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Purchasing and Contracting

The most important pieces of legislation affecting public purchasing and contracting this session (1) authorize the use of the “reverse auction” bidding method for purchase contracts, (2) allow public agencies to receive formal bids electronically for most types of purchase contracts, and (3) revise the law governing the use of competitive specifications for materials used in public construction projects. The first two changes continue the trend established over the past several sessions of expanding and updating public agencies’ choices of contracting methods and approaches. The third reflects the constant tension between the government’s desire for flexibility and the legal requirements for competition in public contracting.

Alternative Bidding Methods

During the past several sessions, the legislature has enacted laws that increased the number of exceptions to the public bidding requirements and expanded the potential for use of electronic media in the bidding process. This year, in S.L. 2002-107 (H 1170), the legislature authorized two new methods of receiving bids for the purchase of apparatus, supplies, materials, or equipment. These methods are alternatives to the process of receiving sealed paper bids and opening them at a public bid opening, as required in G.S. 143-129, or to the informal bidding procedures established in G.S. 143-131. Codified in G.S. 143-129.9, the new methods are (1) reverse auction and (2) electronic bidding.

Reverse auction is a method of receiving bids that allows bidders to compete against each other by offering multiple bids during a fixed bidding period. As defined by the statute, reverse auction is “a real-time purchasing process in which bidders compete to provide goods at the lowest selling price in an open and interactive environment. The bidders’ prices may be revealed during the reverse auction” [G.S. 143-129.9(a)(1)]. Local governments may conduct these auctions themselves or through a third party, including the state’s electronic procurement system. The reverse auction provisions in G.S. 143-129.9 apply only to purchases made by local governments;

they do not apply to construction or repair contracts. An exception in this statute provides that reverse auction bidding shall not be used for the purchase of “construction aggregates, including but not limited to, crushed stone, sand, and gravel” [G.S. 143-129.9(c)].

The second alternative bidding method authorized in the new statute is *electronic bidding*. This provision authorizes local governments to receive electronic bids instead of or in addition to paper bids. Like the reverse auction provision, the electronic bid authorization applies only to purchase contracts and not to construction or repair contracts. Since the informal bidding requirements in G.S. 143-131 (for purchasing contracts costing between \$5,000 and \$90,000) do not specify the form in which bids must be received, local governments already had the ability to receive bids electronically (including by fax) for contracts in this range. The electronic bidding authority was necessary, however, to provide an alternative to the sealed-bid requirement for contracts in the formal bid range (\$90,000 and above) under G.S. 143-129.

A separate provision of the new statute provides that “the requirements for advertisement of bidding opportunities, timeliness of the receipt of bids, the standard for the award of contracts, and all other requirements in this Article that are not inconsistent with the methods authorized in this section shall apply to contracts awarded under this section.” So for example, the usual requirement that all bids must be received at a set time may be modified to accommodate the reverse auction method but would still apply to bids received electronically under the traditional bidding system.

The foregoing discussion applies to the use of alternative methods by local governments. Local school systems, however, along with state agencies (including universities) and community colleges, are subject to bidding procedures established by the Department of Administration. S.L. 2002-107 amends the statute governing the purchasing authority of that department to include the use of “negotiation, reverse auctions, and acceptance of electronic bids” [sec. 2 (amending G.S. 143-53(a)(5))]. This provision also broadens the scope of the authority in that statute to include installment and lease purchase contracts. The use of reverse auctions under this provision, however, is limited to local school units. This method is not available to state agencies (including universities) or to community colleges. An uncodified provision in the law requires the Department of Administration to conduct a pilot program for reverse auctions for purchases by local school systems and to report the results to the Joint Select Committee on Information Technology when the 2003 General Assembly convenes. The exception barring use of the reverse auction for construction aggregates is not included in the authorization for local school systems.

Authority to use negotiations, reverse auctions, and electronic bids was also added to G.S. 147-33.95, which governs the procurement of information technology goods and services through the Office of Information Technology Services [S.L. 2002-207, sec. 4 (amending G.S. 147-33.95)].

