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INTERPRETATIONS OF THE "PIGGYBACKING" EXCEPTION TO NORTH CAROLINA'S FORMAL BIDDING REQUIREMENTS

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In 1997, the General Assembly enacted S.L. 1997-174 (S 891) making several changes in the competitive bidding laws that apply to local government contracts. This law created a new exception, commonly referred to as the "piggybacking" exception, codified as G.S. 143-129(g). The exception reads as follows:

> When the governing board of any municipality, county, or other subdivision of the State, or the manager or purchasing official delegated authority under subsection (a) of this section, determines that it is in the best interest of the unit, the requirements of this section may be waived for the purchase of apparatus, supplies, materials, or equipment from any person or entity that has, within the previous 12 months, after having completed a public, formal bid process substantially similar to that required by this Article, contracted to furnish the apparatus, supplies, materials, or equipment to:
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> (1) The United States of America or any federal agency;
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> (2) The State of North Carolina or any agency or political subdivision of the State; or
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> (3) Any other state or any agency or political subdivision of that state,
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> if the person or entity is willing to furnish the items at the same or more favorable prices, terms, and conditions as those provided under the contract with the other unit or agency. Notwithstanding any other provision of this section, any purchase made under this subsection shall be approved by the governing body of the purchasing municipality, county, or other political subdivision of the State at a regularly scheduled meeting of the governing body no fewer than 10 days after publication of notice, in a newspaper of general circulation in the area served by the governing body, that a waiver of the bid procedure will be considered in order to contract with a qualified supplier pursuant to this section. Rules issued by the Secretary of Administration pursuant to §G.S.143-49(6) shall apply with respect to participation in State term contracts.

Since the enactment of this provision, a number of questions have arisen about its interpretation and application. This bulletin attempts to answer some of those questions.

Does the piggybacking exception apply to construction or repair contracts?

No. It only applies to contracts for the purchase of apparatus, supplies, materials, or equipment.

Does the piggybacking exception apply to contracts in the informal range?

No. The exception is contained in the formal bidding statute (G.S. 143-129) and there is no indication of legislative intent to extend it to informal bids, which are governed by G.S. 143-131. More importantly, an exception is not really necessary to piggyback on a contract in the informal range (contracts costing from $5,000 to $30,000). If a seller is willing to extend pricing established in prior contracts, the local government can simply accept the seller's price as an informal bid, seek additional bids (no minimum number is required but competition should be sought), and award to the lowest responsible bidder. No advertisement or governing board action is required for contracts in the informal range.

Does the piggybacking exception apply to local school units?

No. School purchasing is governed by the provisions of Article 3 of Chapter 143, as implemented by the State Division of Purchase and Contract. The piggybacking exception is contained in G.S. 143-129 in Article 8 of the General Statutes, which does not apply to school purchasing contracts, only school construction contracts.

When a local government piggybacks on another contract, does the local government actually become a party to that contract?

No. In this sense, the term "piggybacking" is actually not an accurate description of what the statute allows. The exception allows a local government to enter into a new and separate contract with a vendor who has contracted with another public agency and who is willing to extend the same or more favorable prices and terms to the local government.

Are local governments still required to "sign on" in advance in order to participate in state contracts? How should local governments interpret the language in the statute about complying with Department of Administration rules for participating in state term contracts?

The piggybacking exception allows local governments to purchase directly from a state contract vendor without agreeing to be a party to the state contract in advance as long as the state contract was entered into within the past 12 months. When a local government uses the piggybacking exception to purchase from a state contract vendor the local government does not become a party to the state contract and is not "participating" in the state contract. As noted earlier, the piggybacking exception allows a local government to enter into a new and separate contract with a vendor who has contracted with another unit. The vendor is not legally obligated to extend to the local government the state contract prices and terms, but if the vendor is willing to do so, the purchase can be made after the procedures in G.S. 143-129(g) are followed.

To participate in a state contract, on the other hand, local governments must comply with the procedures and regulations established by the Department of Administration through the Division of Purchase and Contract. In most cases (except in the case of convenience contracts discussed below) those procedures require local governments to "sign on" or agree in advance to participate in the state contract. If a local government takes this route, the vendor is *obligated* to extend the state contract prices and terms to the participating unit, and the participating unit is *obligated* during the term of the contract to purchase from the state contract vendor all of its needs for the items covered by the contract. The effect of agreeing to participate in a state contract is that the local government is bound to the same extent as if it had awarded the contract itself.

