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1977 CHANGES IN LOCAL GOVERNMENT LAW

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This Local Government Law Bulletin discusses seven acts passed by the 1977 General Assembly of particular interest to city and county attorneys and an eighth act that will interest city attorneys. Each of these acts is discussed in the Institute's legislative summary, which will be published shortly, but that publication's format does not permit a detailed look at these new statutes.

FOUR PURCHASING STATUTES

The 1977 General Assembly enacted four acts that make changes to G.S. Chapter 143, Article 8, the public purchasing laws. They are:

Ch. 617 (H 1046) -- Withdrawal of bids
Ch. 619 (H 1056) -- Change orders; bid bonds
Ch. 620 (H 1057) -- Separate specifications
Ch. 644 (H 1195) -- Number of bids

Ch. 617: Withdrawal of bids. A recurring and difficult question has been what procedure a unit should follow when the apparent low bidder on a contract comes forward and announces that his bid is in error. Ch. 617 enacts a new G.S. 143-129.1 permitting a unit to allow the bidder on a construction or repair contract to withdraw his bid without forfeiting his security in certain circumstances and under specified procedures. The section permits withdrawal of a bid that meets all of the following characteristics:

1. The bid was submitted in good faith.
2. The error was substantial.
3. The error was clerical in nature rather than judgmental.
4. The error was due to either.
   a. "an unintentional and substantial arithmetic error" or
   b. "an unintentional omission of a substantial quantity of work, labor, material or services."

The bidder must make written request to withdraw his bid before the contract is awarded and not later than 72 hours after bids are opened. When it receives such a request, the agency is to promptly hold a hearing on the request, giving "reasonable" notice thereof to the bidder. At the hearing the bidder must make his case on the basis of "objective evidence drawn from inspection of the original work papers, documents or materials used in the preparation of the bid." Within five days after the hearing, the agency must issue a written ruling allowing or denying the request to withdraw the bid. The ruling should contain a finding whether an error

was made and whether it was of the sort that would justify withdrawal under the statute. If it does make such a finding, the agency must allow withdrawal without forfeiture of the bid security. If it finds that the error does not qualify under the statute, the agency must deny the request and require forfeiture of the security. (Once the process has begun, these are the only two outcomes permitted by the statute. It is not clear whether the unit could reject and return all bids, including the allegedly erroneous one once notice has been given.) If the request is denied, the statute permits an appeal, within 20 days, to the General Court of Justice, where the trial will be de novo and without a jury. If an appeal is taken, the security is not forfeited (if at all) until a final determination in the cause is made.

A bid that a bidder requests be withdrawn is to be counted as a bid for purposes of the minimum-bid requirement of G.S. 143-132. Otherwise, however, if a request to withdraw is made, the unit is to continue to consider the remaining bids as if the erroneous bid had never been received. Also, if the unit decides to return all bids and readvertise, a bidder who requests withdrawal may not rebid the work. Finally, once the contract is awarded, the withdrawing bidder may not serve as a subcontractor on the work or supply materials or labor for the work without the prior written approval of the agency. Acting as a subcontractor or supplying supplies or labor without that approval constitutes a misdemeanor.

One point should be made about the hearing required by this new section. The agency is to make a finding whether the bidder committed the sort of error described in the statute and is to issue a written ruling setting forth its decision. The agency would seem therefore to be acting more or less in a quasi-judicial capacity, and so it may well be that it must conduct the hearing according to the general guidelines set out in Refining Co. v. Board of Aldermen [284 N.C. 458, (1974)]. Those guidelines include the necessity to swear witnesses, the right of parties to have counsel (which is express in new G.S. 143-129.1), and the right of cross-examination. It should be noted that judicial review in the Refining Co. case was to be on the record, while under G.S. 143-129.1 it is to be de novo; this may indicate less need to observe these rules of procedure. However, until some case law is established, it would be best to proceed as if the Refining Co. rules fully applied.

