

Public Purchasing and Contracting

The legislature did not make any significant changes in the public purchasing and contracting laws this session. This summary includes several minor changes that will be of interest to local and state government purchasing officials.

Construction Contracting Changes

Statute of Limitations on Breach-of-Contract Lawsuits against Local Governments

G.S. 1-53(1) provides a two-year statute of limitations for breach-of-contract actions brought against local units of government. S.L. 2008-139 (H 1284) amends G.S. 1-53(1) to permit the commencement of actions arising out of a contract to improve real property if the suit is brought no later than ninety days after (1) substantial completion of the project (as defined in G.S. 1-50(a)(5)(c)), as long as proper notice of the claim has been given if required by the contract, or (2) the date the contract was terminated, if the contract was terminated before substantial completion.¹ This amendment was a reaction to a recent North Carolina Court of Appeals case, *ABL Plumbing & Heating Corp. v. Bladen County Board of Education*, 175 N.C. App. 164, 623 S.E.2d 57 (2005), *rev. denied*, 360 N.C. 362, 629 S.E.2d 846 (2006). In *ABL Plumbing & Heating*, the court held that the plaintiff's breach-of-contract claims against the Bladen County Board of Education were barred by the two-year statute of limitations in G.S. 1-53. The plaintiff in *ABL Plumbing & Heating* argued that the statute of limitations should not begin to run on construction

1. G.S. 1-50(a)(5)(c) defines "substantial completion" as "that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended."

contracts until the date of substantial completion.² The court disagreed, instead following what it called the "well-settled rule in North Carolina that a cause of action for breach of contract accrues as soon as the injury becomes apparent to the claimant or should reasonably become apparent to the claimant."³ With this amendment to G.S. 1-53(1), that "well-settled rule" will no longer apply to breach-of-contract actions brought against local governments on contracts involving improvements to real property as long as the claimant brings its lawsuit within ninety days of substantial completion of the project or ninety days of contract termination. S.L. 2008-139 applies to actions filed on or after July 28, 2008, but does not revive claims previously barred under G.S. 1-53(1).

Joint Municipal Assistance Agency Contracts

Article 3 of G.S. Chapter 159B authorizes agencies and municipalities to form joint municipal assistance agencies to assist municipalities in the construction and operation of their electronic systems. G.S. 159B-44(13) gives these agencies the authority to make and execute contracts "necessary or convenient in the exercise of the powers and functions of" the agency. By deleting the three-year limitation from G.S. 159B-44(13), S.L. 2008-38 (H 1679) permits joint municipal assistance agencies to make and execute contracts for periods greater than three years.

Greenhouses Exempt from Building Rules

S.L. 2008-176 (H 2313) amends G.S. 143-138(b) to exempt farm buildings that are greenhouses from building rules under the North Carolina State Building Code or under local building rules even if those farm buildings are located within the building-rules jurisdiction of a municipality. The revised statute defines a greenhouse as "a structure that has a glass or

2. 175 N.C. App. at 168, 623 S.E.2d at 59-60.

3. *Id.*

plastic roof, has one or more glass or plastic walls, has an area over ninety-five percent (95%) of which is used to grow or cultivate plants, is built in accordance with the National Greenhouse Manufacturers Association Structural Design manual, and is not used for retail sales.” The statute is also amended to permit local building-rules jurisdictions to approve rules addressing “distinct life safety hazards.”

Public-Private Agreements for Construction of Transportation Infrastructure

In 2006, the General Assembly enacted G.S. 136-18(39), which gave the Department of Transportation (DOT) the authority to enter into private-public agreements to finance the cost of acquiring, constructing, and operating transportation infrastructure through “tolls and other financing methods authorized by law.” A 2007 amendment to the statute included the use of contracts as a permissible financing method for such agreements. S.L. 2008-164 (H 2318) further amends G.S. 136-18(39) to give DOT the authority to enter into public-private agreements “to plan, design, develop, acquire, construct, equip, maintain, and operate highways, roads, streets, bridges, and existing rail, as well as properties adjoining existing rail lines in this State.” The amendment, however, requires that any contracts for construction entered into under the statute comply with the competitive bidding requirements applicable to DOT, which are found in Article 2 of G.S. Chapter 136.

G.S. 136-28.6 permits DOT to participate in private engineering and construction contracts for state highways as long as the requirements in G.S. 136-28.6 are met. A 1995 amendment to the statute permitted municipalities to participate financially in these contracts when the contracts involved streets or highways on a “mutually adopted transportation plan” for the municipality. S.L. 2008-164 amends G.S. 136-28.6 to permit both municipalities and counties to participate financially in private land acquisition contracts—as well as private engineering and construction contracts—entered into for the construction of a street or highway on either (1) the Transportation Improvement Plan adopted by DOT or (2) a “mutually adopted transportation plan” that is designated a DOT responsibility.

Irrigation Contractor Licensing

As part of its response to the recent drought in North Carolina, the General Assembly enacted a new G.S. Chapter 89G [S.L. 2008-177 (H 2353)] requiring the licensure of irrigation contractors and creating the North Carolina Irrigation Contractors’ Licensing Board. The new chapter requires any individual, firm, partnership, association, corporation, or other entity that “constructs, installs, expands, services, or repairs irrigation systems”

for pay to be licensed as an irrigation contractor. There are several exemptions to the licensure requirement, including exemptions for:

- public entities performing irrigation work on public property;
- a property owner performing irrigation work on his or her own property;
- registered landscape architects;
- licensed professional engineers, general contractors, wastewater contractors (performing irrigation work on wastewater systems), public utility contractors, and plumbing contractors (performing plumbing work on irrigation systems); and
- projects costing less than \$2,500.

