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Public Purchasing and Contracting

The most significant legislative changes in the purchasing and contracting area this session affect contracting by local school units and community colleges. Several bills designed to provide flexibility in school contracting were enacted based on recommendations from the Legislative Education Oversight Committee. Other changes reflect the increasing use of technology in public contracting.

School Construction Contracts

Single-Prime and Separate-Prime Bidding

Identical bills introduced in the House and Senate during the 1998 legislative session would have allowed local school units to receive bids for major building construction projects on a single-prime only basis as recommended by the Legislative Education Oversight Committee. One of the bills, House Bill 1327, was enacted as S.L. 1998-137 but with a different approach from the original bill. The new law creates a new subsection of G.S. 143-128 that applies only to local school administrative units. A brief summary of the existing statute will be useful in understanding the effect of the new subsection.

Current Separate-Prime Bidding Requirements. For building construction projects estimated to cost over $500,000, the state and local governments (including local school units) are required to receive bids on a separate-prime (also called "multiple-prime") basis under G.S. 143-128(b). This means that specifications must be divided into at least four categories specified in the statute—(1) heating, ventilating, and air conditioning; (2) plumbing; (3) electrical; and (4) general construction work not included in the other three categories—and bids must be solicited in each of these categories of work. Subsection (d) of the statute authorizes the unit to solicit bids on a single-prime basis, that is, a single bid for the entire project, but requires that the unit solicit separate-prime bids as well. Thus, bids may be received on a separate-prime only basis, or on a separate-prime and single-prime basis, but not on a single-prime only basis. When bids are received both ways, the award is made to the lowest responsible bidder or bidders for the entire project. This is done by comparing the lowest single-prime bid received with the total of the lowest bid in each category of separate-prime bids. Subsection (d)

also requires single-prime bidders to identify in their bids the subcontractors they will use for each of the four categories of work listed above.

New Option for Awarding School Construction Contracts. S.L. 1998-137 creates a new subsection, G.S. 143-128(d1), which authorizes local school units to award a contract to *either* the lowest responsible single-prime bidder or the lowest responsible set of separate-prime bidders. The new law does not allow local school units to receive bids on a single-prime only basis. Local school units must still receive bids on either a separate-prime only basis or on both the single-prime and separate-prime bases. The difference is that the new statute allows a school unit to award a contract to a single-prime contractor even if the single-prime bid is higher than the lowest set of separate-prime bids, or to award to the separate-prime contractors even if their bids are higher than the lowest single-prime bid. Local school units are also free, under the new provision, to award contracts as provided under subsection (d) summarized above.

The new law states that in deciding how to award the contract under subsection (d1), the local school unit "may consider the cost of construction oversight, time for completion, and other factors it deems appropriate." This language appears to give the local school board broad discretion in determining whether to choose the single-prime or separate-prime system for a particular construction project. It is not clear, however, whether it is legally necessary for the board to articulate the basis for its decision. As a general rule, a court will invalidate a contract award decision only in cases of fraud or abuse of discretion. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. 383, 384, 416 S.E.2d 607, 608, *cert. denied*, 332 N.C. 345, 421 S.E.2d 149 (1992). If a board articulates the factors upon which it relies, it is unclear how much support the board would have to have for its reliance on those factors. For example, if the board awards to the single-prime contractor based on the board's determination that this method will be cheaper and faster than the separate-prime system, could the board be called upon to demonstrate support for its conclusion, or be challenged for failure to do so? Proving that one system is more cost-effective may be difficult for an individual board. There is much debate over whether the separate-prime system generally costs local governments more than the single-prime system,[1] although the size of a particular unit's staff and other resources for construction oversight would certainly affect the cost to the unit of the different systems. If, on the other hand, the board says nothing about the basis for its choice, could the decision be challenged as being arbitrary, or could a challenger argue, in the alternative, that the statute's listing of factors suggests that the board *must* state the basis for its decision? Given the permissive language in the statute, it appears that the legislature has given local school units broad discretion to choose the construction method they deem most appropriate.

The new law makes several additional changes in the requirements for school construction projects that are bid on both the single- and separate-prime bases.