One unanswered question remains concerning this new procedure. Under the common law, a unit has been able to permit a bidder to withdraw his bid without forfeiting his security if his bid contains an honest error of a nonjudgmental nature. [See In Re Metric Constructors, 31 N.C.A. 88 (1976).] Occasions may arise when a bidder has committed what he considers an honest error but does not use this statutory procedure. The error may not fit the two categories of the statute (arithmetic or omissions); or the bidder may prefer to have the unit return all bids, including his, and re-advertise, which would permit him to rebid; or the error might not be discovered within 72 hours. The statute simply does not indicate whether a unit retains its common law right to allow withdrawal or whether the statute is to be the exclusive means by which withdrawal takes place. The practicalities of contracting procedures, however, may indicate that the statute should be understood as supplementing rather than replacing

the common law. On large projects it often takes a unit longer than 72 hours just to review and analyze the bids, and so an error may not be discovered within that time. There seems no good reason in such a situation to penalize the bidder by not permitting him to withdraw his bid.

Ch. 617 became effective on July 1, 1977, and may be used for any work advertised or re-advertised after that date.

Ch. 619: Change orders. Another gray area under the purchasing statutes has been the extent, if any, that change orders on construction and repair projects that require additional outlays by the unit need be advertised and awarded under the formal competitive bid procedures. In February 1976, the Attorney General's office reviewed Teer v. Highway Comm'n [4 N.C. App. 126 (1969)] and suggested that change orders totaling more than $10,000 could be authorized without competitive bidding only if necessary to complete the project as originally understood (45 N.C.A.G. 227). If a change order were to add to a project, it would have to be bid.

Ch. 619 changes the rule suggested by the Attorney General. It adds a provision to G.S. 143-129 stating that that section is not to apply to "construction or repair work undertaken during the progress of a construction or repair project initially begun pursuant" to the section. "Project" is not defined by the amendment, but it is obvious that a unit must take care not to abuse this authority by too broad a reading of the word. A substitution of terrazzo tile for concrete flooring would seem permitted, as would the addition of extra plumbing facilities to the structure as originally designed and contracted. It would seem improper, however, to use a change order to contract for the builder of the city hall to construct a vehicle shed at the city's garage as an add-on to the city hall contract. One purpose of this amendment seems to be to avoid the inconvenience of having two different contractors at work on the same job. One possible measure that a unit might use in deciding whether a potential change order would involve the project already bid and begun is the amount of inconvenience that would result if different contractors were to work on the main contract and the change-order contract. If no or little inconvenience would result, a unit might wish to resolve a close question about whether the same project was involved by following the formal bid procedure.

Ch. 619 was effective on ratification, June 20, 1977. Presumably it applies to any change order authorized on or after that date.

Ch. 619: Double indemnity on bid bonds. G.S. 143-129 requires the surety on a bid bond that has been forfeited to make payment "forthwith." If the surety does not make payment, the statute has required it to pay double indemnity. The second change effected by Ch. 619 is to remove the provision for double indemnity.

Ch. 620: Separate specifications. G.S. 143-128, which requires the preparation of separate specifications and award of separate contracts for major branches of work on public buildings when the costs are above a certain level, was rewritten and substantially modified by Ch. 620.

First, the section has applied only when the entire cost of the work exceeds $20,000. The minimum has been raised to $50,000.

Second, it has not been necessary to prepare separate specifications for or bid separately on a branch of work unless the estimated cost of that branch is less than $2,500. This threshold amount has been raised to $5,000.

Third, the section has applied to the "erection, construction or altering" of buildings. It now also applies to repairs.

Fourth, the branches themselves have been somewhat modified. The section had listed four branches for which separate specifications were required, in addition to the general contract. Those four have been reduced to three by adding refrigeration work (of 15 tons or more) to the branch for heating, ventilating, and air conditioning work. However, general work has been made into a fourth branch, and this last change creates an interpretation problem.