The section of the new chapter creating the North Carolina Irrigation Contractors’ Licensing Board became effective on October 1, 2008; the sections authorizing the new licensure requirements become effective on January 1, 2009.

New State Purchasing and Contracting Initiatives

Sustainable Public Buildings Program

In 2007, the General Assembly passed legislation [S.L. 2007-546 (S 668)] directing the Department of Administration (DOA) to administer a program to improve the energy efficiency of buildings designed and constructed by the state, state agencies, constituent institutions of the University of North Carolina, and all community colleges and regional institutions. S.L. 2008-203 (S 1946) codifies this program in the new Article 8C of G.S. Chapter 143 and the new section 146-23.2. The program requires that buildings larger than 20,000 gross square feet that are constructed or renovated by a “public agency”—defined as the state, state agencies, constituent institutions of the University of North Carolina, and all community colleges and regional institutions—to meet specific energy efficiency and water use standards. The program applies to building construction and renovation projects that have not yet entered the schematic design phase before the August 8, 2008, effective date. Under new Article 8C, DOA is also directed to (1) establish policies and guidelines to implement the article, (2) create an advisory committee, (3) develop education and training requirements based on recommendations from the advisory committee, (4) conduct an annual performance review of the program, and (5) report to specified General Assembly commissions and committees on its findings from this review. One of the required components of DOA’s performance review under new Article 8C is whether additional public agencies should be included in the program.

New G.S. 146-23.2 prohibits state agencies from purchasing a building unless the building was designed and constructed to at least the same energy efficiency and water use standards that would have applied to the design and construction of a comparable state building at the time the building was constructed. Similarly, the statute prohibits state agencies from purchasing any building that had a major renovation unless the renovation complied with the same energy efficiency and water use standards that would have applied to a renovation of a comparable state building at the time of the renovation. These restrictions do not apply to the purchase of buildings of historical, architectural, or cultural significance, nor do they apply to gifts or bequests.

Statewide Electronic Document Management System Pilot Program

Section 6.12 of the appropriations act, S.L. 2008-107 (H 2436), requires \$200,000 of the funds appropriated to the Office of Information Technology Services (ITS) for the 2008–09 fiscal year to be used for a statewide electronic document management system pilot program that will include digital signature capability. ITS will identify a state agency for the pilot, and that agency must develop the requirements for the statewide electronic document management system, including the development of statewide procurement standards for “electronic records infrastructure.”

Exemptions from Bidding and Property Disposal Laws

Section 27.7A of the appropriations act (S.L. 2008-107) authorizes DOA to contract with the North Carolina Freedom Monument Project, Inc., a nonprofit 501(c)(3) corporation, for the design and construction of the North Carolina Freedom Monument. The act also requires the North Carolina Freedom Monument Project, Inc., to select the designer and consultant for the project, notwithstanding the requirements in G.S. 143-64.31 regarding the selection of design professionals using a qualifications-based process or the State Building Commission’s rules regarding the selection of designers and consultants.

S.L. 2008-204 (S 1925) amends G.S. 142-94 to exempt the purchase, construction, or operation of capital facilities by Gateway University Research Park, Inc., a joint Millennial Campus in Greensboro, from the procurement requirements and energy conservation requirements that apply to the purchase, construction, and operation of other state facilities under Articles 3, 3B, 3C, 3D of G.S. Chapter 143. The amendment provides that Article 8 of G.S. Chapter 143 (requiring the use of specific construction

methods and requiring competitive bidding for construction projects) does not apply to the purchase, construction, and operation of capital facilities by Gateway University Research Park, Inc.

In the 2008 session, the legislature followed a common pattern of authorizing several local modifications allowing exemptions from aspects of the competitive bidding requirements for construction projects. These acts often create exemptions to particular requirements to deal with circumstances affecting particular projects. Iredell County is exempted, in S.L. 2008-67 (H 2468), from certain bidding requirements for the purchase and erection of a prefabricated modular building system for use as an animal shelter. This exemption expires July 1, 2010. S.L. 2008-67 (H 2468) permits the Town of Mooresville to use the design-build method of construction for the construction of a sewer pumping station. S.L. 2008-55 (H 2770) increases the force account limit in G.S. 143-135 for several City of Winston-Salem road projects and greenway projects (until July 1, 2010) and for the City of Asheville Zoo City Park Project (until December 31, 2010) to \$300,000. S.L. 2008-40 (S 1895) exempts Johnson County from certain bidding requirements for renovations to the Johnson County Courthouse. S.L. 2008-7 (S 2136) exempts the City of Concord from certain bidding requirements for the construction of the Speedway Area Infrastructure Projects until December 31, 2013. The city council must adopt a resolution approving the exemption, and specified conditions must be met in order for the exemption to take effect. S.L. 2008-73 (H 2376) exempts the City of Goldsboro from the competitive bidding requirements of Article 8, G.S. Chapter 143, until December 31, 2008, for the repurchase of a performing arts facility.

In addition to these exemptions from the bidding laws, the legislature approved an exemption relating to property disposal and an exemption relating to leases. S.L. 2008-46 (H 2347) authorizes the City of Winston-Salem to impose limitations on the future use of property disposed pursuant to Article 12, G.S. Chapter 160A. S.L. 2008-60 (S 2118) authorizes the Village of Wesley Chapel to lease certain property to the YMCA of Greater Charlotte for a term of more than ten years without following any procedures other than the procedures required by G.S. 160A-272 for leases of less than ten years. (G.S. 160A-272 requires that leases of real property for a term of more than ten years be executed following the procedures required for the sale of real property under Article 12, Chapter 160A of the General Statutes.)

Eileen R. Youens