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Public Purchasing and Contracting

Legislative changes in the 2005 session affecting public contracting continue the recent trend of increasing flexibility through higher bidding thresholds and the creation of new exceptions to bidding requirements. The most important change was the increase in the minimum threshold for informal bidding, which created a significant category of contracts (those costing less than $30,000) that do not require any form of competition. Even though some jurisdictions may choose to conduct informal bidding for some or all contracts below this threshold, local units will have a choice about what procedures to adopt and are not restricted to the statutory procedures. Another significant change is the explicit authorization for agreements with developers to construct infrastructure improvements associated with new development. These provisions, which were enacted as part of a major revision to the land use development laws for local governments, provide a practical approach to the common occurrence in which developers are able to make infrastructure improvements as part of a private project, improvements that will benefit the jurisdiction as a whole.

Threshold Changes and New Exceptions

Threshold Changes

The legislature changed the dollar thresholds that trigger several contracting procedures for purchasing, construction contracting, and property disposal. In S.L. 2005-227 (H 1332), which became effective July 27, 2005, the legislature increased from $5,000 to $30,000 the minimum expenditure level in G.S. 143-131(a) at which informal bidding is required for purchases of apparatus, supplies, materials, and equipment, and for construction or repair work. Therefore, unless required by local policy, bidding procedures are no longer required for contracts in these categories costing less than $30,000. Local governments may establish local policies requiring competition at a lower threshold or in certain circumstances. Since the requirement to award contracts to the "lowest responsible bidder" would no longer apply to contracts below this threshold, local governments may be able to establish local preferences for contracts in this dollar range. As another result of this change, minority outreach requirements included in G.S. 143-131(b) no longer apply to contracts below $30,000. Local governments may, under local policies, continue minority outreach practices when seeking competition below this threshold. The threshold change is automatic; that is, it requires no action by the governing

board to become effective in a local unit of government. A local policy to continue bidding requirements below the $30,000 threshold, however, will require local action; the policy adopted should specify whether the unit will follow the otherwise applicable informal bidding procedures or whether local variations will apply.

The new law also increases from $5,000 to $30,000 the value of surplus property that may be sold under a delegation of authority as provided in G.S. 160A-266(c). This statute allows the governing board to delegate authority for disposal of property using informal procedures designed to receive fair market value. Unlike the change in the bidding threshold, this change is not automatic, and local governing boards must approve a delegation to the increased level. The effect of the delegation is to alleviate the need for public advertisement and board action on sales of particular property valued at up to $30,000. The new delegation provides broader authority for the use of electronic auction or other methods of selling property as it becomes surplus as an alternative to storing such property for later sale by public auction.

S.L. 2005-227 also adds authority in two statutes for the use of electronic advertisement instead of published notice: G.S. 143-129(g), commonly referred to as the "piggybacking" exception, and G.S. 160A-270(c), regarding electronic auctions. This authority was included in the formal bidding statute, G.S. 143-129, in 2001.

The changes discussed above apply to cities, counties, schools, and other local government entities. Lower thresholds in local acts or charters remain in effect.

Infrastructure Agreements

As part of a major revision to the land use development laws, the legislature has created new provisions that govern infrastructure projects conducted by private developers or property owners. In S.L. 2005-426 (S 814) the legislature enacted parallel statutes for cities and counties authorizing reimbursement agreements to be used when private developers design and construct infrastructure included in the local government's Capital Improvement Plan. The agreements must be provided for by ordinance, and the reimbursements may be paid from any lawful source. The statutes specifically exempt these agreements from the competitive bidding requirements. The developer, however, must comply with these requirements when awarding contracts for work that would have required competitive bidding if the contract had been awarded by the local government.

Similar provisions for road work and public enterprise (utility) work authorize cities and counties to contract with a developer or property owner, or with a contractor working for a developer or property owner, for improvements adjacent or ancillary to a private land development project. These contracts are exempt from bidding if the public cost does not exceed $250,000 and the local government determines that: (1) using the private developer will be less expensive than the unit's estimated cost of using its own forces or contracting with a different private contractor or (2) it would be impracticable to coordinate the work if the projects were separately constructed. These provisions become effective January 1, 2006.

In S.L. 2005-41 (H 489) several local governments obtained the same authority regarding reimbursement agreements as provided by S.L. 2005-426. S.L. 2005-41 applies to Apex, Broadway (but only for municipal infrastructure located in Lee County), Cary, Goldston, Holly Springs, Pittsboro, Sanford, Siler City, to all municipalities wholly or partially in Cabarrus County, and to Cabarrus, Chatham, Durham, and Lee counties. The act exempts reimbursement agreements with private developers and property owners for design and construction of public infrastructure included in the unit's Capital Improvement Plan designed for the benefit of the developer or property owner and contains the same requirements as described above regarding developer compliance with bidding requirements. This act became effective May 16, 2005.