Competitive Items in Construction Specifications

State laws governing public construction projects include a provision requiring public agencies to use open and competitive specifications for materials to be used in public works projects. General Statute 133-3 requires that materials be specified in terms of performance characteristics and allows brand-specific requirements only when it is “impossible or impractical” to use performance specifications. When brands *are* specified, multiple brands must be listed, if possible. A provision added to the law in 1993 allowed public agencies to list a preferred brand as an alternate to the base bid but still required that the base bid list three or more items of equal or equivalent design. This provision has allowed agencies to choose the preferred alternate at their discretion if they consider the product and cost to be the most desirable.

Concerns about the lack of open competition that occurred in some cases when the preferred alternate option was used led the legislature to repeal that portion of G.S. 133-3 in S.L. 2002-107; the repeal became effective September 6, 2002. After learning about this change, public agency officials expressed concern about the loss of flexibility in choosing materials for standardization or other purposes. To address this concern, compromise language was inserted into G.S. 133-3 and enacted as part of the technical corrections bill [S.L. 2002-159, S 1217, sec. 64(c)]. The new

language became effective January 1, 2003. Between September 6, when deletion of the preferred alternate option became effective, and January 1, 2003, public agencies had no authority to use this option to specify a particular brand in construction specifications.

The new language in G.S. 133-3 authorizes the use of one or more preferred brands as an alternate to the base bid “in limited circumstances.” A public agency’s preference for one or more particular brands must be supported by performance standards and must be approved in advance by the owner in an open meeting. The preference may be approved “only where (i) the preferred alternate will provide cost savings, maintain or improve the functioning of any process or system affected by the preferred item or items, or both, and (ii) justification identifying these criteria is made available in writing to the public.” It would appear that approval by the public agency in an open meeting satisfies the requirement to make the justification available to the public but that agencies could also make the information available at local offices or on official Web sites. Alternatively, the agency might indicate where the public can obtain the information in the advertisement for the public meeting at which the brand preferences are to be approved.

Other Public Construction Law Changes

Department of Transportation: Threshold Increase

The threshold for formal bidding of projects by the Department of Transportation under G.S. 136-28.1 was increased from \$800,000 to \$1,200,000 [S.L. 2002-151 (H 1518)]. The same law broadened the department’s authority to use the design-build method of construction by eliminating the three-project-per-year limit on use of this method. New standards and reporting requirements for design-build projects were added to G.S. 136-28.11.

Technical Correction for Separate-Prime Bidding

A provision in G.S. 143-128 erroneously deleted in an earlier revision to that statute was reinserted in the technical corrections bill. The reinserted provision applies to public building construction projects that are bid under the separate-prime bidding procedure in G.S. 143-128(b). It allows work in any category that is estimated to cost less than \$25,000 to be included in another category of work for purposes of bidding.

Energy Efficiency in State-Owned Buildings

In S.L. 2002-161 (H 623), the legislature extended to state agencies, including the university system, the authority to use guaranteed energy savings contracts and to finance the costs of improvements made under those contracts. The guarantee in these contracts is that the resulting energy savings will pay back the cost of the improvements over the term of the contract. Procedures for state agencies undertaking guaranteed energy saving contracts are set out in G.S. 143-64.17A(c1). Reporting and inspection provisions are set out in Sections 143-64.17H and 143-64.17K. Authority and procedures for financing guaranteed energy savings projects are established in G.S. 142-60 through 142-70.

Engineering and Landscape Architecture Study

The Legislative Research Commission is authorized to study the professions of engineering and landscape architecture as they are regulated by North Carolina statutes. The study will address continuing concerns arising out of areas of overlap between the two professions.

