

Purchasing and Contracting

This was a year for updating and modernizing the rules that apply to public contracts. Several groups of individuals who work in and represent public agencies developed legislative proposals to revise the public bidding requirements and the criminal self-dealing statutes with the goal of clarifying these laws and making them better reflect current contracting practices. An effort to provide flexibility in the public construction bidding process resulted in major changes affecting building construction and significant new requirements designed to promote the use of minority contractors and document good faith efforts toward that end. Public agencies now have authority to use single-prime contracting and construction management at risk for major building construction. Local governments (other than local school units) now have authority to use a “request for proposals” process for procuring information technology goods and services and have several new exemptions under which goods may be purchased without bidding. Thresholds for the sealed bidding and other requirements have been significantly increased. These modifications will provide increased flexibility for public agencies, and in some cases, will significantly change how business is done through public contracts in North Carolina.

Building Construction Law Changes

Since 1925 state law has required public agencies to receive bids for major building construction or repair projects using the separate-prime (also called multiple-prime) bidding method. Under this method, contractors in the major trades—general construction, electrical, plumbing, and mechanical (heating, ventilating, and air-conditioning)—must be given the opportunity to bid directly to the public agency. In contrast, under the single-prime bidding method, these contractors would be subcontractors to a general contractor and would not have an independent contractual relationship with the owner. Beginning in 1989, public agencies were given the option of receiving bids under both the single-prime and the separate-prime systems but

were not allowed to receive bids only on a single-prime basis.¹ Under this dual bidding system, the public agency was required to award to the lowest responsible bid or combination of bids for the entire project. If the separate-prime bids were the lowest (in total), the agency was required to award the contract on a separate-prime basis. In 1998, local school units obtained additional flexibility when changes in the law authorized these agencies to receive bids both ways and to award contracts to *either* the lowest responsible single-prime bid *or* the lowest responsible set of separate-prime bidders.² This essentially allowed local school boards to choose the preferred contracting method after receiving bids both ways. This legislation grew out of a proposal generated by a legislative committee focused on education issues, and the bill was not extended beyond school systems in its coverage at that time.

A separate development in the evolution of the building construction bidding requirements was the establishment, in 1995, of a process through which public agencies could petition to the State Building Commission for approval to use an alternative construction method.³ These alternatives included single-prime only, construction management, and design-build construction. Public agencies have obtained approval for numerous projects under this authority. Perhaps most significant, however, was the university system's successful application last year to use the construction management at risk system for several substantial projects to be built using voter-approved bond money for university improvements. Following the university's efforts, a coalition of organizations, including all of the major associations representing public agencies in North Carolina, proposed a revision to the general law to make both the single-prime and the construction management at risk methods available to all public agencies as a matter of general law.

After lengthy negotiations that extended to the very last day of this longest-ever legislative session, S 914, proposing significant changes in building construction procedures, was finally ratified by both houses, making significant changes in building construction procedures. Most of these provisions became effective January 1, 2002. The bill also addressed the respective responsibilities of landscape architects and engineers. A summary of the most significant changes in the act, S.L. 2001-496, follows.

Increases in Dollar Thresholds

Many of the requirements for procedures in the public contracting process are based on the dollar value of the project or contract involved. S.L. 2001-496 increased several of these thresholds. Those that trigger the formal bidding process for contracts for construction or repair work, mandated in G.S. 143-129, were increased from \$100,000 to \$300,000. The threshold for formal bidding of contracts for the purchase of apparatus, supplies, materials, and equipment was increased to \$90,000. A bill enacted earlier in the session had increased this figure from \$30,000 to \$50,000. [See S.L. 2001-328 (H 1169), discussed below.] For some small jurisdictions, these thresholds are very high in relation to their budgets and typical contract expenditures. Public agencies are free to use formal bidding even when not required to by statute, either on a case-by-case basis or according to local policy.

The threshold at which specified methods for building construction and requirements for minority participation apply has been set at \$300,000. S.L. 2001-496. This actually represents a decrease in the threshold, which was \$500,000, but with the range of methods now allowed under the law, the statute is less a limitation than an authorization, and the threshold is of less importance.

Performance and payment bonds are required under G.S. 44A-26(a) based on both the size of a construction or repair project and the size of particular contracts. The dollar thresholds under this statute were increased in S.L. 2001-496. Bonds are now required when a project exceeds \$300,000 (increased from \$100,000), for each contract that exceeds \$50,000 (increased from \$15,000).

1. 1989 N.C. Sess. Laws Ch. 480.

2. S.L. 1998-137.

3. 1995 N.C. Sess. Laws Ch. 367, sec. 10.

Performance bonds provide a remedy for the owner in the event that the contractor defaults, and payment bonds provide a remedy for subcontractors who provide labor or materials for a project in the event that they are not paid by the general contractor. A contractor's ability to obtain bonds is also generally considered an indication of financial solvency and is sometimes considered a measure of responsibility in considering a contractor's ability to successfully perform a project. A public agency is free to require bonds for contracts that fall below the statutory thresholds.

S.L. 2001-496 also increased the dollar thresholds that determine when plans and specifications for public projects must be prepared by a registered architect or engineer. Under G.S. 133-1.1, this requirement applies to (1) new construction or repairs involving major structural or foundation changes when the expenditure is \$135,000 or more (increased from \$45,000), (2) repairs not involving structural or foundation changes when the expenditure is \$300,000 or more (increased from \$100,000), and (3) a new category of work "affecting life safety systems" when the expenditure is \$100,000 or more. Subsection (d) of this statute specifies that a certificate of compliance with the building code must be obtained for projects that are not required to be designed by an architect or engineer. A new provision in this subsection provides that the certificate of compliance is not required for any project that does not alter life safety systems and has a projected cost of less than \$100,000.

New Construction Methods Authorized

A major thrust of S.L. 2001-496 was to expand the options available to public agencies in selecting methods for construction of building projects. New subsection G.S. 143-128(a1) now lists five methods from which public agencies may choose: (1) separate-prime bidding, (2) single-prime bidding, (3) dual bidding pursuant to subsection (d1) of the statute, (4) construction management at risk pursuant to G.S. 143-128.1 (described below), and (5) alternative contracting methods authorized by the State Building Commission pursuant to G.S. 143-135.26(9). These options, and the other requirements in G.S. 143-128, apply to projects estimated to cost more than \$300,000. Exceptions for prefabricated buildings have been retained. As described below, changes have been made for some of the existing procedures, and new procedures are established for the new methods authorized.

Separate-Prime Bidding

Procedures for separate-prime bidding are contained in G.S. 143-128(b), and the divisions of work are specified in subsection (a), which is not significantly changed by the new law. The provision allowing work costing less than \$25,000 in one subdivision of work to be a part of the specifications for another subdivision has been deleted.