Units might sometimes wish to further subdivide one or more of the separate branches of work or to divide some of the remaining general work into one or more separate branches. The rewritten section seems to intend to allow this sort of division, but the statutory language offers difficulties. It reads:

> All such specifications must be so drawn as to permit separate and independent bidding upon each of the subdivisions or branches of work enumerated above. The above enumeration of subdivisions or branches of work shall not be construed to prevent any officer, board, department, commission or commissions from preparing additional separate specifications and awarding additional separate contracts for any other category of work when it is deemed in the best interest of such officer, board, department, commission or commissions to do so .

The second sentence would seem intended to permit division of the existing branches into additional categories. However, the first sentence can be read to require a single separate set of specifications and a single separate contract for each of the four branches, including the general branch. Although the statute is not clear in this regard, perhaps the two sentences are best read as (1) requiring at the least a separate set of specifications and a separate contract for each listed branch of work for which the estimated cost is $5,000 or greater, but (2) permitting any branch to be further divided if the unit wishes.

Ch. 620 became effective on July 1, 1977.

Ch. 644: Number of bids on construction and repair contracts. G.S. 143-132 has for many years required three bids on the initial advertisement for construction and repair contracts. Ch. 644 permits the award of such a contract after the initial advertisement upon the receipt of only two bids in certain limited circumstances. First, the estimated expenditure

of funds must be no more than $30,000. Second, the governing body must find as a fact that it would not be in the public interest to re-advertise and make a written entry to that effect in its minutes.

Normally, if fewer than three bids are received, all bids are returned without being opened. Therefore, if only two are received, the amount of expenditures should be estimated and the governing board should make its finding before those bids are opened. If the estimate is higher or if the finding cannot be made, the two bids should be returned. What if the estimate is made, but the low bid is higher than $30,000? If the estimate was made in good faith, then the unit ought to be able to go ahead and award the contract, even if the amount is somewhat greater than $30,000. However, if the $30,000 limit is exceeded by very much (perhaps by more than 10 or 15 per cent), that in itself might be seen as evidence that the estimate was not made in good faith. In such a case, the safest course would be to re-advertise.

This act became effective on July 1, 1977.

EMPLOYEE AND OFFICIAL'S LIABILITY

The General Assembly enacted two bills amending G.S. 160A-167, which has authorized cities and counties to provide counsel to employees and officers who are sued for actions or omissions growing out of their official duties. The two acts are Ch. 307 (H 825) and Ch. 834 (H 1338).

To take the simpler act first, Ch. 307 amends G.S. 160A-167 (and the cross-reference section, G.S. 153A-97) to permit a county or city to defend "any member of a volunteer fire department or rescue squad which receives public funds." Although the statute is not explicit about this, the obvious intent is to permit defense of a person whose department or squad receives funds from the unit that provides the defense.

The second act is concerned not with defense but with payment of claims and judgments. Whether G.S. 160A-167 has permitted a unit to pay any judgment entered against the person it defends has been a matter of dispute. The section nowhere expressly permits such a payment. It has, however, specifically stated that the defense could be provided "by purchasing insurance which requires that the insurer provide the defense." Although it has been suggested that this simply allows purchase of insurance that pays for the lawyer and nothing more, that interpretation takes no note of the practicalities of insurance. First, there does not appear to be any sort of insurance under which all that is paid is the attorney's fee. Second, it is a normal feature of a general liablility policy for the insurer to provide defense counsel. On balance, then, the section probably has permitted payment of judgments, but the continuing uncertainty made it useful to seek legislative clarification. The result is Ch. 834.

This act renumbers existing G.S. 160A-167 as G.S. 160A-167(a) and adds two new subsections. Under these subsections cities and counties

are authorized to pay all or a part of "a claim made or any civil judgment entered" against any officer or employee or former officer or employee, arising from acts or omissions taking place during the scope and course of the person's employment or duty. The unit may pay either from appropriations made for this purpose or by purchasing insurance, with three limitations:

1. If the unit finds the act or omission resulted from "actual fraud, corruption or actual malice," it may not pay any claim or judgment arising from the act or omission.

