retains a technical error that was to be corrected in the technical corrections bill. The hasty adjournment of the legislature without enactment of the technical corrections bill left this error in place. The intent of the legislature, however, appears clear from the substance of the bill; if called upon to interpret it, a court could easily recognize the error and would be likely to give full effect to the law as intended.

Other Changes Affecting School Purchasing

Competitively bid beverage contracts. A provision in the budget bill [sec. 6.15 of S.L. 2003-284 (H 397)] adds a new statute, G.S. 143-64, which requires local school units, community colleges, and universities to competitively bid contracts that "involve the sale of juice or bottled

water.” The act appears to cover contracts for vending machines that sell these types of beverages, as well as concessions and other contracts. The law authorizes these agencies to set quality standards for these beverages and to use those standards to accept or reject bids.

The act applies to contracts bid on or after June 30, 2003, and does not establish specific requirements for competitive bidding. The process should probably include some form of broadly announced notice or advertisement, development of specifications, and a prescribed form for submission of bids.

Preference for high-calcium foods and beverages. S.L. 2003-257 (H 1032) enacts a new statute, G.S. 115C-264.1, which requires school food services to give preference in purchasing contracts to high-calcium foods and beverages. These are defined as “foods and beverages that contain a higher level of calcium and that are equal to or lower in price than other products of the same type or quality.” A local school is not required to use the preference in purchasing food for individuals receiving services from the public school food program if the high-calcium food or beverage would interfere with their proper treatment or care. The schools are also not required to apply this preference retroactively to contracts entered into prior to the effective date of the new law (June 16, 2003) if the requirement would change the terms of those contracts.

Replacement school buses. A budget provision, Section 7.25 of S.L. 2003-284, appropriates funds to the State Board of Education for allotments to local schools to replace school buses under G.S. 115C-249(c) and (d). The provision specifies conditions that apply to the use of these funds, including procedures for bidding and contract terms.

Privatization of driver education. The budget also calls for the State Board of Education to study statewide privatization of driver education programs and to report to the legislature on its findings by November 30, 2003 [sec. 29.7 of S.L. 2003-284 (H 397)].

University Purchasing Flexibility

This session the legislature enacted several laws that will increase university purchasing flexibility. S.L. 2003-312 (H 1070) amends G.S. 116-31.10 to increase from \$250,000 to \$500,000 the amount of the expenditure benchmark that may apply to purchases by constituent institutions of the university. This benchmark determines the process, including the amount of state involvement, each institution must use in making purchases, and the threshold, which may vary according to the institution’s internal capabilities and compliance record. The effect of the change is to increase the degree of autonomy constituent institutions may obtain. For institutions that obtain an increase under the new law, purchases between \$250,000 and the \$500,000 limit must be submitted to the Division of Purchase and Contract for approval or other action; the submission must include information on all offers received and the institution’s recommendation for award of the contract or other action. Notice of the division’s decision on the purchase will be sent to the institution, which may then award the contract or take other action.

Additional flexibility was provided in S.L. 2003-228 (H 975), which creates an exemption from state oversight for university purchases of personal property or services primarily paid for with moneys other than state-appropriated general funds or tuition. Competitive bidding procedures still apply to these contracts, but state approval and oversight do not. This law also exempts special responsibility constituent institutions from the requirement to purchase from sources certified by the Secretary of Administration on term contracts, subject to certain conditions. This provision accords the university’s constituent institutions the kind of purchasing flexibility granted in the past to local school units and community colleges.

Other Purchasing Changes

Use of Recycled Steel Products

The state budget [sec. 6.10 of S.L. 2003-284 (H 397)] contains a provision designed to promote the use of products made with recycled steel. The new law requires any state agency or agency of a political subdivision of the state (that is, a local government), or any person contracting with any of these agencies with respect to work performed for that contract, to procure products of recycled steel. The requirement is subject to conditions that the product must (1) be acquired competitively within a reasonable time, (2) meet appropriate performance standards, and (3) be acquired at a reasonable price. The Department of Administration is required to report to the legislature on compliance with this provision.

Purchase of Reconstituted or Recombined Milk

A new law, S.L. 2003-367 (H 974), prohibits any department, institution, or agency of the state from entering into a contract for the purchase of any “fluid milk product that is labeled or that is required to be labeled as ‘reconstituted’ or ‘recombined.’” This act became effective October 1, 2003, and applies to any contract entered into on or after that date. This provision does not appear to apply to local school units, since they are not generally considered agencies of the state.