Receiving and Opening Bids. S.L. 1998-137 (H 1327) requires the school unit to receive the separate-prime bids three hours before the single-prime bids are due. (The statute does not specifically say, but it should be understood, that the separate-prime bids received early should not be opened until the single-prime bids are received. Thus the time for opening of bids is the same as the time for receipt of the single-prime bids, and the separate-prime bids are due three hours earlier.) The likely purpose of this requirement is to allow additional bid preparation time

1. A statewide study conducted from 1989 to 1994 was inconclusive on this question because there was no useful data about costs other than those contained in the bids themselves (such as the cost of construction administration and oversight, or of litigation). *Report to the North Carolina General Assembly: Single- and Multi-Prime Contracting in North Carolina Public Construction: 1989–1994.* The study did show that 75 percent of the time, separate-prime bids are lower than single-prime bids, but this comparison does not consider the cost of administering the project, which may be higher where there are four contractors instead of one. A 1994 study of New York's separate-prime statute (the "Wicks" law) concluded that separate-prime projects cost more to construct and took longer than those not subject to the separate-prime requirement. (See, *Report to the North Carolina General Assembly: Single- and Multi-Prime Contracting in North Carolina Public Construction: 1989–1994, Appendix B, "Contracting Report,"* p. 25).

for contractors who wish to submit bids under both the separate-prime and the single-prime systems.

The law also contains a significant new requirement affecting the opening of bids. G.S. 143-132 currently requires that the unit receive three bids in order to award a contract after the first advertisement. If fewer than three bids are received, the project must be readvertised (for a minimum period of one week) and new bids solicited, after which a contract may be awarded even if fewer than three bids are received. As applied to projects bid on both the single- and separate-prime bases, the three-bid requirement would allow the award of a contract after receipt of at least three single-prime bids, at least three complete sets of separate-prime bids, or some combination of single-prime and complete sets of separate-prime bids, adding up to at least three.

Under the new law, applicable *only to local school units*, a unit must receive *at least one bid from a general contractor under the separate-prime system* before opening bids. Thus, even if the unit receives three or more bids from single-prime contractors, these bids must be rejected and the project must be readvertised if there is not at least one separate-prime bid from a general contractor. (Combining this requirement with the staggered receipt of bids, it appears that when the separate-prime bids are received, if there is no bid from a general contractor, the unit could consider notifying the single-prime contractors from whom bids are expected that no bids will be opened and that the bid will be readvertised.)

Subcontractor Bids. As noted above, existing law requires single-prime contractors to identify in their bids the subcontractors in each of the major types of work. The new law prohibits a subcontractor from submitting a bid as a separate-prime contractor that is *lower* than the bid the subcontractor made to a general contractor bidding under the single-prime system. To facilitate enforcement of this provision, the new law adds a requirement that the subcontractors' prices must be listed in all single-prime bids.

Unfortunately, however, the law does not specify what should be done if a contractor violates this requirement. There are several possibilities. Failure to meet this requirement could require the unit to invalidate and reject the separate-prime bid, the single-prime bid, both bids, or all the bids received. Another possible interpretation is that the lower separate-prime bid must be increased to match the bid submitted to the general contractor under the single-prime method, or that the subcontractor bid should be lowered, although alteration of bids would be a dramatic remedy to fashion without specific statutory direction. The most appropriate action would appear to be for the unit to reject the separate-prime bid, since that promotes the purpose of the requirement without punishing the other bidders.

A final complication with this requirement stems from the operation of an existing statutory provision in G.S. 143-132(b). This law states that if at least three single-prime bids are received, but no complete set of separate-prime bids is received, the unit is prohibited from opening the separate-prime bids. Under the new provisions in G.S. 143-128(d1), however, it may be necessary to open a separate-prime bid in order to determine whether the bidder submitted a higher bid as a subcontractor to a single-prime contractor. The only reasonable way to reconcile these provisions may be to conclude that the prohibition on opening bids under G.S. 143-132(b) simply does not apply under circumstances where it frustrates the unit's ability to determine whether bidders have complied with G.S. 143-129(d1). The new law does provide that all provisions of Article 8, Chapter 143 that are "not inconsistent" with subsection (d1) apply.