This means that if the local government wants to be guaranteed the state contract price, it must participate in the contract in accordance with the Division of Purchase and Contract procedures. If the local governments does not wish to be bound by the state contract it is free to purchase from a willing state contract vendor without signing on in advance as long as the state contract was entered into within the past 12 months and the notice and board approval requirements in G.S. 143-129(g) are met. As noted earlier, if a contract is in the informal range, the local government can purchase from the state contract vendor without going through the piggybacking procedure and without signing on in advance as long as it complies with the informal bidding procedures. A listing of state term contracts is available through the Internet at the State Purchase and Contract web site: *http://www.doa.state.nc.us/PandC/stdhp.htm*.

What procedures apply to state "convenience" contracts, like the microcomputer contract, where the state does not require local governments to sign on in advance?

The state has established several "convenience" contracts that are available to local governments and do not require a commitment to participate in advance. The largest contract that has been set up this way is the contract for the purchase of microcomputers. There is no specific statutory authority for local governments to purchase through state contracts, though it has generally been thought that there is implicit authority to do so under G.S. 143-49(6) which authorizes the state to makes its purchasing services available to local governments. Some attorneys (including the author) have been somewhat concerned that the implicit authority may be weaker for purchases under convenience contracts where the local government has taken no official action in advance to participate in the contract and the bidding procedure conducted by the state is on behalf local governments generally, rather than particular named local governments that have agreed to participate. Nonetheless, convenience contracts may offer significant savings and efficient purchasing opportunities and many local governments have taken advantage of them. Local governments can use the piggybacking procedure to purchase from state convenience contracts (if the contract is fewer than 12 months old) to be absolutely certain that the contract will be judged valid if challenged.

What information should be contained in the notice that must be published under the piggybacking exception?

The statute does not specify, but I recommend that the notice contain at least the following information: (1) a general description of the items(s) to be purchased (the anticipated quantity probably *does not* need to be included, but could be if the unit feels the information would be useful); (2) the identity of the supplier; (3) the city, state, or other agency with whom the supplier has contracted within the past 12 months (the date the contract was entered into might be useful, but probably is not essential); and (4) the date of the regular board meeting at which the board will consider the waiver of bidding.

A local government may also want to list the name and phone number of a person within the unit to contact for more information. This would allow interested competitors to contact the appropriate person to present an alternative offer prior to the board's award of a contract under the exception (see discussion below about alternate offers).

A sample notice might read (substitute information appropriate to your unit of government for material in brackets):

"The [Landville Board of Commissioners] will consider a waiver of competitive bidding under G.S. 143-129(g) at its regular meeting on [August 22, 1998] for the purchase of [two front end loaders] from [Heavy Duty Equipment, Inc.], the seller having agreed to extend to [Landville] the same or more favorable prices and terms set forth in its contract with [Greenleaf County], entered into on [November 12, 1997]. For additional information, contact [Pat Johnson, Landville Purchasing Director] at [phone number, fax number, email address]."

Is a local government required to accept bids offered by other suppliers during the process of purchasing under the piggybacking exception?

Although the statute does not require this, it seems logical that one purpose of the notice requirement is to let potential competitors know about the board's intent to award a contract without bidding. If an alternative proposal is made that would result in savings to the unit, or if the responsible person otherwise becomes aware that it would be in the best interest of the unit to obtain competition, he or she should abandon the piggybacking option in favor of receiving formal bids. It does not appear that board action would be required to abandon the piggybacking option and initiate a formal bidding process.

Does the unit of government that originally contracted with the vendor have to take any action prior to piggybacking by a North Carolina local government?

No. No action is required by the prior contracting agency because, as noted earlier, the North Carolina local government is not becoming a party to the prior contract. Instead, the exception allows the local government to enter into a new and separate contract with the vendor. Some cooperative purchasing contracts have provisions that require the vendor to make its prices available to other local governments, but the exception in the North Carolina statute does not require such a provision to have been included in order for the piggybacking to occur. It may be necessary for the local government to contact the original contracting agency, however, to verify that a public bidding process was undertaken, and to verify the terms and date of the original contract.

How must a local government document the existence of the prior contract in order to use the piggybacking exception?

The statute does not require any specific proof of the existence of the prior contract, but local

governments should not rely upon the representations of a vendor or other person without verification. If it turns out that there was no contract, or that the contract is more than 12 months old, the local government is not entitled to a waiver of bidding and the resulting contract, if challenged, would be held to be void. The local government could require the vendor to present a certified copy of the contract, or a copy of the contract accompanied by a verification letter from the original contracting agency, or the local government could simply contact the agency and verify the information directly.

From what date does the 12-month period begin to run?