Single-Prime Bidding

The procedures for single-prime bidding are substantially the same as those that were in place for dual bidding under the prior law. They are set forth in G.S. 143-128(d). Single-prime contractors are required to list on their bids the subcontractors they have selected for work in the four major categories listed above. The new law adds provisions relating to the substitution of subcontractors. The prior law allowed substitution with the approval of the awarding authority for good cause shown. The law now allows a substitution if the contractor determines that the listed subcontractor's bid is nonresponsible or nonresponsive, or if the listed subcontractor refuses to enter into a contract to do the work that is covered by the bid.

Dual Bidding

The dual bidding system is set forth in G.S. 143-128(d1) and is essentially the same system that has been available to local school units since 1998. Agencies selecting this option may choose either the lowest responsible single-prime or the lowest responsible set of separate-prime bidders.

A complicated bid-counting requirement that previously applied to the dual bidding process used by local school units has been removed. (Under former G.S. 143-128(d1), it was necessary to obtain at least one general contractor bid under the separate-prime system in order to meet the three-bid requirement for opening bids.) The law retains, however, the limitation that the amount of a bid submitted by a subcontractor to the general contractor under the single-prime system shall not exceed the amount bid, if any, for the same work that subcontractor would do directly for the public agency under the separate-prime system. The dual bidding system requires a staggered bid opening process under which bids from separate-prime contractors are received *but not opened* one hour before the single-prime bids are received, at which time both sets of bids are opened. This represents a change in the previous version of this subsection that applied to local school units and required a three-hour separation of the receipt of bids.

Construction Management at Risk

Procedures for the construction management at risk construction method are set out in a new statute, G.S. 143-128.1. This law defines construction management services to include “preparation and coordination of bid packages, scheduling, cost control, value engineering, evaluation, preconstruction services, and construction administration.” G.S. 143-128.1(a)(1). These services are not otherwise discussed in the statutes and are not subject to specific procedures. Public agencies may use and procure construction management services as they would other consultant services. In contrast, construction management *at risk* services (CM at risk), as defined in the new law, must be procured using the qualification-based selection procedures required for architects, engineers, and surveyors under G.S. 143-64.31. This statute has been modified to expressly cover selection of CM at risk services. A new subsection has also been added to require public agencies to report to the state Department of Administration on the selection and use of CM at risk. The report must include the reasons for the selection, the terms of the contract, a list of all firms considered and their proposed fees, and the form of bidding used. G.S. 143-64.31(b). The formal bidding statute, G.S. 143-129, has also been amended to exempt selection of the CM at risk from its coverage.

Under the construction management at risk system as defined in the new law, the CM at risk (1) provides construction management services for a project throughout the preconstruction and construction phases, (2) is a licensed general contractor, and (3) guarantees the cost of the project. G.S. 143-128.1(2). The statute specifies that the public agency contracts separately (rather than through the CM at risk) for design services on a CM at risk project.

A key aspect of the CM at risk system generally is that the CM selects and contracts directly with the subcontractors. In this respect, it is a form of single-prime contract under which the public agency has only one direct contract, which is with the CM. North Carolina’s version of CM at risk, however, imposes specific procedures upon the CM for the selection of subcontractors. The statute defines as *first-tier subcontractors* those contractors who have a contract with the CM. These may include those in the major trades of general construction, electrical, plumbing, and mechanical work, though it may include greater subdivisions of work resulting in more first-tier subcontractors, and it could involve fewer, as determined by the CM on a particular project. The statute requires the CM to use the public advertisement procedures for these first-tier contractors as set forth in G.S. 143-129 (the formal bidding statute). The statute also requires the CM to prequalify these contractors using criteria determined by the public agency and the CM. The statute includes a broad and nonexclusive list of acceptable criteria for prequalification. G.S. 143-128.1(c). The CM is required to submit a plan for compliance with minority contracting goals (discussed below). Bids under this process are opened publicly and the bids are public records once opened. The CM acts a fiduciary of the public agency in handling and opening bids and is

responsible for awarding the contracts to the “lowest responsible, responsive⁴ bidder, taking into consideration quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, compliance with [minority contracting requirements in] G.S. 143-128.2, and other factors deemed appropriate by the public entity and advertised as part of the bid solicitation.” The public agency may select a different contractor from the one chosen by the CM but must compensate the CM for any increase in cost.

The CM may perform portions of the work only with the approval of the public agency when bidding produces no responsible contractor or in the event of a default if no prequalified replacement can be obtained in a timely manner. The CM is required to provide performance and payment bonds to the public agency under the statutory bonding requirements in Article 3 of Chapter 44A of the General Statutes. Increased thresholds for these bonding requirements are described above.

Alternative Contracting Methods

The procedures for applying to the State Building Commission for alternative contracting methods have not substantially changed under the new law. In practical terms, however, the methods most frequently sought under these procedures, single-prime and construction management, are now generally available to public agencies. Applications for project-specific approval under this method will most likely be for use of the design-build method, which is not explicitly authorized under the general law, or for some modification of the methods now authorized in G.S. 143-128(a1). The act did change the vote required for approval of alternative methods by the State Building Commission from two-thirds to a majority of commission members present and voting. S.L. 2001-496, Section 11; G.S. 143-135.26(9). Local governments seeking authority to modify bidding requirements for particular projects have also continued to use the separate route of obtaining local acts, examples of which are summarized later in this chapter.

Reporting Requirements

Public agencies that use one or more of the methods authorized under G.S. 143-128(a1) are required to report to the Secretary of the Department of Administration on the cost and effectiveness of each method used. Reports are to be filed in a format and containing data as prescribed by the department, but the act requires at least the following information: (1) the method used; (2) the total value of each project; (3) the “bid costs and relevant post-bid costs”; (4) a detailed listing of all contractors and subcontractors used on the project, including identification of whether the contractor was an “out-of-state” contractor; and (5) in cases where an out-of-state contractor was used, the reasons why that contractor was selected. The reports must be filed annually beginning April 1, 2003, and thereafter must be filed in the year in which the project is completed.

Dispute Resolution Requirements

S.L. 2001-496 requires public agencies to establish procedures for dispute resolution on all building construction or repair projects. Each agency is required under G.S. 143-128.1(g) to provide a dispute resolution process, which must include mediation. The law separately requires the State Building Commission to adopt procedures for dispute resolution, and other agencies may use these procedures or may develop their own. The dispute resolution procedures must be available to all the parties involved in the construction project, including the architect, the CM, and the contractors (including all levels of subcontractors), and it must be available for any issue

4. The new law adds the term *responsive* to the standard of award for contracts throughout the competitive bidding statutes in Article 8 of Chapter 143 of the General Statutes. This is not a substantive change, since the requirement that bids be responsive is implicit in the bidding process. *See Professional Food Services Management v. North Carolina Dep’t of Admin.*, 109 N.C. App. 265, 426 S.E.2d 447 (1993).

arising out of the “contract or construction process.” The agency is authorized to set a limit not to exceed \$15,000 for the minimum amount in controversy for which the procedures may be used. The statute authorizes the public agency to require the parties to pay part of the cost, but at least one-third of it must be paid for by the public agency if the public agency is a party to the dispute. The agency may require in the contract that a party must participate in mediation before initiating litigation concerning the dispute.