Small Business Contractor Programs

Two bills were enacted this year to promote the use of small businesses in contracting and to provide financial assistance to small businesses. In S.L. 2002-181 (S 832), the legislature established the North Carolina Small Business Contractor Authority to provide financial assistance to small businesses unable to obtain adequate financing and bonding in connection with contracts. The authority is to be housed in the Department of Commerce and the provisions governing its work are contained in G.S. 143B-472.75 through 472.87. Small businesses are defined, for purposes of the act, according to the standards of the U.S. Small Business Administration. Types of assistance that may be provided include guarantees of loans made to qualified small business applicants and direct loans to applicants who demonstrate that they are unable to obtain money from any other source [G.S. 143B-472.80(a)]. The law also authorizes the Authority to establish a small business surety bond fund, which may be used to guarantee a surety for losses incurred under a bid bond, payment, or performance bond on small business contracts for government-funded projects [G.S. 143B-472.82]. The Authority may also issue bonds to a small business applicant [G.S. 143B-472.84]. The law will take effect January 1, 2003, and expire on June 30, 2006.

A local act amending the Charter of the City of Charlotte authorizes the city to establish a "Small Business Enterprise Program" [S.L. 2002-91 (S 1336)]. The authorization is to create a "race and gender neutral" program "to enhance opportunities for small businesses to participate in City contracts." The act does not define a small business enterprise but authorizes the city to do so. The provision authorizes the city to "establish bid and proposal specifications that include subcontracting goals and good faith efforts requirements," and to consider compliance with these requirements in awarding contracts. The act states that the program supplements and does not replace the requirements for minority business enterprise participation under existing general laws (G.S. 143-128.2, 143-131, 143-135.5). A legal challenge to Charlotte's minority business enterprise program led to the suspension of that program and to the establishment of race-neutral efforts pending development of the necessary legal and statistical requirements for maintaining a race-based program.

Other Provisions Affecting Local School and State Contracting

School Purchasing Studies

S.L. 2002-126 (S 1115), sec. 7.9(b), requires the Joint Legislative Education Oversight Committee to study the viability of the state contracting with "on-line school supply vendors to allow teachers free access to a specific amount of school supplies, textbooks, test[s], and other classroom materials." The study must determine whether "the establishment of an on-line debit account for each teacher is cost-effective and an efficient way to meet the supply needs of teachers." The committee must report its findings and recommendations to the General Assembly by January 15, 2003. In addition, S.L. 2002-180 (S 98), sec. 8.3, authorizes the Joint Legislative Education Oversight Committee to study local flexibility for school systems, including whether they have the "fiscal and administrative flexibility they need to operate the public schools efficiently and effectively." The committee may look at constraints on school board expenditure of state funds and purchases of supplies, textbooks, and other goods and services.

School Bus Replacement Funds

The state budget authorizes the State Board of Education to use up to \$10 million dollars for replacement of school buses, the funds to be allocated to particular local school boards under G.S. 115C-249(c) and (d). S.L. 2002-126, section 7.14(a), specifies that the buses must be purchased from vendors approved by the State Board of Education on terms approved by the State Board.

Umstead Act Exemptions

A provision in the state budget requires the UNC Board of Governors to report to the Joint Legislative Commission on Governmental Operations prior to March 1, 2003, on activities undertaken under exemptions to the Umstead Act (G.S. 66-58(b)(8)) for the Centennial Campus at N.C. State University, the Horace Williams Campus at UNC Chapel Hill, and a millennial campus at another constituent institution of the university. The Umstead Act prohibits certain activities by state agencies that compete with private businesses. Additional exemptions to the Umstead Act were authorized as follows: (1) for the University of North Carolina to operate gift shops, snack bars, and food service facilities physically connected to university exhibition spaces, including the North Carolina Arboretum [S.L. 2002-109 (S 1441)]; (2) for the State Highway Patrol [S.L. 2002-126, sec. 18.5]; and (3) for the sale of products raised or produced incident to the operation of a community college viticulture/enology program as authorized by G.S. 18B-1114.4 [S.L. 2002-102 (H 190), sec. 3].

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