Good Faith Efforts Affidavits

S.L. 1998-137 (H 1327) also contains a clarification about the documentation of "good faith efforts" under the minority- and women-owned business participation requirements of G.S. 143-128(f). Under existing law, contracting units are required to adopt a percentage goal for participation of minority- and women-owned businesses, and bidders are required to make a good faith effort to meet that goal. Most local governments require bidders to submit with their bids (or at some later time) documentation of good faith efforts. The law now specifically requires

contractors to submit good faith efforts affidavits to the local school units and provides that the units may reject the bids of contractors who fail to do so.

As with all of the foregoing provisions, this requirement only applies to construction projects of local school administrative units. Most other local governments have assumed that the requirements of G.S. 143-128(f) implicitly authorize rejection of a bid for failure to demonstrate good faith efforts. Although it could be argued that the specific authority for local school units undermines the implicit authority of other local governments, it is probably still safe for local governments to reject bids that do not comply with good faith effort requirements, especially if those requirements are contained in the specifications.

State and Local Government Purchasing

Local School and Community College Purchasing Flexibility

Local school units and community colleges are required, under G.S. 115C-522(a) and G.S. 115D-58.5(b), respectively, to purchase all supplies, materials, and equipment through contracts approved by the state Department of Administration. The state Division of Purchase and Contract, which is the centralized state purchasing agency, awards contracts (commonly called "term contracts") for a wide variety of products from which state agencies, schools, and community colleges are required to purchase all of their needs for the products covered. In 1996, the legislature authorized a pilot program to allow twelve local school units to purchase from noncertified sources (that is, from suppliers other than those to whom term contracts have been awarded). In 1998, the legislature extended that option to all local school units and to community colleges, subject to some limitations.

Local Schools. S.L. 1998-194 (H 1371) amends G.S. 115C-522.1 to authorize all local school administrative units to purchase from noncertified sources if all of the following requirements are met:

1. The purchase price, including the cost of delivery, is less than the cost under the state term contract.
2. The items are the same or substantially similar in quality, service, and performance as items available under the state term contract.
3. The cost of the purchase does not exceed the benchmark under G.S. 143-53.1 (currently, $10,000 for most units).
4. The unit maintains written documentation of the cost savings.
5. The unit notifies the Department of Administration when it purchases items that are substantially equivalent to items under the state term contract.

These requirements do not apply to purchases that are below the minimum order quantity under the state term contract.

It is important to note that this law authorizes the purchase of the same or *substantially similar* items. This resolves an ambiguity that arose during the pilot program about whether the purchase from the noncertified source must be of the exact make and model and have other features the same as the item on state term contract.

The Department of Public Instruction has issued guidelines adopted by the State Board of Education as authorized under the new statute. Under those guidelines, items are the "same" if they have the same manufacturer and model number, but "substantially similar" items need not be identical. All "meaningful features, standards, and specifications" that affect "quality, service, and performance" should be compared to determine whether items are substantially similar. The guidelines caution purchasers to exercise extreme care to ensure that critical performance and safety requirements are not compromised by purchasing substantially similar items. (This reflects the fact that items on state contract often are tested and thoroughly evaluated to ensure that they are suitable and safe for the intended use.)

The new legislation also authorizes the Department of Administration to require local school units to document that purchases from noncertified sources actually did cost less than they would have under term contracts. This replaces the requirement under the pilot program that participating units provide annual, itemized reports of cost savings. The guidelines issued by the Department of Public Instruction include the new documentation requirements. Local school units must maintain a copy of the purchase order with a "clear notation of information supporting the savings (i.e., the number of the related state term contract, a calculation of the total cost if the purchase had been made under the state term contract, and the total cost savings)." This information must be provided to the Department of Administration only upon request. The local school unit must submit a report to the Division of Purchase and Contract no later than August 15 each year containing, for each purchase made from a noncertified source, the date of the purchase, the purchase order number, and a description of the item purchased. The legislature also required the State Board of Education to adopt rules exempting "supplies, equipment, and materials related to student transportation" from the new law. The apparent effect of this exemption is to require local school units to purchase from certified sources for these items.