Minority Business Participation Requirements

Since 1989, public agencies subject to G.S. 143-128 have been required to implement a program for promoting the use of minority business enterprises as defined in the statute. The law does not establish set asides or quotas but instead requires agencies themselves to make, and to require of contractors, a good faith effort to use minority businesses in major building construction projects. The statute prohibits the use of race, sex, or other listed characteristics in the award of contracts. The provisions in G.S. 143-128 have been replaced in S.L. 2001-496 with a new statute, G.S. 143-128.2, which contains more specific and stringent requirements for good faith efforts. References in other statutes requiring compliance with the prior good faith efforts provisions in G.S. 143-128(f) have been replaced with references to G.S. 143-128.2. In addition, a more generalized requirement of good faith efforts now applies to contracts for construction or repair work in the informal bidding range (between \$5,000 and \$300,000) and in the selection of architects, engineers, surveyors, and construction management at risk service providers under G.S. 143-64.31. The law continues to prohibit the award of contracts based on race, sex, and the other listed characteristics. A new provision has been added to G.S. 143-135.5 to express the policy of the state not to accept bids or proposals from or to engage in business with any firm that has been held to have unlawfully discriminated on the basis of any of those characteristics in its solicitation, selection, hiring, or treatment of another business.

New Definition of Minority Business

Under the new statute, the definition of minority business (which currently includes listed ethnic minorities and women) has been expanded to include socially and economically disadvantaged individuals or a corporation in which at least 51 percent of the stock is owned by one or more socially and economically disadvantaged individuals. The term *socially and economically disadvantaged individual* is defined by reference to a federal statute, 15 U.S.C. § 637. That law defines socially disadvantaged individuals as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” 15 U.S.C. § 637(a)(5). Economically disadvantaged individuals “are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business who are not socially disadvantaged.” 15 U.S.C. § 637(a)(6)(A). The federal law provides methods of determining economically disadvantaged status based on the individual’s assets and net worth. A socially and economically disadvantaged business is one that is 51 percent owned by one or more socially and economically disadvantaged individuals, an economically disadvantaged Indian tribe, or an economically disadvantaged Native Hawaiian organization.

Goal Requirements

Since its initial enactment in 1989, the state’s minority contracting program has required state agencies to use a 10 percent goal for participation by minority businesses and has required local governments to develop their own goals. The new law continues the 10 percent goal requirement for the state, but it also expands the applicability of the 10 percent requirement to several new types of projects. Under G.S. 143-128.2(a), the 10 percent goal applies to state building projects,

including projects done by a private entity on a facility to be leased or purchased by the state. The 10 percent goal will also apply to any building project costing \$100,000 to be done by a local government or other public or private entity that receives state appropriations or other state grant funds for the project. This will also apply to projects done by a private entity on a facility to be leased or purchased by a local government unit. The law provides, however, that a local government may apply a different verifiable goal adopted prior to December 1, 2001, if it has a sufficiently strong basis in evidence to justify the use of that goal. For state projects and projects subject to the state goal, the Secretary of the Department of Administration is required to identify specific percentage goals for each category of minority business for each type of contract involved.

The new law restates the existing requirement that local governments adopt verifiable percentage goals and make good faith efforts, which are substantially redefined. An uncodified provision of the act specifically provides that local governments may use goals enacted prior to the effective date of the act.⁵ Legal considerations in establishing goals are discussed below.

Good Faith Efforts

The new law creates specific requirements for both owners and bidders to satisfy the “good faith efforts” obligations. Under subsection G.S. 143-128.2(e), the law delineates the specific steps a public entity must take before awarding a contract. They include developing and implementing a minority business outreach plan, attending prebid conferences, and providing notice to minority businesses at least ten days prior to the bid opening. The statute specifies what information must be included in the notice.

The steps that bidders must take to satisfy the good faith efforts requirement are set out in G.S. 143-128.2(f). This subsection requires the use of a point system to determine whether a sufficient effort has been made. There are ten activities listed in the statute from which bidders may choose in carrying out their obligations under the law, and each activity will be assigned points. The Secretary of the Department of Administration is responsible for adopting rules to establish the points required based on project size, cost, type and other factors the secretary considers to be relevant. The total points required may not exceed fifty, and the secretary must assign at least ten points to each of the ten efforts listed in the statute. The secretary is required to adopt rules to implement this requirement no later than June 30, 2002. Until sixty days following the adoption of those rules, a bidder must show compliance with at least five of the ten efforts in order to comply with the good faith efforts requirement. The statute allows any public agency to require additional efforts in its bid specifications.

Under G.S. 143-128.2(c) all bidders (including first-tier subcontractors on CM at risk projects) must identify on their bids the minority businesses that they will use on the project and the total dollar value of the bid that will be performed by minority businesses. They must also include an affidavit listing the good faith efforts they have made under subsection (f). If contractors intend to perform all of the work with their own forces, they may submit an affidavit to that effect instead of providing the otherwise required information on minority participation and good faith efforts.

After bids are received, the apparent lowest responsible bidder must provide additional information within a time period specified in the bid documents. This bidder must provide either (1) an affidavit describing the portion of the work to be executed by minority businesses, expressed as a percentage of the total contract amount, showing a percentage equal to or more than the applicable goal on the project, or (2) documentation of good faith efforts to meet the goal, “including any advertisements, solicitations, and evidence of other specific actions demonstrating recruitment and selection of minority businesses for participation in the contract.” G.S. 143-128.2(c)(1)(b). The law states that an affidavit showing participation equal to or greater than the applicable goal “shall give rise to a presumption that the bidder has made the required good faith

5. S.L. 2001-496 (S 914), sec. 14(c).

effort.” G.S. 143-128.2(c)(1)(a). Within thirty days after a contract is awarded, the successful bidder must list all identified subcontractors that will be used on the project. Failure to provide the affidavit or documentation required to demonstrate good faith efforts is grounds for rejection of a bid.

The new law adds provisions limiting replacement of subcontractors. This addresses the concern that minority contractors may be used for purposes of obtaining a contract and then substituted with nonminority contractors after the contract is awarded. Under G.S. 143-128.2(d) a subcontractor may not be replaced except (1) when the subcontractor’s bid is determined to be nonresponsive or nonresponsive or the subcontractor refuses to enter into a contract for the complete performance of the work, or (2) with the approval of the public entity “for good cause.” The statute requires that when selecting a substitute subcontractor, the contractor must make and document good faith efforts as required for informal construction or repair contracts under G.S. 143-131(b).

All of the public records created under the requirements of this new section, including good faith efforts documentation, must be maintained for at least three years from the date of completion of the building project. G.S. 143-128.2(i). This requirement supersedes any otherwise applicable rules for record retention for these documents.