The statute does not provide much guidance on this question. It says that the seller must have "contracted" within the previous 12 months. Although there are several possible interpretations of this language, the most conservative and therefore safest interpretation is that the period begins to run from the date the contract became effective, that is, when the last act necessary to create a mutually binding contract has occurred. Where a contract is evidenced by a purchase order, there is some question about when the contract actually comes into being since there is often no separate document signed by the vendor. In such cases, it would be appropriate to use the date of the purchase order as the contract date.

What if the original contract was entered into more than 12 months ago, but it has been renewed within the past 12 months?

If a renewal option was a part of the original contract, then the renewal does not amount to a new contract, but is instead a continuation of the original contract. In such a case it appears that a contract would not meet the requirement for piggybacking. If, on the other hand, a renewal was not a part of the original contract, but is a new contract, an argument could be made that the new contract is within the 12-month limit. A counter argument could be raised, however, that the new contract was not formally bid, but perhaps a court would view the new contract as having resulted from the original bid process.

It is also possible that a court would interpret the statute as not allowing piggybacking on a renewed contract in either case. One interpretation of the intent behind the 12-month limitation is that it is designed to insure that the bidding process undertaken for the original contract is recent enough to justify piggybacking without rebidding. The statute may reflect an assumption that a bidding process has occurred just before the contract was issued and thus, roughly within the past year. If a local government piggybacks on a contract that was bid three years ago but that was renewed within the past year, a court may find that the original bidding process is too old and does not reflect the current competitive market. Under this reasoning, a court might rule that the use of the exception on a renewed contract violates the intent of the statute.

What are the key aspects of a "public, formal bid process" that must be present in order for a prior contract to be eligible for piggybacking under the exception?

Again, the statute is not specific on this point. Based on a review of competitive bidding requirements from other jurisdictions, the key aspects of a public competitive bidding process typically include (1) public advertisement or other broadly announced and generally accessible notice of an opportunity to bid, and (2) sealed, competitive bids. Most competitive bidding procedures from other jurisdictions probably satisfy this requirement.

Can a local government piggyback on its own contract?

Although this probably wasn't how the exception was intended to be used, the statute appears to allow it. The unit would still have to comply with the notice and board approval requirements under the exception even though the prior contract was already approved by the same board. A better way to accomplish this result, however, is to include an "additional quantities" clause in the specifications for the initial contract. This would authorize the local government, at its option, to obtain additional quantities of items under contract at the same price (usually for a specified period), and alleviates the need, when additional quantities are desired, either to conduct a second bidding procedure, or to use the piggybacking procedure to avoid bidding. The specifications for the initial bid should clearly indicate that an additional quantities clause will be a part of the contract.

Can a local government piggyback on a contract that was entered into under the piggybacking exception (piggyback on a piggybacked contract)?

Although the statute does not specifically address this issue, it does not appear that this would be legal. The statute requires the original contract to have been entered into following a public, formal bid process substantially similar to that required under G.S. 143-129. Although it could be argued that since the piggybacking exception is contained in G.S. 143-129 the contract complies with that statute's requirements, the better interpretation is that a contract entered into under the piggybacking exception does not satisfy the requirement of formal, public bidding.

Can a local government purchasing under the exception make any changes in the terms of the original contract if the vendor will agree to them?

The statute specifically allows the vendor to provide *more favorable* terms or prices than those offered under the original contract. It is probably also acceptable for the local government to purchase a different quantity of items, or to agree to a different duration term for the new contract than in the original contract. Great caution should be exercised, however, in making other types of changes that might place the new contract outside the scope of the exception. Since the statute authorizes the purchase of *the same items* that were purchased under the original contract, a substantial change in the character of the items to be purchased under the new contract may render the contract void. For example, if the original contract was for two-door vehicles and the local government wishes to purchase a four-door vehicle, such a purchase could not legitimately be made under the piggybacking exception. A closer case would involve a change in the options chosen by the local government. It may be legitimate for the local government to choose options that were not chosen by the original contracting agency without undermining the use of the exception. In some cases, changes made in the original contract may be justified under the language that allows the original vendor to offer the same *or more favorable* prices, terms and conditions.

There is no way to establish a hard rule on this issue, but local governments should consider whether modifications to the original contract would have been outside the scope of what was originally bid or would substantially increase the price. If so, a separate bidding process should be undertaken instead of using the piggybacking exception, even if the contractor has offered competitive prices. The exception does not authorize simply entering into negotiations with a vendor who has contracted with another public agency. Local governments should be cautious when purchasing under the exception to stay within the limits of its scope.

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