2. The council or board of commissioners must receive notice of the claim or litigation before the claim is settled or judgment entered; otherwise, no payment may be made.

3. The council or board of commissioners must adopt uniform standards under which claims or judgments are paid, and these standards must be a public record. The statute gives no indication of the kind of standards it intends. However, if a unit purchases insurance to cover employee liabilities, the terms of the insurance coverage ought to be considered the sort of standards required by the statute. If a unit decides to pay any claims or judgments from appropriations, rather than by purchasing insurance, the terms of a typical general liability policy, plus extensions, or of a public official's or law enforcement officer's liability policy might offer a model for that unit's standards.

Ch. 834 took no cognizance of Ch. 307, and that may create a small problem. As now written, G.S. 160A-167(a) permits a county or city to defend (1) current officers and employees, (2) former officers and employees, and (3) members of volunteer fire departments and rescue squads. G.S. 160A-167(b) and (c) permit a city or county to pay claims or judgments against (1) current officers and employees and (2) former officers and employees. It does not mention volunteer firemen or rescue squad members. Can a county or city, then, pay a claim or judgment against such a person? That throws us back to the basic question discussed above of whether the original G.S. 160A-167 (now subsection [a]) permitted payment of claims or judgments. Even if it did, it would seem clear that a county or city may pay a claim or judgment against a current or former officer or employee only under the standards and procedures added by Ch. 834. The continuing authorization to provide defense counsel through insurance, however, still seems, on balance, to permit payment of claims judgments against volunteer firemen and rescue squad members, but the matter remains open to debate. If a unit decides to pay these additional claims and judgments, it would be well advised to do so under the standards and procedures of Ch. 834.

REGULATING CONSUMPTION OF BEER AND WINE (Ch. 693, H 470)

In State v. Williams, 283 N.C. 550 (1973), the State Supreme Court was faced with an ordinance providing that "no person shall have open and in his possession, or consume, serve or drink wine, beer . . . on

or in the public streets." The defendants in the action had been charged with possessing an open beer on the public streets. The Court held that G.S. 18A-35(a) fully regulated the "transportation and possession of malt beverages" and therefore pre-empted any local ordinance on the same subject. For that reason the Court upheld the quashing of the warrants against defendants.

That decision clearly held that state law pre-empted local ordinances prohibiting possession of malt beverages. What has not been clear, however, is its effect on ordinances regulating consumption. The ordinance in question regulated consumption, but the defendants were charged only with possession and the Court talked only about possession. Some trial courts, however, have indicated that they read the decision as affecting consumption ordinances as well. For that reason, H 470 was introduced in this legislative session, to expressly authorize local ordinances regulating consumption. The bill, significantly amended, was finally enacted as Ch. 693.

The act adds a proviso at the end of G.S. 18A-35(a) authorizing the "local government units of the State," by which should be understood cities and counties, to regulate the consumption of malt beverages or unfortified wine "on property owned or occupied by the local government unit." Because the authorization is now express, it will probably be interpreted as exclusive; counties and cities will be able to regulate consumption only to the extent permitted by the statute. This is important, because the authorization is limited in important ways.

A county or city may regulate consumption "on property owned or occupied" by the unit, and that is all. It may not regulate consumption on private property, such as parking lots of places that sell malt beverages or wine. It may not regulate consumption on public property not owned or occupied by the unit that adopts the regulation. Clearly a city may regulate consumption in city-owned buildings, or city-occupied buildings, or on land owned by the city, such as a park. The crucial and unanswered question concerns streets and sidewalks.

A county may not adopt an ordinance regulating consumption on streets outside municipalities; it in no way owns or occupies such a street. Some streets inside cities--the principal ones--are under the control of the state Department of Transportation. When the state holds title to the right of way, the city unquestionably neither owns nor occupies the street. Therefore it may not regulate consumption on it. (Normally the city will maintain the sidewalk, if any, adjoining a state-maintained street. The city might be said to occupy that sidewalk. See the discussion regarding the word "occupy" in the next paragraph.) That leaves state-system streets for which the city holds title and city-system streets. Some of these are held by the city in fee, and for them the city may claim ownership. The city's title to the remainder, however, is simply an easement for street purposes; the fee is elsewhere, usually with the owners of abutting property. Two questions arise with regard to streets so held: (1) Does a city "own a street when its interest is simply an easement? (2) Can a city be said to "occupy" property used as a public street?