Sludge Management Facilities

An existing statute, G.S. 143-129.2, authorizes an alternative bidding and contracting approach for certain solid waste facilities. The law sets out a request for proposals process rather than sealed bidding for contracts that include the design, construction, operation, and maintenance of a solid waste

management and disposal facility. The statute also establishes a flexible standard for awarding the contract, specifically including factors other than price, and allows negotiation prior to contract finalization. The legislature amended this statute in S.L. 2005-176 (H 1097) so that it now applies to any sludge management facility, defined as "a facility that processes sludge that has been generated by a municipal wastewater treatment plant for final end use or disposal." The definition excludes "any component of a wastewater treatment facility that generates sludge." The law also amends the statute to specify that it applies to sanitary districts, water and sewer authorities, metropolitan sewerage districts, and county water and sewer districts.

Purchase of Voting Systems

The legislature established new requirements for voting systems used in state elections, including minimum requirements for the purchase of new systems. In S.L. 2005-323 (S 223), the legislature amended G.S 163-165.7 to require that counties purchase only voting systems certified by the State Board of Elections. While paper balloting systems are automatically deemed certified, other systems must be specifically approved by the state. To be certified the systems must meet the requirements of a request for proposal process set forth in the amended statute. The state request for proposal process will establish which systems may be purchased by counties upon recommendation of the county board of elections. Under G.S. 163-165.8, when the county purchases a voting system certified by the state, the county is exempt from the otherwise applicable bidding requirements in Article 8 of G.S. Chapter 143. The amendments affecting voting systems also require the vendors to place the source code in escrow to secure its continued use in the event of a failure of the system or the business. A list in the statute specifies who may view this material, which is otherwise not subject to public disclosure.

Local Exemptions

As is typical, the legislature approved several local modifications to the bidding requirements. Durham County obtained flexibility under S.L. 2005-172 (S 435) for public-private projects, including freedom from the procedural requirements for leases of greater than ten years and from otherwise applicable bidding procedures to allow use of the same contractor for the publicly and privately funded portions of the projects.

S.L. 2005-174 (S 340) grants exemptions to Roanoke Rapids from the building construction requirements for construction of theater projects in the Music Theater and Entertainment District and for construction of a new fire station using the design-build construction method, which is not authorized under the otherwise applicable law.

S.L. 2005-32 (H 997) increases the force account limit in Davie County from the statutory threshold of $125,000 to $600,000 for expansion and improvement of an EMS station.

State, University, and Community College Contracts

Historically Underutilized Business Certification

A new law requires the state Department of Administration to adopt rules and procedures for certification of historically underutilized businesses and to create and maintain a database of these businesses. S.L. 2005-270 (S 907) amends several statutes that deal with minority business programs in state and local government contracting to create the new requirement. The definition of "historically underutilized business" is consistent with the definitions already listed in these statutes for "minority business" as well as businesses owned by disabled persons as defined in G.S. 168-1 or G.S. 168A-3. This act codifies authority for the substantial certification program already in place at the state level. While the law does not require local governments to recognize the state certification process, it may promote more consistency and reliability in the recognition of minority firms included in contracting programs.

Outsourcing and Preferences

Under a new statute, G.S. 143-59.4 [S.L. 2005-169 (H 800)], vendors bidding on state contracts will be required to disclose in a statement submitted with their bids where contracted services (including subcontracted services) will be performed. The statement must specify whether any work is anticipated to be performed outside the United States. The law requires the Secretary of the Department of Administration to retain these statements and report annually on them. The law became effective on October 1, 2005, and applies to bids submitted on or after that date. The new requirement applies to state government contracts only, and not to local government contracts.

S.L. 2005-213 (S 879) removes the sunset on the reciprocal preference requirement enacted in 2001 (S.L. 2001-240). That law requires the state to increase bids from vendors who come from states having in-state preferences. The increase is a percentage equal to that of the in-state preference. The legislature also amended several statutes to authorize the state to maintain a list of resident bidders and to endeavor to provide notice to all resident bidders who express an interest in bidding on state contracts.

University Contracts

The Umstead Act limits state agency and university competition with the private sector in the provision of specified services. The act contains numerous exceptions for particular activities. This year, in S.L. 2005-20 (H 752), the legislature created an exception in G.S. 66-58(c) for sales by North Carolina State University of dairy products produced by the Dairy and Process Applications Laboratory. Profits from these sales must be used to support the University Department of Food Science and the College of Agriculture and Life Sciences. S.L. 2005-63 (S 510) adds a new exception for the use of personnel and facilities of Western Piedmont Community College in support of economic development through the operation of the East Campus and its companion facilities as an event venue. Another new provision of the Umstead Act enacted in S.L. 2005-397 (H 1539) requires the UNC Board of Governors to create a panel to determine whether particular activities are covered by the authority provided in the act.