Community Colleges. In a separate act, the legislature made a similar change applicable to community colleges. S.L. 1998-68 (H 1368) enacts G.S. 115D-58.14, authorizing community colleges and the Center for Applied Textile Technology to purchase from noncertified sources, subject to the first and third conditions listed above for local school units. While the authorization for public schools specifically allows purchase of "the same or *substantially similar*" items (emphasis supplied), the authorization for community colleges simply authorizes purchase of "the same" items. The State Board of Community Colleges has promulgated guidelines for documentation and reporting of purchases made under the new purchasing flexibility provision. For each purchase from a noncertified source, the purchasing unit must maintain the following information: the item purchased, the state term contract number, the term contract price, and the total cost of the item (including the cost of delivery) purchased from the noncertified source. This information must also be forwarded semiannually to the Department of Community Colleges, which will compile the information and forward it to the Division of Purchase and Contract.

"Best Value" Information Technology Procurement

A new law, G.S. 143-135.9 [S.L. 1998-189 (H 1357)], requires the state to use a "best value" procurement method when purchasing information technology. "Best value" means

> [S]election of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor. The award decision is made based on multiple factors, including: total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance.

G.S. 143-135.9(a)(2). Information technology includes "electronic data processing and telecommunications goods and services, microelectronics, software, information processing, office systems, any services related to the foregoing, and consulting or other services for the design and/or redesign of business processes." G.S. 143-135.9(a)(1). The law applies to state government and will extend to local school administrative units and community colleges by virtue of their statutory obligation to purchase through the State Department of Administration, discussed above. The law does not apply to other local governments.

Although the best value basis for awarding contracts is probably consistent with the existing statute, G.S. 143-52, which lists criteria that may be considered in determining the "lowest and best bid most advantageous to the State," the new law *requires* consideration of specified factors in awarding contracts for information technology purchases. In addition, the law requires the Division of Purchase and Contract to develop and implement policies, procedures, and training programs by December 31, 1998, to ensure the use of the best value procurement method.

The new law also authorizes, for highly complex acquisitions, the use of "solution-based solicitations" and "government-vendor partnerships." A solution-based solicitation is one in which "the requirements are stated in terms of how the product or service should accomplish the business objectives, rather than in terms of the technical design of the product or service." G.S. 143-135.9(a)(3). This appears to be similar to a performance specification, often used in a "request for proposal" form of solicitation. A government-vendor partnership is defined as "a mutually beneficial contractual relationship between state government and a contractor, wherein the two share risk and reward, and value is added to the procurement of complex technology." G.S. 143-135.9(a)(4). This provision appears to authorize jointly developed products designed to meet information technology needs not currently met by existing products and in which the state, by virtue of its contribution to the product, may wish to retain some ownership or beneficial interest in the resulting product.

Procurement Card Pilot Program

In 1997, the legislature established a pilot program authorizing limited use by certain state agencies, schools, universities, and community colleges of procurement cards in purchasing.[2] A special provision in the 1998 Appropriations Act continues that program and extends to March 31, 1999, the prohibition on the use of procurement cards by those not included in the pilot program. S.L. 1998-212 (S 1366), sec. 20.3. The Division of Purchase and Contract is required to report on the use of procurement cards to the Joint Legislative Commission on Governmental Operations on February 1, 1999. The limitation on the use of procurement cards in this provision does not limit their use by local governments (other than schools), a number of which are currently using procurement cards.

Lease-Purchase and Installment-Purchase Authority

As noted in Chapter 16 (Local Government and Finance), the legislature added regional public transportation authorities, metropolitan sewerage districts, and certain sanitary districts to the list of local government entities that have authority to enter into installment-purchase contracts under G.S. 160A-20. In addition, the legislature removed a limitation in G.S. 160A-20(h)(6), extending installment-purchase authority to several additional local school administrative units that have taxing authority.

A separate law, also summarized in Chapter 16 (Local Government and Finance), extends lease-purchase and installment-purchase authority to community colleges for the purchase of equipment. S.L. 1998-11 (H 1369). Under the new statute, G.S. 115D-58.15, contracts for more than $100,000 or for a term of more than three years must be approved by the State Board of Community Colleges if the source of funds for payment of the obligation is intended to be state funds. If local funds are used, the statute requires the county to acknowledge in writing its understanding that funds may need to be appropriated to meet the obligation. The statute specifies, however, that the tax power is not pledged to secure the moneys due under the contract. The statute also requires contracts to be approved by the Local Government Commission if the contract extends for five or more years and contains an obligation of $500,000 or more over the term of the contract.