Administration, Enforcement, and Reporting

A new statute, G.S. 143-128.3, describes the reporting and administration provisions for the new good faith efforts requirements described above. Public agencies are required to report to the Department of Administration for each building project: (1) the verifiable percentage goal; (2) the minority business utilization achieved, the good faith efforts guidelines or rules used, and the documentation accepted by the public agency from the successful bidder; and (3) the utilization of minority businesses under the various construction methods authorized under G.S. 143-128(a1). (The second and third requirements appear to require some of the same information.) The University of North Carolina and the State Board of Community Colleges must report quarterly, and all other public agencies must report semiannually. The specific format and data required will be determined by the Department of Administration, and the department is required to report the information received to the Joint Legislative Committee on Governmental Operations every six months.

The statute gives the Department of Administration responsibility for overseeing and enforcing compliance with the good faith efforts requirements. If a public agency receives notice from the secretary that it has failed to comply with the statutory requirements on a project, the agency must develop a compliance plan that addresses the deficiencies identified by the secretary. The corrective plan must apply to the current project to the maximum extent feasible, or to subsequent projects. If the public agency fails to file a corrective plan or fails to implement it, the secretary may require consultation with the department on the development of a new plan and may require that the agency refrain from bidding another project without prior review by the department and the Attorney General as to compliance with the plan. The agency may be subject to review of its good faith compliance for a period of up to one year under this remedial provision. These actions may be contested by an aggrieved agency under the Administrative Procedures Act. The Secretary of the Department of Administration is required to report to the Attorney General the failure of a public agency to provide the required data, any false statements knowingly provided to a public agency in an affidavit under G.S. 143-128.2 (agencies are required to notify the secretary of any such false information they receive), and any other information requested by the Attorney General.

Finally, the law requires the secretary to study ways to improve the effectiveness and efficiency of state capital facilities development, minority business participation, and good faith efforts. The statute calls for the secretary to appoint an advisory board to develop recommendations to improve the recruitment and utilization of minority businesses and requires the secretary to adopt rules and guidelines for implementation of the good faith efforts and other

requirements of G.S. 143-128.2. The law also amends the statute governing the powers and duties of the State Building Commission to incorporate rulemaking, oversight, and administration of state projects under the new law.

Good Faith Efforts Requirements for Contracts in the Informal Bid Range

The foregoing requirements all apply to building construction contracts costing \$300,000 or more. Until now there have been no requirements in state law for promoting the use of minority businesses in building construction or repair projects in the informal bidding range. A new provision has been added to the informal bidding statute, G.S. 143-131, requiring public agencies to solicit minority participation for building construction or repair contracts in the informal range (between \$5,000 and \$300,000). The law requires the agency to document its efforts but makes clear there is no requirement to formally advertise for bids. (The informal bidding process allows the public agency to obtain bids in any manner and does not require advertisement, sealed bids, or public bid openings.) Upon completion of the project, public agencies must report to the Department of Administration, Office of Historically Underutilized Business, “all data, including the type of project, total dollar value of the project, dollar value of minority business participation on each project, and documentation of efforts to recruit minority participation.” G.S. 143-131(b).

It seems clear from the language in this provision that the law does not require compliance with the detailed efforts set forth in G.S. 143-128.2 for contracts in the informal range. It is also important to note that the requirements to solicit and document minority participation apply only to *building* construction contracts and not to those involving other types of construction, such as street and utility projects. They also do not apply to purchase contracts. In addition, there is potential for confusion in determining whether the informal good faith efforts in G.S. 143-121(b) rather than the more detailed requirements of 143-128.2 apply. While the informal bidding statute applies to “contracts,” the building construction statutes, G.S. 143-128 and the new 143-128.2, apply to “projects.” It is possible to have a contract that is in the informal bidding range (between \$5,000 and \$300,000) that is part of a project of \$300,000 or more. The best interpretation would appear to be that the informal minority outreach procedures apply when a building construction or repair contract is not part of a project of \$300,000 or more. This means that contracts in the informal range will be subject to the more detailed good faith efforts requirements if they are part of a project that will cost more than \$300,000.

Legal Considerations for Implementation of Minority Contracting Provisions

Programs designed to increase the use of minority-owned businesses on public projects have been subject to challenges in state and federal courts since the United States Supreme Court’s decision in 1989 invalidating the City of Richmond’s program.⁶ As enunciated in that case, programs that create preferences or otherwise use race as a factor in the award of public contracts are subject to strict scrutiny and must be supported by a compelling justification by the government in order to satisfy the constitution’s equal protection requirement. To meet that requirement, many jurisdictions, including several North Carolina local governments and the State of North Carolina, have conducted disparity studies to document the history of discrimination in the construction industry as well as the underutilization of minority businesses by the public agencies themselves. Many local governments in North Carolina, however, have not conducted such inquiries and do not have documentation to support the goals programs that have been in effect pursuant to the requirements of G.S. 143-128(f). While many have argued that the “good faith efforts” requirements under the statute do not create a preference and are thus race neutral, a review of cases decided around the country suggests that if challenged, a decision to reject a bid for failure to meet the good faith efforts requirement would probably be subject to strict scrutiny.

6. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

The new law does not fundamentally change the structure of the minority contracting program in North Carolina, but its increased specificity and mandatory provisions make it both more effective for the purpose it is intended to serve but also, perhaps, more likely to invoke a legal challenge. (Under the prior law, local governments decided independently what constituted a sufficient good faith effort and often did not carefully scrutinize the efforts reported by contractors.) In light of this, local government officials are advised to review the goals they are using and to develop or obtain information about the availability and local utilization of minority contractors in order to establish supportable goals. Public agencies should consider developing separate goals for the different categories of minority firms, as defined under the statute, and for different types of work, since the availability of minority firms varies according to the type of contract involved. Without this evidentiary support and specificity of goals, a program is unlikely to survive a legal challenge. Even though local governments are mandated by state law to comply with the requirements of the statute, they are not insulated from liability since they have the capacity (at least in theory) and the legal obligation to implement the statutory requirements in a constitutional manner.

Public Bidding Procedure Changes

The primary statute that governs public bidding procedures for public agencies, G.S. 143-129, was amended by S.L. 2001-328 (H 1169). The changes clarify ambiguous provisions, create new exceptions to the bidding requirements, provide more options for local administration, and make technical changes. The law also increased the bidding threshold for purchasing, which was increased again in the later-enacted statute described above.