The answer is not clear. Ch. 693 is in essence a criminal statute--at least it authorizes ordinances that may constitute misdemeanors--and so the general tradition that criminal statutes should be construed against the state would apply and would argue for a narrow reading of "owned or occupied." All the same, if a city holds an easement for a street, it does own an interest in land; and if the street has been opened, the city's interest is by far the most important in that land. Furthermore, to occupy property means to put it to use, and to construct and maintain a street or sidewalk is certainly to put the property to use. The question is close enough to justify a city's attempt to extend a consumption ordinance to the public streets and sidewalks it maintains.

PRORATING TAXES UPON ANNEXATION (Ch. 517, H 1194)

The 1975 General Assembly enacted legislation requiring that city property taxes on property annexed by a city be prorated. Unfortunately, difficulties in the statute immediately became evident with regard to the formula under which proration was to be made and the collection of the prorated taxes. Therefore this General Assembly enacted Ch. 517 to deal with those difficulties. This act extends to and requires the proration of taxes for each of the annexation procedures in G.S. Ch. 160A. It does not extend to annexations effected by the General Assembly itself; therefore taxes would not be prorated in such an annexation unless the annexation act itself directed proration.

The Proration Formula. The 1975 legislation prorated taxes according to the number of days remaining in the fiscal year. Ch. 517, however, prorates by month, requiring the newly annexed property owner to pay taxes on the basis of the number of full calendar months remaining in the fiscal year. The formula reads as follows:

> The amount of municipal taxes that would have been due on the property had it been within the municipality for the full fiscal year shall be multiplied by the following fraction: the denominator shall be 12 and the numerator shall be the number of full calendar months remaining in the fiscal year, following the day on which the annexation becomes effective.

An example will make the formula clear. If an annexation takes effect on January 15, five full months remain in the fiscal year. Therefore, the property's tax liability, had it been in the city for the full fiscal year, is multiplied by the fraction 5/12. The product is the property's prorated tax liability.

It should be noted that an annexation at any time during June will result in no prorated tax liability. There remain no months in the fiscal year after June, and so the fraction would be 0/12 and the product zero. Therefore, June 30 would once again be an appropriate effective date to annex if the city wishes to tie the beginning of services to the beginning of tax liability, while avoiding any prorated taxes.

Due date for prorated taxes. If an annexation becomes effective after June 30 and before September 2, the prorated taxes become due that September 1, that is, September 1 of the fiscal year for which the taxes have been levied. If the effective date is after September 1 and before July 1, the prorated taxes do not become due until the succeeding September 1, in the next fiscal year. In either case, the prorated taxes are to be collected under the same schedule as other taxes levied for the fiscal year in which they become due. The only difference is that the lien on real property for prorated taxes attaches to the parcel on the January 1 immediately preceding the fiscal year in which the annexation becomes effective, regardless of the year in which the taxes become due.

Validations and use of the 1975 formula. It may be that some cities annexed property on or after January 1, 1976 (the effective date of the 1975 legislation) and did not properly prorate taxes in the annexed area or did not attempt to collect prorated taxes at all. Any such failure could amount to an unlawful release of those taxes, and the city's governing board members could be held personally liable for the amount of the released taxes. Therefore, Ch. 517 validates whatever method of taxation was used on any annexation made after December 31, 1975, and through June 30, 1977.

In addition, some units might have adopted annexation ordinances this spring with effective dates set in reliance on the formula of the 1975 legislation. Therefore, the act permits any annexation for which the annexation ordinance was adopted no later than July 3, 1977, to be implemented under the 1975 act.