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2. For a listing of the units participating in the pilot program, *see* Frayda S. Bluestein, "Public Purchasing and Contracting," Chapter 21 in *North Carolina Legislation 1997* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997), p. 270.

Other Legislation Related to Government Contracting

Electronic Commerce in Government

More and more, public as well as private entities are conducting business using the Internet and other computer-based systems. Concerns about the reliability and authenticity of electronic signatures apparently prompted the legislature's enactment of S.L. 1998-127 (H 1356), which authorizes, but also appears to limit, the use of electronic commerce by public agencies. The new law, codified as Article 11A of G.S. Chapter 66, provides that a transaction between a private entity and a public agency is not unenforceable on the sole ground that it is evidenced by an electronic record or that it has been signed with an electronic signature. G.S. 66-58.5(b). "Public agency" is defined broadly to include all offices, agencies, and boards of state and local government.

The statute specifies the circumstances under which an electronic signature will be deemed to have the same force and effect as a manual signature. First, the public agency must specifically request or require the use of electronic signatures. Second, the signature itself must be unique, under the sole control of the person using it, and secure. G.S. 66-58.5(a). In addition, the signature must conform to rules adopted by the Secretary of State and must be "capable of certification." The new law outlines procedures for certification either by the Secretary of State or by a certification authority licensed by the Secretary of State to vouch for the relationship between the person or entity and the signature. A licensed certification authority will be required to enforce standards established by the Secretary of State for the controls, security, and responsibility of the entity using the electronic signature. The law authorizes the Secretary of State to impose civil or criminal penalties for violation of the statute or of the implementing rules.

For purposes of the act, a transaction means "an electronic transmission of data between a person and a public agency, or between public agencies, including … contracts, filings, and legally operative documents." G.S. 66-58.2(6). The act *does not apply* to (1) electronic signatures and facsimile signatures that are otherwise allowed by law; (2) the execution of documents filed with, issued, or entered by a court of the General Court of Justice; or (3) transactions where a public agency is not a party. G.S. 66-58.9. In addition, the law does not allow the use of an electronic signature when the signature requires attestation by a notary public. G.S. 66-58.4(b).

It appears from this definition of transaction that the law does not limit the ability of state or local government agencies to use electronic communication internally. Thus, the increasing use by public agencies of "paperless purchasing," in which requisitions and other documents commonly created prior to issuance of a purchase order are transmitted electronically, are unaffected by this law. In addition, the exemption for facsimile signatures otherwise allowed by law applies to local governments in which the use of such signatures has been authorized by the governing board under G.S. 159-28.1.

The extent to which the new law will affect common transactions with public agencies remains uncertain. It is important to recognize that the limitation on the use of electronic signatures applies only if a signature is otherwise required. Under the Uniform Commercial Code, for example, the signature requirements for enforceable contracts for the sale of goods have been broadened to include "any symbol executed or adopted by a party with present intention to authenticate a writing." G.S. 25-2-201(39). Indeed, under general law, an intent to be bound by a contract sufficient to create an enforceable obligation may be drawn from evidence other than a signature. The wording of the new law leaves it somewhat unclear, but it does not appear to displace other statutory or common law bases for validating contracts that do not contain manual signatures.

Local School Responsibility for Impounded Vehicles

The legislature made several changes in the laws governing the seizure and sale of vehicles driven by certain impaired driving offenders. S.L. 1998-182 (S 1336), as amended by S.L. 1998-217 (S 1279). As enacted in 1997, major changes in the driving while impaired (DWI) laws required local school administrative units to take responsibility for storage (either on the school site or by contract at some other site) and sale of seized vehicles. A thorough discussion of the

changes in the DWI vehicle seizure law is contained in Chapter 19 (Motor Vehicles). This section will briefly describe the changes that relate to contracting by local school administrative units in connection with the storage and sale of seized vehicles.