Increase in Bid Threshold

The formal bidding threshold for purchasing apparatus, supplies, materials, and equipment was increased in S.L. 2001-328 from \$30,000 to \$50,000 and was increased again in S.L. 2001-496 to \$90,000, where it now stands. This threshold, contained in G.S. 143-129, applies to each contract (not each item) purchased with public funds and was last increased in 1997. Informal bids required under G.S. 143-131 will, by virtue of the wording of that statute, automatically apply to contracts between \$5,000 and the new formal bid limit of \$90,000. This bid threshold applies only to local government agencies other than local school units. Local school units, community colleges, and state agencies are subject to the requirements in Article 3 of Chapter 143 of the General Statutes as administered by the Department of Administration for contracts to purchase supplies, materials, and equipment.

Advertisement of Bid Opportunities

Contracts that are subject to the formal bidding requirements of G.S. 143-129 must be advertised as required by that statute. Questions of interpretation have arisen due to the wording of the requirement regarding the minimum time for which the advertisement must appear prior to the bid opening. The language in the statute has been changed to make clear that for all contracts that are subject to this requirement, at least seven days must elapse between the date of the advertisement and the date of the bid opening. In many cases public agencies allow significantly more time than the minimum in order to provide ample opportunity for preparation of bids. However, in some cases, including where rebidding is necessary due to insufficient number of bids received, agencies wish to advertise for the minimum time allowed by law. In these cases, the clarification will eliminate ambiguity and provide a clear standard for what is required.

The formal bidding statute was also amended to allow electronic instead of newspaper advertisement if the governing board approves the use of this method.⁷ Prior to this change, public agencies have been free to publicize bidding opportunities through various methods *in addition* to the required newspaper notice. Local governments have commonly provided individual notice by mail to interested bidders. In order to provide broader notice of bidding opportunity, some local governments also have begun to use electronic media, including their own Web sites, the state's Web site,⁸ and services that publicize bidding opportunities electronically at no charge to the public agency. These efforts, though not specifically required or authorized, are legal and practical means to increase competition for public contracts. Indeed, in many cases, they are more likely to generate bids than the mandatory local newspaper advertisement, especially when specialized equipment or large contracts are involved.

Under G.S. 143-129(a), as revised by S.L. 2001-328, a governing board may now authorize the use of electronic advertisement of bidding opportunities *instead* of publication in a newspaper of general circulation in the area. This authorization may be for all contracts that require advertisement under the statute or for particular contracts on a case-by-case basis. Although the statute does not specifically provide for it, it would seem that the governing body could authorize the use of electronic advertisement generally and delegate to a local official the authority to determine which method or combination of methods to use for particular contracts.

The statute does not define what it means to advertise electronically. Most local units will make use of local and other Web sites but could also use e-mail notice and other electronic methods. In determining the means to be used, the local unit should attempt to meet at least two important purposes underlying the advertisement requirements. The first is to obtain competition for the contracting opportunity. This includes making bid information accessible to both large and small contractors, including local vendors as well as those from a broader market. The second is to make available to the citizens in the jurisdiction information about the contracts their government will award. As such, it is recommended that information about bidding and contracting opportunities continue to be made accessible to local citizens, for example, on the local government's Web site or in other physical locations where public notices are regularly posted.

Finally, it is important to note that the new provisions relate only to electronic advertisement of bidding opportunities and do not authorize electronic receipt of bids. Under existing law, bids that are subject to formal bidding must be submitted as sealed bids and must be opened at a public bid opening. Further statutory changes would be necessary to authorize electronic receipt of bids that are in the formal bidding range.

The foregoing changes apply to local school units, community colleges, and state agencies only with respect to contracts for construction or repair work.

New Exceptions to Public Purchasing Requirements

The formal bidding statute contains several exceptions, and several new exceptions were authorized this session. The statute was also reorganized so that most of the exceptions appear in subsection (e) of G.S. 143-129. The wording of the exceptions as contained in subsection (e) makes clear that they apply to both the formal bidding requirements under G.S. 143-129 and the informal requirements under G.S. 143-131. When a contract falls within an exception, there are no procedures that must be followed unless a particular exception requires them. For example, existing exceptions for sole sources [G.S. 143-129(e)(6)] and for previously bid contracts [G.S. 143-129(g), commonly referred to as the "piggybacking" exception] require governing board approval. Contracts made under the new state contract exception, however, do not require board

7. A similar provision was included in the budget as a special provision to authorize the state Department of Transportation to accept electronic bids. S.L. 2001-424 (S 1005), sec. 27.9(a).

8. The bidding statute that governs state contracts, G.S. 143-52, was amended in 1997 to specifically authorize electronic advertisement of bidding opportunities, and the state maintains a Web site on which it advertises bidding opportunities with the state. The state also invites local governments to advertise bidding opportunities on the state Web site as well.

approval unless mandated by locally established procedures. New exceptions enacted in S.L. 2001-328 include purchases from state contracts, purchases of used equipment, and purchases from competitive group purchasing programs. An exception for information technology purchases is discussed in the next section. These exceptions do not apply to local school units, community colleges, or universities or other state agencies that are subject to the purchasing requirements established by the state Department of Administration.

State contract purchases. The state Department of Administration, Division of Purchase and Contracts, establishes state term contracts to serve the needs of state agencies and local school units. These entities are generally required to purchase from state contracts. The division has for many years made state contracts available to local governments and in some cases has established contracts that are primarily used by local governments. The procedures and legal authority for local governments to purchase from state contracts, however, have been unclear. The bidding statute has now been amended to clarify that local governments are not required to comply with formal or informal bidding procedures when purchasing from contracts “established by the State, or any agency of the State.” (This last phrase means, for example, that local governments may purchase under this exception from an agency other than the Department of Administration, such as the Department of Transportation.) This exception is codified as G.S. 143-129(e)(9).

This new exception does not create any obligation on the part of state contractors to extend prices to local governments, although the state could impose such a requirement in particular contracts. A purchase under this exception does not require approval by the state. A local government is not required to commit to purchase from the contract in advance in order to take advantage of the exception. The state may continue to give local governments the opportunity to participate in contracts, entitling them to purchase under those contracts and creating an obligation on the part of the vendor and the local government as parties to the contract.

The new exception for state contract purchases overlaps with the existing exception under G.S. 143-129(g), the “piggybacking” exception. That exception authorizes local governments to purchase without bidding from contractors that have contracted with another public agency within the past year. It is important to recognize that if the previous contract was with the State of North Carolina or any North Carolina state agency, the local government may purchase directly under the new state contract exception without complying with the notice and board approval requirements under subsection (g). Furthermore, the twelve-month limitation in subsection (g) does not apply to state contract purchases. The state contract exception also overlaps with the existing exception for purchases from the state Office of Information Technology [G.S. 143-129(7)], a state agency. There are no procedural requirements that apply to the use of that exception, so there will be no difference between using it and using the new state contract exception.

Purchase of used equipment. Another new exception, codified as G.S. 143-129(e)(10), authorizes the purchase without bidding of used equipment. Under this exception a local unit may, for example, purchase used equipment at a private auction, or may purchase by any other means it deems appropriate, any item of used apparatus, supplies, materials, or equipment. The exception makes clear that remanufactured items, refabricated materials, or demo equipment⁹ are not within its scope. Purchasing officials should generally assume that materials that are sold on the market as new are not covered by this exception.