Several acts this session provide the University system additional contracting flexibility. S.L. 2005-125 (H 678) amends G.S. 143-53 to add a new subsection (d) allowing The University of North Carolina to solicit bids for service contracts with terms of ten years or less, including extensions and renewals, without prior approval of the State Purchasing Officer. This act became effective June 29, 2005. S.L. 2005-300 (H 1464) makes permanent an increase in autonomy for University construction projects costing $2 million or less. That law also removed the sunset provision in a 2001 law giving the University autonomy and flexibility in managing projects. S.L. 2005-300 requires the Board of Governors annually to report to the State Building Commission on projects undertaken under the flexibility provisions.

A provision in the Current Operations and Capital Improvements Appropriations Act of 2005 [S.L. 2005-276 (S 622); section 9.8] authorizes the University and its constituent institutions to participate in the aggregation of purchasing for computer hardware and software licenses and multiyear agreements as administered by the Office of Information Technology Services. The provision directs the Office of State Budget and Management to study whether further aggregation is cost justified.

Community Colleges

S.L. 2005-370 (H 576) gives community colleges flexibility in awarding open-ended contracts (that is, contracts that are not limited to a single project) for architectural, engineering, or surveying services estimated to cost less than $300,000. (Similar flexibility has previously been provided to The University of North Carolina.) As amended by this act, G.S. 143-64.34 exempts community college projects below the $300,000 threshold from State Building Commission approval if they are part of an open-ended contract, are publicly announced, and comply with State Building Commission procedures. This change became effective October 1, 2005.

School Purchasing

The formal bidding statute, G.S. 143-129, requires governing board approval of purchase and construction or repair contracts in the formal bidding range. The statute provides, however, that for purchase contracts only, the board may delegate authority to award contracts and to reject bids or readvertise to receive bids. In S.L. 2005-227 the legislature included superintendents in the list of individuals to whom the delegation may be made. When the provision was originally enacted, local school units were not governed by it, so this change brings the law into conformity now that it applies to schools.

Sales of certain beverages in school vending machines will be restricted under a new law enacted in S.L. 2005-253 (S 961), which limits certain types of food and drinks in the schools. For more information about this law, see Chapter 10, "Elementary and Secondary Education."

Other Contracting Changes

S.L. 2005-134 (S 537) authorizes a taxing unit to accept as payment of taxes due an offset against an obligation under a lease or another contract between the taxpayer and the taxing unit entered into prior to July 1 of the taxing year for which the unpaid taxes were levied. This law became effective June 29, 2005.

S.L. 2005-290 (H 819) gives regional councils of government authority to acquire and improve real property in order to meet office space and program needs. The statute, G.S. 160A-475, as amended, specifically states that councils of government are *not* authorized to acquire property by eminent domain.

Property Disposal

The legislature enacted several new provisions regarding the disposition of firearms. G.S. 15-11.1(b1) lists the ways a judge may order the disposition of firearms in cases where firearms are seized and are no longer needed for a criminal trial. S.L. 2005-287 (H 1016) adds to that statute a provision specifying that the judge may order the firearm turned over to a law enforcement agency, which may in turn use, sell, or trade it to or exchange it with a federally licensed firearm dealer. The law specifies that if the firearm is sold, the proceeds of the sale must be remitted to the schools pursuant to G.S. 115C-452. The receiving agency must maintain a record of all firearms received. Identical language was also added to G.S. 14-269.1, which addresses the confiscation and disposition of deadly weapons. In addition, a new section was added to G.S. Chapter 15 setting forth similar procedures for firearms found or received by a law enforcement agency rather than confiscated. G.S. 15-11.2 establishes procedures for providing notice of unclaimed firearms. If a firearm remains unclaimed after the notice and thirty-day waiting period, the statute provides for disposition in the same manner as described above for firearms awarded by a judge. In the case of unclaimed firearms under this section, however, the proceeds of sales may be retained by the agency. (The constitutional requirement to remit proceeds to the schools does not apply to found property, only to seized or confiscated property.)

The City of Raleigh obtained a local act [S.L. 2005-157 (S 392)] amending its charter to authorize the city to sell uniforms and equipment (excluding weapons) to employees at private sale upon their separation from employment. The city council must set prices, terms, and conditions by resolution.

Conflicts of Interest

S.L. 2005-70 (H 869) amends G.S. 131E-14.2, which concerns the conflict of interest laws that apply to public hospitals. As amended, the statute now prohibits hospital board members from having

direct interests (was, direct or indirect interests) in hospital contracts. The statute was also amended to specify that there is no conflict of interest if the board member is not involved in making or administering the contract. The new provision incorporates parallel language from G.S. 14-234 in the definition of the following: (1) *administering* a contract includes overseeing performance of, or interpreting, the contract; (2) *making* a contract includes participating in the development of specification or contract terms or in the contract preparation or award. The new law adds several conditions to the exception for small contracts under subsection (d) of the statute and creates an exception for a director who serves on the board as an *ex officio* representative of the hospital medical staff under a hospital bylaw adopted prior to January 1, 2005. This exception also applies to the spouse of any director who meets these criteria.

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