In order to relieve some of the burden on individual local school administrative units, the legislature enacted a new provision authorizing the Department of Public Instruction (DPI) to enter into a single statewide contract or several regional contracts for vehicle towing, storage, sale, and other administrative services required under the DWI vehicle seizure law. G.S. 20-28.9(a). DPI must award the contract(s) after complying with applicable competitive bidding requirements. If a contract is awarded, all vehicles seized under the statute in the area covered by the contract will be handled by the contractor. The contractor must maintain and make available to DPI an inventory of vehicles held and funds received from the sale of vehicles and must pay the towing and storage charges owed on seized vehicles when the contractor takes possession of the vehicles. The contractor will be reimbursed for these charges when vehicles are sold but must hold the state harmless from any deficiency in the amount generated from the sale of a vehicle on which charges have been incurred.

Originally, the law required that sales of seized vehicles be conducted under the rules that apply to judicial sales. The law now requires that the sale be conducted using one of the competitive methods under G.S. 160A-266(a)(2), (3), or (4) (sealed bid, upset bid, or public auction). G.S. 20-28.5(a). These are the procedures that generally apply to disposal of property by local school administrative units. [*See* G.S. 115C-518(a), and G.S. 160A-268, 160A-269, 160A-270.] In addition to the notice required under these statutes, the DWI law requires the school or its agent to give notice to all owners and lienholders of vehicles to be sold as well as to the Division of Motor Vehicles. A lienholder may purchase the vehicle for the amount of the lien without tendering additional funds if his or her bid is the highest. G.S. 20-28.5(a). Disbursement of proceeds from the sale of vehicles is established in G.S. 20-28.5(b).

The law was also amended to deal with a concern of local school units that by the time the criminal proceeding has concluded, the towing and storage costs might exceed the value of the vehicle. The law now authorizes the early sale of vehicles that have a fair market value of $1,500 or less, or when the outstanding towing and storage costs exceed 85 percent of the fair market value of the vehicle. G.S. 20-28.3(i). Fair market value is determined according to the schedule of values adopted by the Commissioner of Motor Vehicles for state highway use tax purposes. Sales under this provision may not be made before ninety days from the date the vehicle is seized. This provision became effective October 15, 1998, and applies to vehicles seized before, on, or after that date. For vehicles seized on or after December 1, 1997, and before December 1, 1998, however, the local school administrative unit must refund towing or storage costs received from the expedited sale if the owner is not obligated to pay those costs under the provisions of the statute. The statute does not specify how expedited sales will be initiated, for example, when the vehicles are being stored by a statewide contractor. It appears, however, that local school administrative units will be responsible for initiating such sales and for demonstrating that any vehicle to be sold meets criteria in the statute. Such proof may be necessary for the Department of Motor Vehicles to effect the transfer of title necessary for the sale.

The revisions also address the potential liability of the local school unit for towing and storage costs by providing that the fees will always be assessed, even to an innocent vehicle owner, prior to release of the vehicle. The local school administrative unit may still retain some liability for towing and storage fees incurred immediately after seizure and prior to retrieval by the school unit, its contractor, or the statewide contractor. G.S. 20-28.3(d). Finally, the maximum fee that may be charged for storage has been increased from $5 to $10 per day, and DPI is required to collect a $10 administrative fee from persons to whom a seized vehicle is released and from the proceeds of the sale of a forfeited vehicle.

The Joint Legislative Transportation Oversight Committee is required to study the financial impact of the DWI forfeiture provisions on local school administrative units and must report its findings to the 1999 General Assembly.

Transfer of Surplus Automobiles for Work First Recipients

Effective October 24, 1998, S.L. 1998-195 (S 1202) amends G.S. 160A-279(a) to allow any North Carolina city or county to convey surplus automobiles to any public or private entity to which the city or county may appropriate funds. Automobiles conveyed under this provision must be reconveyed to Work First recipients selected under rules adopted by the county department of social services. This legislation is discussed in more detail in Chapter 24 (Social Services).

Projects and Units Exempted from Competitive Bidding Requirements

Several entities obtained exemptions from the competitive bidding laws in Article 8 of G.S. Chapter 143 for particular construction projects. The town of Sparta and Alleghany County obtained an exemption in S.L. 1998-18 (H 1593) from bidding requirements for development of an electrical power substation, and from the limitations on use of government forces for construction of water and sewer lines. S.L. 1998-104 (S 1238) authorizes Forsyth County to contract for renovations to a former R.J. Reynolds tobacco factory building for county government offices upon terms and conditions it deems appropriate. The city of Greenville obtained authority to construct a downtown development project without bidding subject to conditions specified in the act. S.L. 1998-144 (H 1332). The Rowan-Salisbury schools obtained authority under S.L. 1998-78 (H 1453) to select and negotiate with separate-prime contractors to build a model school. The city of Charlotte and the Raleigh-Durham Airport Authority obtained authority to contract with private parties without bidding for airport facilities that will be for the benefit of and leased by private entities, which will also be responsible for repayment of the costs. S.L. 1998-173 (S 672) (Charlotte); S.L. 1998-141(S 1398) (Raleigh-Durham).