Competitive group purchasing programs. An existing exception for purchases made through competitive group purchasing programs that only applied to hospitals now applies without limitation to any unit of government to which the bidding requirements apply. This exception has been recodified as G.S. 143-129(e)(3). Group purchasing programs may be organized by public or private entities for the purpose of providing products at discounted prices to their subscribers. They generally offer volume discounts due to the pooling of purchasing power by participating agencies. The needs of the participating agencies are identified, competition is sought, and

9. This provision was added in the Technical Corrections Act, S.L. 2001-487 (H 338), sec. 88. A *demo item* is defined as one that is used for demonstration purposes and is sold by the manufacturer or retailer at a discount.

contracts are awarded from which the participating entities may purchase. Without this exception, purchases from these programs would require separate bidding by North Carolina local governments. The exception does not dictate how the group purchasing system must operate, except that the entity that awards the contracts from which local units purchase must obtain prices competitively when selecting the contractors.

Request for Proposals for Information Technology Contracts

A new statute creates another exception to the bidding requirements that applies to contracts for the purchase of information technology goods and services. Under G.S. 143-129.8, local governments may use a request for proposals (RFP) process for purchasing information technology, defined in G.S. 147-33.81(2) to include “electronic data processing goods and services and telecommunications goods and services, microprocessors, software, information processing, office systems, any services related to the foregoing, and consulting or other services for design or redesign of information technology supporting business processes.” Procurements under this statute must be advertised in the same manner as is required for formal bids under G.S. 143-129(a), including solely by electronic means if authorized under the new provision in that subsection, discussed earlier. The standard for awarding a contract under this statute is more flexible than the existing “lowest responsible bidder” standard for contracts that require bidding. Contracts may be awarded to the submitter of the “best overall proposal,” and the statute requires that factors to be considered in awarding contracts be identified in the RFP.

Another important difference between the new RFP process and the standard bidding procedure is that the RFP provision permits negotiation after proposals are submitted, something that is often desirable to conform the best proposal to the specific needs of the local government. Protections are written into the law, however, to prevent negotiations that undermine the competitive process. Negotiations must not alter the contract beyond the scope of the original proposal in a manner that (1) deprives the proposers or potential proposers of a fair opportunity to compete for the contract, and (2) would have resulted in the award of the contract to a different proposer if the changes had been included in the original RFP.

Finally, the new statute provides that proposals are not subject to public inspection until a contract is awarded. It is important to note that this language does not necessarily protect trade secrets or other information from disclosure at a later time under the public records law. That protection is available under G.S. 132-1.2, but only if the material meets the definition of trade secrets as provided under that law. The protection in the RFP statute simply allows the local government, if it chooses, to refrain from providing copies of the RFPs to the public while they are being evaluated. The local government is free to disclose the material (except for trade secrets that have been properly identified) as it deems appropriate and is required to disclose it once a contract is awarded.

A similar procedure was approved in S.L. 2001-54 (S 675), applicable only to the city of Winston-Salem and Forsyth County.

Miscellaneous Changes in Bidding Laws

In addition to those already discussed, S.L. 2001-328 made numerous other changes of a more technical nature in the competitive bidding statutes.

Bonding requirements. The statute previously required local governments to obtain performance, payment, and bid bonds for all formal bids, but it authorized a waiver of these bonding requirements for contracts for the purchase of apparatus, supplies, materials, or equipment. Many jurisdictions waived the requirements as allowed under the statute, but more often jurisdictions simply failed to obtain the bonds even though no formal waiver was in place. The law now simply eliminates these requirements. Public agencies may still require the bonds at their discretion but need not go through the step of approving a waiver if they are not desired. These bonds remain mandatory and may not be waived for construction or repair contracts in the formal bidding range.

Recording bids in board minutes. The bidding law has for many years required that bids be recorded in the minutes of the governing board. The common practice in local governments, however, is to report to the governing board *a summary* of the bids received, while the bids themselves are retained and discarded in accordance with the state records retention requirements. The law has been revised to eliminate the requirement that bids be recorded in the minutes. If the board acts on the contract [which is required for all contracts in the formal range but can be delegated for purchase contracts in the formal range under G.S. 143-129(a)], a permanent record of the action will be contained in the board's minutes. For all other contracts, records will be retained and discarded in accordance with the records retention rules.

Standard for rejecting bids. The formal bidding statute provides broad authority for the governing board to "reject any and or all proposals" and limits that authority by stating that proposals shall not be rejected "for the purpose of evading the provisions of this Article." G.S. 143-129(b). New language has been added stating that the board can reject proposals for any reason it determines to be in the best interest of the unit, but the existing limitation on rejecting bids is retained. This change emphasizes the unit's potentially legitimate interest in rejecting bids, though questions of interpretation may still arise in particular circumstances when bids are rejected.

Other technical changes. A number of technical changes are also made in this law, some of which are briefly noted here. Changes have been made in the statutory provisions relating to withdrawal of bids for mistake (G.S. 143-129.1) and to negotiations that are allowed when all bids exceed the funds available [G.S. 143-129(b)] to clarify that both of these procedures are available for purchase contracts as well as for construction or repair contracts. The bid withdrawal statute requires that the bidder submit notice of withdrawal within seventy-two hours of the bid opening. This provision has been amended to authorize the public agency to provide in its instructions to bidders for a longer period for submission of a request to withdraw a bid. This change provides the authority for units to include a standard provision in their specifications to extend the period for withdrawal to the beginning of the next business day in the event that the seventy-two-hour period expires on a weekend or holiday. The provision that allows the governing board to delegate authority to award purchase contracts in the formal bid range and to perform other related functions [G.S. 143-129(a)] has been amended to clarify that the delegation can be made to the manager, the chief purchasing official, or both.

School Purchasing

Several changes made this session affect local school purchasing procedures. As noted earlier, the changes in G.S. 143-129, the formal bidding statute, apply to local school units only for contracts for construction or repair work. The changes noted in this section apply to local schools, community colleges, and state agencies, all of which are subject to the purchasing procedures established by the state Department of Administration.

Procurement Cards/E-Procurement

For the past several years, special provisions in the state budget have limited the authority of local school units and state agencies to use procurement cards to obtain goods and services. These cards function like credit cards and are issued for the sole use of the public agency, subject to limitations on amount and type of purchase that are recognized by the issuing financial institution. The state established a pilot program under which a limited number of state agencies, community colleges, universities, and local school units were permitted to use procurement cards. Those not chosen for the pilot program were prohibited from using them. This year, the budget contains a provision that lifts the ban on general use of procurement cards.¹⁰ This special provision also

10. S.L. 2001-424, sec. 15.6.

amends G.S. 143-49, which lists the powers of the Secretary of Administration, to add a new subsection (8) spelling out the secretary's responsibilities with respect to the procurement card program. A provision that would have limited the use of procurement cards to the e-procurement service and imposed a card purchase limit of \$250 for the University of North Carolina at Chapel Hill and North Carolina State University was removed in the Appropriations Technical Corrections Act.¹¹

In addition, the budget special provision establishes a statewide electronic procurement system to be used by state agencies and local school units. The use of the system is intended to be mandatory for these agencies. Exemptions from the use of the state's system are provided for a limited time for units that have previously developed their own systems and for North Carolina State University and The University of North Carolina at Chapel Hill.

