New Procedures for School and College Construction, Purchasing, and Sales

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THE 1998 GENERAL ASSEMBLY enacted laws affecting single- and separate-prime bidding for local school administrative unit building projects, increasing the purchasing flexibility of school units and community colleges, extending lease-purchase and installment purchase authority to community colleges, and simplifying the responsibility that schools must shoulder for vehicles impounded in drunk driving cases. This article summarizes those changes and their impact on school and college construction, purchasing, and sales procedures.

Single-Prime and Separate-Prime Bidding

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

Current Separate-Prime Bidding Requirements

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

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New Option for Awarding School Construction Contracts

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

The new law states that in deciding how to award a contract under Subsection (d1), a local school unit "may consider the cost of construction oversight, time for completion, and other factors it deems appropriate." This language appears to give the local school board broad discretion in determining whether to choose the single-prime or the separate-prime system for a particular construction project. It is not clear, however, whether it is legally necessary for the board to articulate the basis for its decision. As a general rule, a court will invalidate a contract award decision only in cases of fraud or abuse of discretion.[1] If a board articulates the factors upon which it relies, it is unclear how much documentation is needed to support the decision. For example, if a board awards a contract to a single-prime contractor based on the determination that this method would be cheaper and faster than the separate-prime system, and the board enunciates this reasoning, could the board then be called upon to demonstrate support for its conclusion or be challenged for its failure to do so? Proving that one system is more cost effective may be difficult for an individual board. Indeed, there is much debate over whether the separate-prime system generally costs local governments more than the single-prime system.[2] However, the size of a particular unit's staff and other resources for construction oversight would certainly make the total cost of the particular contracting method vary according to the unit. If, on the other hand, the board says nothing about the basis for its choice, could the decision be challenged as being arbitrary, or could a challenger argue that the listing of factors in the statute indicates that the board must state the basis for its decision? The language in the statute appears to give local school units broad discretion in choosing the construction method deemed most appropriate, but the answers to these questions are not clear.

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

Receiving and Opening Bids

SL 1998-137 requires a school unit to receive separate-prime bids three hours before single-prime bids are due. (The statute does not specify, but it should be understood that separate-prime bids received early should not be opened until the single-prime bids are received. Thus the time for opening bids is the same as the time for receiving single-prime bids, and separate-prime bids are due three hours earlier.) One likely purpose of this requirement is to allow additional bid-preparation time for contractors who want to submit bids under both the separate-prime and the single-prime systems.

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

1. Kinsey Contracting, Co. v. City of Fayetteville, 106 N.C. App. 383, 384, 416 S.E.2d 607, 608, *cert. denied*, 332 N.C. 345, 421 S.E.2d 149 (1992).

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

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

Subcontractor Bids

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

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

A final complication with this requirement stems from an existing statutory provision in G.S. 143-132(b), which states that if at least three single-prime bids are received but no complete set of separate-prime bids is received, the unit is prohibited from opening the separate-prime bids. The new provisions in G.S. 143-128(d1), however, may make it necessary to open a separate-prime bid in order to determine whether a bidder submitted a higher bid as a subcontractor to a single-prime contractor. One way to reconcile these provisions is to conclude that the prohibition on opening bids under G.S. 143-132(b) simply does not apply under circumstances where it would frustrate the unit's ability to determine whether bidders have complied with G.S. 143-129(d1). The new law does provide that all provisions of Article 8, Chapter 143, that are "not inconsistent" with Subsection (d1) apply. Another theory is that it is not necessary to open the incomplete set of separate-prime bids because the contract cannot be awarded on a separate-prime basis, and any bidder who violates the prohibition on underbidding gains no advantage for which there is any effective remedy.

Good Faith Efforts Affidavits

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

Local School and Community College Purchasing Flexibility

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

tracts had been awarded). In 1998 the legislature extended this option to all local school units and to community colleges, subject to some limitations.