Toner or Inkjet Cartridge Contracts

A new law enacted in S.L. 2003-386 (H 999) limits the use of a provision in any agreement or contract that prohibits reusing, remanufacturing, or refilling of a toner or inkjet cartridge. Under G.S. 75-36, any such provision is void as a matter of public policy. The act does not, however, prevent a vendor from requiring the use of new or specified toners or inkjet cartridges as a condition of the warranty under a maintenance contract. The act becomes effective October 1, 2003, and applies to contracts entered into on or after that date.

Airport Authorities Installment Purchasing Authority

Certain local governments have authority under G.S. 160A-20 to enter into installment purchase agreements that give a security interest in the property to the seller. S.L. 2003-259 (S 652) amended the statute to add to the list of entities that may use this financing method airport authorities created pursuant to a local act of the General Assembly.

Construction Law Changes

County property acquisition for financing school projects. Under G.S. 115C-528, local school units have limited authority to use installment purchasing (in which a security interest in the asset is given to the seller to secure the financing), but most do not have authority under G.S. 160A-20 to finance school construction in this way. Counties have individually sought and obtained authority to acquire property for school projects through installment purchasing, and later to lease or transfer it to the school units, thus financing school projects by using their broad authority under G.S. 160A-20. These local acts have been codified in G.S. 153A-158.1. This year the legislature extended this authority to all one hundred counties by enacting S.L. 2003-355 (S 301).

Public contract surety bonds. A provision included in a bill making a number of changes to the insurance laws limits the authority of public agencies to require a contractor or bidder to obtain a bond (bid, payment, or performance) from a particular surety, agent, producer, or broker [sec. 27 of S.L. 2003-212, (H 276)]. This change became effective October 1, 2003, and is contained in a new statute, G.S. 58-31-66. It is likely that existing language in G.S. 44A-26(b) had already created this

limitation, since that statute requires bonds to be executed by one or more surety companies legally authorized to do business in North Carolina. Under this provision, public agencies arguably did not have authority to restrict a bidder to a particular company as long as the one chosen is authorized to do business in the state. G.S. 143-129(c) does allow public agencies to reject bonds from companies with which the agency has pending claims, and this authority does not appear to be limited by the new provision. Furthermore, the new provision specifically authorizes the public agency to approve the form and sufficiency of the bond and to disapprove, “on a reasonable and nondiscriminatory basis, the surety selected by the bidder . . . because of the financial condition of the surety.” A violation of the new provision renders the construction contract void.

Exception for pre-engineered structures. The statute governing when public projects must be designed by an architect or engineer has been amended by S.L. 2003-305 (H 994) to create a limited exception for pre-engineered structures used exclusively by public employees for purposes related to their employment. The new provision, G.S. 133-1.1(c) (5), applies to “garages, sheds and workshops” of up to 5,000 square feet and requires a minimum separation of 30 feet between these structures and other buildings or property lines.

Limited licensure exception. The general contractors licensing law, G.S. 87-1, requires a person who submits a bid to have a license that covers the work involved in the contract being bid. In some cases, however, a project involves the work of multiple trades, which may be subcontracted by the bidding contractor. The State Licensing Board for General Contractors had attempted to adopt a rule allowing a licensed plumbing or electrical contractor to submit a bid for work that also includes general contractor work, as long as the general contracting work does not exceed 25 percent of the total bid price. That rule was objected to during the rules review process and did not become final because the board lacked the authority to change a statutory requirement. A new law, G.S. 87-1.1, enacted in S.L. 2003-231 (S 437), now authorizes the board to adopt a rule effecting this change. It is expected that the board will now adopt the same rule or a similar rule establishing a maximum percentage of general contracting work that may be included in a bid submitted by a plumbing or electrical contractor.

Retailers installing plumbing, heating, or air conditioning. S.L. 2003-31 (S 772) clarifies the circumstances under which retailers can sell certain goods and services without being licensed to install them, as long as licensed contractors do the installation work.

Locksmith licensing exemption. G.S. 74F-26(9) provides that general contractors are not required to have a locksmith license when acting within the scope of their general contractors license. Section 10.1 of S.L. 2003-350 (S 655) amends this statute to extend the exemption to agents or subcontractors of the general contractor when acting within the ordinary course of business.

Security for guaranteed energy savings contracts. Public agencies in North Carolina have authority to enter into guaranteed energy savings contracts under which (1) improvements are made and financed over time, and (2) the energy savings are guaranteed to pay for the cost of the improvements over the period of the contract. As originally enacted, the law required the contractor to provide the governmental unit a bond securing the contractor’s obligation under the contract. An amendment to this provision in G.S. 143-64.17B, as enacted by S.L. 2003-138 (H 864), replaces the bond requirement with a requirement that the contractor provide “security to the governmental unit in the form acceptable to the Office of the State Treasurer.” This act also adds to the law two provisions applicable only to state agency projects requiring additional audits and reviews of proposals and contracts, and directing the State Energy Office to adopt rules governing their use.