Reciprocal Bid Preference

North Carolina does not allow or require in-state preferences for bidders on public contracts. Some states do, however, and this year the legislature enacted a provision to penalize bidders from those states. S.L. 2001-240 (H 3) amends G.S. 143-59 to impose a "reciprocal preference" on bids submitted by nonresident bidders in an amount equal to "the percent of increase, if any, that the state in which the bidder is a resident adds to bids from bidders who do not reside in that state." This requirement becomes effective January 1, 2002, and applies to contracts for equipment, materials, supplies, and services valued at over \$25,000. It applies to state agencies, community colleges, and local school units. The Secretary of the Department of Administration will be responsible for publishing a list of states with in-state preferences and the amount of those preferences for purposes of applying the statute. The requirement does not apply in emergencies and the secretary has discretion to waive it after consultation with the Board of Award.

Miscellaneous Construction Contracting Changes

In addition to the major changes in construction contracting procedures described above, several other changes affecting the construction process were enacted this session.

Landscape Architect Law Changes

The statute governing the practice of landscape architecture has been the subject of an ongoing disagreement between some landscape architects and engineers and their respective regulatory boards, due to the overlap of work that they legally may do. S.L. 2001-496 revised G.S. 89A-1(3) by including within the practice of landscape architecture the performance of services in connection with the development of land areas where "the dominant purpose . . . is the preservation, enhancement or determination of proper land uses, natural land features, ground cover and planting, naturalistic and aesthetic values, the settings, approaches or environment for structures of other improvements, natural drainage and the consideration and determination of inherent problems of the land relating to the erosion, wear and tear, blight or other hazards." The statute was also amended to include a list of specific design elements that may be prepared by a landscape architect. These include: (1) location and orientation of buildings and similar site elements; (2) locations, routing, and design of streets, but not construction plans for major thoroughfares or larger roads; (3) location, routing, and design of public pathways and other travelways; and (4) design of surface or incidental subsurface draining systems, soil conservation, and erosion control measures necessary to an overall landscape plan and site design. The act requires the respective boards to enter into a memorandum of understanding that identifies the areas of overlap or common practice along with a means of resolving disputes concerning the

11. See S.L. 2001-513, sec. 28(b).

standards of practice, qualifications, and jurisdiction of the respective professions. The parties are required to submit a joint report to the legislature by April 30, 2002. The law also authorizes a Legislative Research Commission study of the issue. S.L. 2001-496, Section 12.1(c).

General Construction Changes

A number of small changes were made in various statutes that affect public construction contracts. The statute governing claims on payment bonds, which guarantee payment of laborers and suppliers on public projects, was amended in S.L. 2001-177 (H 1053). As amended, G.S. 44A-27(b) reduces from 180 to 120 the number of days within which the claimant must provide to the contractor written notice of the claim. For general contractors, state law establishes thresholds for the various classifications of licensure. In S.L. 2001-140 (S 431), the thresholds for limited and intermediate licenses were increased to reflect inflation. The project cost limit under G.S. 87-10(a) for an intermediate license was increased from \$500,000 to \$700,000, and the limited license threshold was increased from \$250,000 to \$350,000.

Greater energy efficiency will be required in state projects under various provisions enacted in S.L. 2001-415 (H 1272). This act requires the use of "life-cycle cost analysis" in renovation and construction of public facilities. This analysis evaluates the energy efficiency and cost over the life of the facility or product as part of the design process. The act also establishes a pilot program for the use of "high performance guidelines" developed by the Triangle J Council of Governments to achieve energy conservation in state facilities.

Finally, a number of jurisdictions have obtained local legislation exempting particular projects from the construction bidding requirements. In S.L. 2001-329 (S 405), the City of Charlotte obtained authority to enter into reimbursement agreements with private developers for the design and construction of infrastructure included in the city's capital improvement plan. The act provides that the bidding laws do not apply to the city under these agreements, but the developer must competitively bid the work. The city received separate authority with similar exemptions for storm drainage improvements and intersection and road improvements ancillary to a private land development project. S.L. 2001-248 (S 534). Johnston County obtained an expansion of a previously authorized exception to the bidding requirements for construction of certain schools. S.L. 2001-135 (H 935). The Forsyth County and Stanly County school systems obtained authority to use a repetitive design approach and to negotiate (instead of competitively bid) contracts with single-prime or separate-prime contractors to expedite school construction projects. S.L. 2001-99 (S 401). The Wake County School system obtained authority to solicit bids from prequalified contractors and to use the construction management and design-build methods of construction for school projects until July 1, 2005. S.L. 2001-44. Construction bidding exemptions for particular projects were obtained by Carteret County to convert a former A&P shopping center into a county health and human services building [S.L. 2001-69 (H 856)], by the Village of Pinehurst for the restoration of a historic property [S.L. 2001-66 (H 196)], and by the College of the Albemarle for construction of a multipurpose facility in Elizabeth City [S.L. 2001-66 (H 196)].

Public Records Exception for Security Plans

In response to concerns about maintaining the confidentiality of plans for public security, the legislature has enacted a new exception to the public records law. S.L. 2001-516 (H 1284). A new statute, G.S. 132-1.6, provides that the definition of public records does not include information containing "specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities." This provision could apply to plans and specifications used in the bidding process, though it may be difficult to maintain confidentiality in this context since plans are widely made available to potential bidders. A public agency could consider restricting their use and requiring bidders to provide plans only to third parties who intend to participate in the bidding process (such as potential subcontractors).

Disposal of Property

Included in the act that made numerous changes in the purchasing laws, S.L. 2001-328, were several changes in the statutes that govern the sale or other disposal of public property. These laws are contained in Article 12 of Chapter 160A of the General Statutes and apply to cities, counties, local school units, community colleges, and some other types of local governments.¹²

A change in the public auction procedures in G.S. 160A-270 might best be understood as the “E-Bay for public agencies” provision. It adds a new subsection to specifically allow public agencies to conduct electronic auctions for the sale of real or personal property. The governing board may authorize electronic auctions using either a public or a private service. The act requires that notice of the auction be provided in the same manner as for traditional auctions—that is, advertisement in a newspaper of general circulation in the jurisdiction conducting the auction. In the case of an electronic auction, the notice must identify the electronic address at which information about the property to be sold may be found as well as the electronic address where bids may be posted. Although it is unlikely that local governments will abandon the traditional surplus property auction, electronic auctions have proved effective for specialty equipment that has a national or international, rather than a local, market. The state may provide a useful model to local governments considering the use of this method since it currently uses electronic auctions for the sale of surplus property.