Local Schools

SL 1998-194 (H 1371) amends G.S. 115C-522.1 to authorize all local school administrative units to make purchases from noncertified sources if each of the following requirements is met:

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

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

It is important to note that this law authorizes the purchase of the same or *substantially similar* items. This resolves an ambiguity that arose during the pilot program about whether the product purchased from the noncertified source must be of the exact make and model and have other features the same as the item under the state term contract. The Department of Public Instruction has issued guidelines adopted by the State Board of Education as authorized under the new statute. Under those guidelines, items are the "same" if they have the same manufacturer and model number, but "substantially similar" items need not be identical. All "meaningful features, standards, and specifications" that affect "quality, service, and performance" should be compared to determine whether items are substantially similar. The guidelines caution purchasers to exercise extreme care to ensure that critical performance and safety requirements are not compromised by purchasing substantially similar items. (This reflects the fact that items on state contract often are tested and thoroughly evaluated to ensure that they are suitable and safe for the intended use.)

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

Community Colleges

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

pile the information and forward it to the Division of Purchase and Contract.

Lease-Purchase and Installment-Purchase Authority

The legislature enacted SL 1998-111 (H 1369), which authorizes community colleges to use lease-purchase and installment-purchase contracts for the purchase of equipment. Under the new statute, G.S. 115D-58.15, contracts for more than $100,000 or for a term of more than three years must be approved by the State Board of Community Colleges if state funds are intended to be the source of funds for payment of the obligation. If local funds are used, the statute requires the county to acknowledge in writing its understanding that funds may need to be appropriated to meet the obligation. The statute specifies, however, that the tax power is not pledged to secure the moneys due under the contract. The statute also requires contracts to be approved by the Local Government Commission if the contract extends for five or more years and contains an obligation of $500,000 or more over the term of the contract.

In addition, the legislature, by enacting SL 1998-117 (S 245), removed a limitation in G.S. 160A-20(h)(6) thereby extending installment-purchase authority to several additional local school administrative units that have taxing authority.

Local School Responsibility for Impounded Vehicles

SL 1998-182 (S 1336), as amended by SL 1998-217 (S 1279), makes several changes to the laws governing seizure and sale of vehicles driven by certain driving while impaired (DWI) offenders. As enacted in 1997, major changes in the DWI laws required local school administrative units to take responsibility for the storage (either on the school site or by contract at some other site) and the sale of seized vehicles. This section will briefly describe the changes that relate to contracting by local school administrative units in connection with the storage and sale of seized vehicles. (The article "Public Schools and Vehicles Forfeited for Drunk Driving," also in this issue of *School Law Bulletin*, explains legislative changes related to seized vehicles in greater detail.)

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

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

The law was also amended to deal with the concern of local school units that by the time a criminal proceeding involving the driver of a seized vehicle has concluded, towing and storage costs could have exceeded the value of the vehicle. G.S. 20-28.3(i) now authorizes the early sale of vehicles that have a fair market value of $1,500 or less or of vehicles for which the outstanding towing and storage costs exceed 85 percent of the fair market value of the vehicle. Fair market value is determined according to the schedule of values adopted by the commissioner of motor vehicles for state highway use tax purposes. Sales under this provision may not be

made before ninety days from the date the vehicle is seized. This provision became effective October 15, 1998, and applies to vehicles seized before, on, or after that date. For vehicles seized on or after December 1, 1997, and before December 1, 1998, however, the local school administrative unit must refund towing or storage costs received from the expedited sale if the owner is not obligated to pay these costs under the provisions of the statute. The statute does not specify how expedited sales will be initiated, for example, when the vehicles are being stored by a statewide contractor, but it appears that local school administrative units will be responsible for initiating such sales and for demonstrating that any vehicle to be sold meets the criteria in the statute. Such proof may be necessary for the DMV to effect the transfer of title necessary for the sale.

The revisions also address the potential liability of the local school unit for towing and storage costs by providing that the fees will always be assessed, even to an innocent vehicle owner, prior to the release of the vehicle. The local school administrative unit may still retain some liability for towing and storage fees incurred immediately after seizure and prior to retrieval by the school unit, its contractor, or the statewide contractor, as outlined in G.S. 20-28.3(d).

Finally, the maximum fee that may be charged for storage has been increased from $5 to $10 per day, and DPI is required to collect a $10 administrative fee from persons to whom a seized vehicle is released as well as from the proceeds of the sale of a forfeited vehicle.

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