The state Department of Transportation is authorized to award up to three contracts annually for construction of projects on a design-build basis. This may be done if the department determines that delivery of the projects must be expedited and that it is not in the public interest to comply with the otherwise applicable design and construction contracting procedures. The department must report its intent to use this authority to the Joint Legislative Transportation Oversight Committee and to the Joint Legislative Commission on Government Operations prior to awarding a contract. S.L. 1998-212 (S 1366), sec. 27.

Finally, the legislature authorized regional public transportation authorities and regional transportation authorities (created under Articles 26 and 27 of G.S. Chapter 160A, respectively) to use an alternative procurement procedure that is more flexible than the method otherwise required under G.S. 143-129(b). In S.L. 1998-185 (S 1280), the legislature added a new subparagraph (h) to G.S. 143-129 that will authorize transportation authorities to use a "competitive proposal" procedure for the purchase of apparatus, supplies, materials, and equipment. This method allows the use of a "request for proposals" rather than a formal, sealed bid process. It requires the authority to establish procedures for conducting technical evaluations and does not require strict adherence to specifications or price when determining which proposal is most advantageous. The procedures must, however, promote fairness and competition. The alternative procedure also allows negotiation and discussion of proposals prior to award, something that is not permitted in a sealed bid procedure. The new subsection requires the governing board of the authority to make "findings of fact" that the alternative method is the most appropriate for a particular procurement prior to using it and to certify that the alternative procedures have been followed before approving the contract.

Construction Contracts

S.L. 1998-193 (S 656) amends G.S. 143-128(e) to specify that when contracts are awarded on a separate-prime basis, the contracting authority may provide in the contract documents for resolution of project disputes through alternative dispute resolution processes, such as mediation and arbitration. It has generally been assumed that public agencies have implicit authority to include such provisions in contracts.

That law also amended the Overhead High-Voltage Line Safety Act to specify that for public projects, the governmental entity is the "person responsible for the work," for purposes of the act. G.S. 95-229.6(4).

For state construction projects costing $100,000 or more, a new law requires the state Department of Administration to certify that the statement of needs submitted by the agency in support of the project is feasible. S.L. 1998-45 (S 1093). This analysis will require the department to review the proposed project and statement of needs to determine if the project is sufficiently defined in scope, building program, and site development; has adequate design, construction, and equipment budgets; and may be completed with the amount of funds requested. G.S. 143-341(3)(b1).

North Carolina Government Competition Act

A proposal to introduce competition into state government that has been discussed for several years was enacted in 1998 as G.S. Chapter 143C, the North Carolina Government Competition Act of 1998. Modeled after similar structures in Virginia and other jurisdictions, the act establishes an independent Government Competition Commission in the Department of Commerce. The commission's purpose is "to improve the delivery of State government services, to make State government more effective and more efficient, and to reduce the costs of government to taxpayers." G.S. 143C-3. The statute lists a number of specific duties for the commission, including developing an institutional framework for statewide competition to encourage innovation within state government, and monitoring activities, products, and services of state agencies to promote competition, innovation, and entrepreneurship that will increase quality of services or reduce costs to taxpayers. The commission is composed of members of the private sector as well as state employees.

Among other things, the commission may receive proposals from private entities for any service currently being provided by a state agency, and the state agency may then be required to perform a "public-private competition analysis" under criteria developed by the commission. The statute requires state agencies to cooperate with and assist the commission in the performance of its duties. G.S. 143C-5.

The act requires the Office of State Budget and Management to submit annual reports to the Governor and to the Joint Legislative Commission on Governmental Operations identifying the amount of a state agency's existing appropriation that no longer would be needed as a result of savings realized through competition. G.S. 143C-8.

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