Another change in the property disposal laws clarifies local government authority to discard property. S.L. 2001-328 amended G.S. 160A-266 by adding a new subsection (d), which provides that a local government may discard personal property that has no value, remains unsold or unclaimed after the unit has exhausted efforts to sell it using applicable procedures, or poses a potential threat to the public health or safety. Although the authority to dispose of property in these situations may have been implicit, the law is now explicit.

A third change affecting the property disposal laws clarifies the language in G.S. 160A-274(b), with the effect of overruling a North Carolina Court of Appeals decision interpreting that law. The opinion, *Carter v. Stanly County*,¹³ invalidated a conveyance from a county to the state on a very narrow reading of the authority for intergovernmental transactions under the statute. As revised, it is clear that governments have broad authority to convey any type of property interest to other units of government.

Conflicts of Interest

Several criminal laws prohibit public officials from obtaining personal benefit from contracts with the units of government they represent. The importance of these limitations is evident from their presence in the criminal code. Unfortunately, the wording of the existing statutes, some enacted more than 150 years ago, has made them difficult to enforce and has limited their use as a guide to public officials on how properly to conduct their public and private business dealings. This session, the legislature enacted S.L. 2001-409 (H 115), which consolidates, clarifies, and in some respects changes the laws governing conflicts of interest in public contracting. The major changes in the law, most of which take effect July 1, 2002, are summarized below.

The main criminal statute governing conflicts of interest in contracting, G.S. 14-234, generally prohibits public officials from obtaining personal benefit from contracts awarded by the public agencies they represent. An exception in subsection (d1) of that law allows local elected officials and officials appointed to certain local boards to contract with their agencies in small jurisdictions for an amount not to exceed a statutory limit. Taking into account changes in population from the recent census, the legislature amended this exception with the intent that it

12. For more information about disposal of public property and the applicability of statutory procedures affecting these transactions, see David M. Lawrence, *Local Government Property Transactions* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2000).

13. 125 N.C. App. 628, 482 S.E.2d 9 (1997).

become effective retroactively on April 1, 2001, to increase the population limit that determines which jurisdictions are covered by the exception and to increase the dollar limit for contracts allowed under the exception. (Due to an error in the original bill, and a subsequent error in the technical corrections bill, these changes will become effective April 1, 2002.¹⁴) As revised, the exception will apply to incorporated municipalities with a population of no more than 15,000, counties in which there is no incorporated municipality with a population of more than 15,000, and school districts in counties in which there is no incorporated municipality with a population of more than 15,000. This is an increase from the preexisting population threshold of 7,500. Contracts made under this exception may not exceed within a twelve-month period \$12,500 for medically related services (increased from \$10,000) and \$25,000 for other goods or services (increased from \$15,000).

There are two principal criminal laws governing self-dealing in public contracts—G.S. 14-234 and G.S. 14-236. These laws have different but overlapping provisions prohibiting public officers and employees from benefiting from contracts made by their agencies. G.S. 14-234 has broad application to all types of contracts but only limits interests in contracts that would benefit individuals who are involved in the making of the contract. The precise coverage of the statute is actually somewhat unclear. In contrast, G.S. 14-236 applies only to state agencies and educational and eleemosynary institutions (a narrower scope than in G.S. 14-234) and prohibits interests in contracts for the purchase of “goods, wares, and merchandise” (also narrower than in G.S. 14-234). However, the statute applies to all employees, regardless of their involvement in the making of the contract (here broader than in G.S. 14-234). A third statute, G.S. 14-237, establishes a separate criminal offense for each board member who approves a contract that violates G.S. 14-236.

Effective July 1, 2002, the legislature repealed G.S. 14-236 and -237 and incorporated several of the components of those statutes into a completely revised G.S. 14-234. This change clarifies the coverage of the conflict provisions and creates a uniform standard of conduct for all public officials, whether at the state or local level.

There are three main prohibitions in the statute as revised:

1. Public officials or employees are prohibited from obtaining a direct benefit from any contract in which they are involved on behalf of the public agencies they serve.
2. Even if public officials or employees are not involved in making a contract in which they have a direct benefit, they are prohibited from influencing or attempting to influence anyone in the agency who is involved in making the contract.
3. All public officials and employees are prohibited from soliciting or receiving any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract.

The bill defines *direct benefit* in a manner that incorporates exceptions that exist under the current law. The revision also includes the interest of a spouse in the definition, a change that is more consistent with the intent of the law than is reflected in at least one court decision on the subject.¹⁵

Under the revised law, a person directly benefits from a contract if the person or his or her spouse (1) has more than a 10 percent interest in the company that is a party to the contract, (2) derives any income or commission directly from the contract, or (3) acquires property under the contract. This essentially incorporates the exceptions in section (c1) of the existing statute. The new version, however, takes the approach of defining what a prohibited benefit is, rather than defining only what is not prohibited, which is the approach under the current law.

The revised law also clarifies what it means to be involved in making a contract, which is now defined to include participating in the development of specifications or terms or preparation or award of the contract. It also makes clear that an official is involved in making the contract when the board or commission on which he or she serves takes action on the contract, even if the official

14. See S.L. 2001-487, sec. 44(a).

15. See *State v. Debnam*, 196 N.C. 740, 146 S.E. 857 (1929), holding that a contract by a local school board to purchase goods from the spouse of a school board member did not violate G.S. 14-236.

does not participate. This prevents such officials from benefiting, for example, by not attending a meeting at which a contract from which they would benefit comes up for a vote. The law also prohibits officials from having a direct benefit in contracts they are responsible for administering. A new definition provides that a person is involved in administering a contract if he or she oversees the performance of the contract or has authority to make decisions regarding the contract or to interpret the contract. The statute also specifies that public officials are not involved in making or administering contracts under the statute if they only perform ministerial duties related to the contract.

The other exceptions in the current law are retained and consolidated into one subparagraph (b). A new exception allows public officials to convey property to the agencies they serve under a condemnation proceeding as long as the conveyance is done by court order. Another provides that the spouse of a public officer may be an employee of the unit the public officer serves without being in violation of the law. The law specifies that any time a contract is entered into under an exception, the interested official is prohibited from deliberating or voting on the contract.

A new subsection was added to provide that contracts made in violation of this statute are void, but it allows for limited continuation of a void contract when necessary to prevent harm to the public safety and welfare. The statute gives authority for approval of this limited continuation to the chair of the Local Government Commission (for local agencies) and the state Director of the Budget (for state agencies).

Provisions similar to those contained in the revised G.S. 14-234 have been incorporated into conflicts of interest statutes affecting public hospitals and hospital authorities.

Frayda S. Bluestein