Community college public/private partnerships. S.L. 2003-286 (S 773) adds a provision to G.S. 115D-20 authorizing community colleges to enter into public/private partnerships to develop community college property under the limited conditions specified in the act. Projects undertaken under this authority may be jointly owned and used but may not be financed under a long-term lease or a capital lease in which the private entity is the lessor; in addition, state bonds funds may not be used to pay for the part of the facility to be owned and used by the private entity.

General Contract Law Changes

Electronic Signatures

Two sets of North Carolina statutes deal with electronic contracting. The Electronic Commerce in Government Act, Article 11A of Chapter 66, was enacted first; it established a system applicable to public agencies (including local governments) for certifying electronic signatures used in electronic transactions. Later, the Uniform Electronic Transactions Act (UETA), Article 40 of Chapter 66, was enacted, providing broad authority for the use of electronic transactions by both public and private entities. UETA included particular requirements for the certification of electronic signatures but did not explicitly displace the provisions enacted earlier. The relationship between the two provisions of law has been somewhat uncertain but is now clarified by a revision to the earlier act. S.L. 2003-233 (S 622) amends the Electronic Commerce in Government statute to authorize public agencies to accept electronic signatures pursuant to that act, pursuant to Article 40 (UETA), or pursuant to other law. This means that the procedure for certification of signatures under Article 11A is optional. It is now clear that public agencies, including local governments, can conduct business electronically under any of the methods authorized by law.

Excessive Prices for Emergency Contracts

New provisions have been added to the state's unfair competition laws to prohibit price gouging during states of disaster. Under G.S. 75-36.1, enacted in S.L. 2003-412 (S 963), it is unlawful in an area under a state of disaster to sell or rent any merchandise or services "with the knowledge and intent to charge a price that is unreasonably excessive under the circumstances." The act covers only merchandise or services consumed or used as a direct result of an emergency, including those needed to protect or sustain the life, health, safety, or comfort of persons or their property. The statute lists two considerations to be used in determining whether a price is unreasonably excessive: (1) Is the price charged attributable to additional costs imposed by the seller's supplier or other costs for providing the goods or service during the state of disaster? (2) Did the seller offer to sell or rent the goods or service at a price that was below the seller's average price in the preceding sixty days before the state of disaster? If the seller was not involved in selling the item or service prior to the disaster, the market price is used to evaluate the reasonableness of the price charged. Under the new law, charging an unreasonably excessive price constitutes a violation of G.S. 75-1.1, and remedies for violations may include damages, restoration of money or property and cancellation of the contract, civil penalties, and attorneys' fees.

Local Government Property Disposal

Electronic Auction of Property

Several provisions included in the budget bill authorize electronic auction of surplus property [sec. 18.69 of S.L. 2003-284 (H 397)]. One change amends G.S. 143-64.03 to authorize the State Surplus Property Agency to "sell or otherwise dispose of" surplus property, including motor vehicles, through an electronic auction service. The same authority is provided to counties, municipalities, and other public bodies under a new statute, G.S. 143-64.6(b). This authority duplicates the authority already provided in G.S. 160A-270(c), which applies to cities, counties, local school units, and several other types of local government entities. The existing provision requires compliance with the notice requirements that apply to other auctions of local government property, but the new provision does not specify any procedural requirements. It seems unlikely that the legislature intended to negate the procedural requirements in the existing law when it enacted the new provision, and it is probably safest to assume that the notice procedures in G.S. 160A-270(c) apply—at least with respect to property covered by that statute. Note that under G.S. 160A-266,

personal property valued at \$30,000 or more, and all real property, must be sold competitively by sealed bid, upset bid, or auction.

The budget provision also amended Article 2 of Chapter 15, which governs the disposal of seized property. A new statute, G.S. 15-14.1, now allows a local law enforcement entity to sell property through an electronic auction service. This provision requires the entity selling property electronically to comply with the publication and notice requirements in G.S. 15-12 through 15-14.

Honoring Deceased or Retiring Firefighters

New parallel statutes in Chapters 160A (cities) and 153A (counties) of the General Statutes authorize a fire department, at the discretion of the governing board, to award a retiring firefighter or surviving relative of a deceased firefighter, upon request, the firefighter's helmet [S.L. 2003-145 (H 55) enacting G.S. 153A-236; 160A-294.1]. The helmet may be awarded "at a price determined in a manner authorized by the board," which may be less than the fair market value of the helmet.

Frayda S. Bluestein