Changes Affecting Construction, Purchasing, and Conflicts of Interest

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The year 2001 saw numerous updates and changes to the rules applying to public contracts. Several groups of individuals who work in and represent public agencies developed legislative proposals to revise both 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 in significant new requirements designed to promote the use of minority contractors and document good faith efforts toward that end. Public agencies, including public schools, community colleges, and the university, now have authority to use single-prime contracting and construction management at risk for major building projects. 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, including public schools, community colleges, and the university. In some cases, the modifications 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, including public schools, community colleges, and the university, 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 agency. Beginning in 1989, public agencies, including public schools, community colleges, and the university, were given the option of receiving bids under both the single-prime and the separate-prime systems but were not allowed to receive bids solely on a single-prime basis.[1] Under this dual bidding system, the public agency was required to award the contract to the lowest responsible bidder or combination of bidders 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 (but not community colleges or the university) 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 re-

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1. 1989 N.C. Sess. Laws Ch. 480 (hereinafter SL).

sponsible 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, including public schools, community colleges, and the university, 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. Numerous public agencies have obtained approval for projects under this authority. Perhaps most significant, however, was the university system's recent successful application 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. 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, SL 2001-496 (S 914), 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. SL 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. The $90,000 threshold does not apply to local school units, community colleges, or the university, because they are required to purchase through the Department of Administration.[4] 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.

For all public agencies, the threshold at which specified methods for building construction and requirements for minority participation apply has been set at $300,000.[5] 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.

For public agencies, including public schools, community colleges, and the university, 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 SL 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). Performance bonds provide a remedy for the agency 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.

SL 2001-496 also increased the dollar thresholds that determine when plans and specifications for projects by public agencies, including public schools, community colleges, and the university, 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

2. SL 1998-137.
3. SL 1995-. 367, sec. 10.
4. *See* SL 2001-328 (H 1169), discussed below.
5. SL 2001-496.

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, 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 SL 2001-496 was to expand the options available to public agencies, including public schools, community colleges, and the university, 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). Available now to all public agencies, including public schools, community colleges, and the university, it 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."[6] These services are not otherwise discussed in the statutes and are not subject

6. N.C. Gen. Stat. § 143-128.1(a)(1) (hereinafter G.S.).

to specific procedures. Public agencies, including public schools, community colleges, and the university, 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.[7] 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.[8] 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.[9] 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, responsive[10] 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."[11] 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

7. G.S. 143-64.31(b).

8. G.S. 143-128.1(2).

9. G.S. 143-128.1(c).

10. 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).

11. G.S. 143-128.1(c).

methods by the State Building Commission from two-thirds to a majority of commission members present and voting.[12] Local governments, including school administrative units, 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, including public schools, community colleges, and the university, 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 contain 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

SL 2001-496 requires public agencies, including public schools, community colleges, and the university, 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 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 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, including public schools, community colleges, and the university, 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 SL 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 building 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

12. SL 2001-496, sec. 11; G.S. 143-135.26(9).

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."[13] 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."[14] 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, including the university and community colleges (but not public schools), 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 undertaken by a local government or other public or private entity, including a public school system or community college, that receives state appropriations or state grant funds for the project. The 10-percent goal 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, including a public school system or community college, 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, including public schools and community colleges, 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.[15] Legal considerations in establishing goals are discussed below.

Good Faith Efforts

The new law creates specific requirements for both public agencies 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, including public schools, community colleges, and the university, 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

13. 15 U.S.C. § 637(a)(5) (1997).
14. 15 U.S.C. § 637(a)(6)(A) (1997).
15. SL 2001-496 (S 914), sec. 14(c).

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."[16] The law states that an affidavit showing minority participation equal to or greater than the applicable goal "shall give rise to a presumption that the bidder has made the required good faith effort."[17] 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 nonresponsible 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.[18] This requirement supersedes any otherwise applicable record retention rules 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, including public school systems, 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

16. G.S. 143-128.2(c)(1)(b).
17. G.S. 143-128.2(c)(1)(a).
18. G.S. 143-128.2(i).

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 rule making, 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 below that level, 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."[19]

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.[20] 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 U.S. 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.

19. G.S. 143-131(b).

20. 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 and, 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.

School, Community College, and University Purchasing

Several changes made this session affect local school purchasing procedures, along with those of community colleges or the university. 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, including the university, 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, community colleges, and state agencies, including the university, 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.[21] This special provision also amends G.S. 143-49, which lists the powers of the secretary of the Department 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.[22]

In addition, the budget special provision establishes a statewide electronic procurement system to be used by state agencies, community colleges, 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. SL 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 became 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.

21. SL 2001-424, sec. 15.6.
22. *See* SL 2001-513, sec. 28(b).

Miscellaneous Changes in Bidding Laws

In addition to those already discussed, SL 2001-328 made numerous other changes of a more technical nature in the competitive bidding statutes. These changes apply to local school units, community colleges, universities, and state agencies only with respect to contracts for construction or repair work.

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 an 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.[23] 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,[24] 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 local contracts are involved.

Under G.S. 143-129(a), as revised by SL 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.

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 (including school boards and community college boards), however, is to report to the governing board *a summary* of the bids received, while the bids themselves are retained

23. A similar provision was included in the budget as a special provision to authorize the state Department of Transportation to accept electronic bids. SL 2001-424 (H 1040), sec. 27.9(a).

24. 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.

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.

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."[25] 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.

Period for Bid Withdrawal

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.

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. SL 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 travel ways; 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 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.[26]

General Construction Changes

A number of small changes were made in various statutes that affect construction contracts by public agencies, including public schools, community colleges, and the university. The statute governing claims on payment bonds, which guarantee payment of laborers and suppliers on public projects, was amended in SL 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 SL 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 SL 2001-

25. G.S. 143-129(b).

26. SL 2001-496, sec. 12.1(c).

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. This provision applies to the university but not to public schools or community colleges. 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 SL 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 that 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.[27] Johnston County obtained an expansion of a previously authorized exception to the bidding requirements for construction of certain schools.[28] 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.[29] 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.[30] 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,[31] by the Village of Pinehurst for the restoration of a historic property,[32] and by the College of the Albemarle for construction of a multipurpose facility in Elizabeth City.[33]

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.[34] 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. Public agencies, including public schools, community colleges, and the university, 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 local government purchasing laws, SL 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, but not to the university.[35]

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

27. SL 2001-248 (S 534).
28. SL 2001-135 (H 935).
29. SL 2001-99 (S 401).
30. SL 2001-44 (H 516).
31. SL 2001-69 (H 856).
32. SL 2001-66 (H 196).
33. *Id.*
34. SL 2001-516 (H 1284).
35. 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).

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 methods for the sale of surplus property.

Another change in the property disposal laws clarifies local government authority to discard property. SL 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*,[36] 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, including public schools, community colleges, and the university. 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 SL 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 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.[37]) 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 had broad application to all types of contracts but has only interests in contracts that would benefit individuals who are involved in the making of the contract. The precise coverage of the statute has actually been somewhat unclear. In contrast, G.S. 14-236 has applied only to state agencies and educational and eleemosynary institutions (a narrower scope than in G.S. 14-234) and has prohibited interests in contracts for the purchase of "goods, wares, and merchandise" (also narrower than in G.S. 14-234). However, the statute has applied 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 com-

36. 125 N.C. App. 628, 482 S.E.2d 9 (1997).

37. *See* SL 2001-487, sec. 44(a).

ponents 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.[38]

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 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. ■

38. *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.