

# 2016 Legislative Summary: Public Contracting and Property Disposal

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The North Carolina General Assembly adjourned the 2015-16 regular legislative session *sine die* (from the Latin "without day") on July 1, 2016. Unless recalled to Raleigh for a special session, the General Assembly will not meet again until January 11, 2017, when a new session convenes following the November 2016 general elections. Enacted legislation affecting public contracting and property disposal is summarized below.

## I. Public Bills

### Retired Law Enforcement Service Animals

Until this year, when a local government law enforcement agency retired a service animal, such as a K9 dog, the agency was required to follow one of the property disposal procedures provided for in [Article 12 of G.S. Chapter 160A](#) to convey the animal to an appropriate owner (typically the animal's handler). Property disposal requirements apply because service animals legally are government property, so when they are retired they must be conveyed as surplus property.

[The Raleigh Apodaca Service Dog Retirement Act](#)<sup>1</sup> (S.L. 2016-101; H550)

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<sup>1</sup> The legislation was named in honor of Senator Tom Apodaca's (R-Henderson) English bulldog, Raleigh, who passed away in September 2015.

creates a new G.S. 20-187.4 which authorizes a new method for conveying retired service animals. When a state agency or local government determines that a service animal should be retired, the animal may be conveyed directly without using a competitive disposal method or selling the animal for fair market value. Instead, the agency or local government may set the price and conditions of transfer that it determines are appropriate. In consideration for accepting the service animal, the new owner must agree to the animal's ownership, care, and custody. A service animal may be transferred under these conditions only to a limited number of recipients:<sup>2</sup>

1. The public officer or employee who had normal custody or control of the animal during its public service (commonly referred to as the animal's handler).
2. The surviving spouse or children of an officer or employee killed in the line of duty if that officer or employee was the animal's handler.
3. An organization or program dedicated to assisting and supporting retired service animals.

If a state agency or local government wishes to transfer a service animal to an

<sup>2</sup> GS 20-187.4(a).

individual or organization other than those described above, it must treat the animal as surplus property and follow one of the Article 12 property disposal methods.

The new statute defines a service animal as any dog, horse, or other animal owned by a state agency or local government that performs law enforcement, public safety, or emergency service functions.<sup>3</sup> Examples include “K9” police dogs, search and rescue dogs, and police horses. Animals owned by a state agency or local government that do not fall within this definition must be conveyed under Article 12 property disposal procedures.

The legislation is effective October 1, 2016.

Several local bills enacted prior to the Raleigh Apodaca Act granted identical service animal transfer authorization to a number of cities and counties: the towns of Apex, Cary, Garner, Knightdale, Morrisville, Rolesville, Wake Forest, Zebulon, and Yancey County and all the municipalities within that county ([S.L. 2016-38; S849](#)); Cleveland and Gaston counties and all the municipalities within those counties ([S.L. 2016-20; H952](#)); and Duplin, Rowan, and Sampson counties and all the municipalities within those counties ([S.L. 2016-37; S831](#)). Those local acts were superseded by the subsequent passage of H550.

### **Automatic Contract Renewal Notice**

Under the North Carolina Consumer Protection Act, a vendor or contractor that “engages in commerce that sells, leases, or offers to sell or lease, any products or services” through a contract with an automatic renewal provision must clearly disclose the automatic renewal and how to

cancel the contract ([G.S. 75-41](#)). [S.L. 2016-113; S770](#) strengthens the notice requirements for automatic renewal provisions by requiring the vendor or contractor to provide written notice prior to the automatic renewal date if the renewal term is longer than 60 days. The written notice must be delivered personally or sent by electronic or first-class mail, and must be sent at least 15 days but no earlier than 45 days before the automatic renewal date. If the terms of the contract change upon automatic renewal (such as an automatic price escalation), the written notice must include the changes and must be highlighted in 12 point type bold print. A violation of these requirements renders the automatic renewal provision void.

Automatic renewal disclosure and notice requirements do not apply to insurance companies, certain financial institutions, telecommunications providers, public utilities, or businesses operating under a local government franchise or license.

The legislation became effective on July 26, 2016, and applies to contracts entered into on or after this date.

### **Sheriff Food Purchases**

During the 2015 long session, 30 counties were exempted from competitive bidding requirements for the purchase of food and food service supplies for county detention facilities (S.L. 2015-156 (H58); 2015-157 (H236); 2015-158 (H312)). Two local bills enacted during the 2016 short session added five more counties to the list of those granted the exemption: Duplin and Sampson ([S.L. 2016-37; S831](#)); and Catawba, Cleveland, and Gaston ([S.L. 2016-20; H952](#)).

Both acts became effective when they became law.

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<sup>3</sup> GS 20-187.4(b)(1).

## School Construction Project Change Orders

[G.S. 115C-521](#) was amended to add a new subsection (h) imposing new requirements for approving change orders on public school construction projects. [S.L. 2016-58; S330](#). Each local school board is required to adopt a policy that addresses all of the following:

1. The process by which a contractor must submit a proposed change order;
2. The individual(s) with the authority to approve change orders in particular categories or work or amounts;
3. The process by which any change order requiring local board approval is submitted to the board; and
4. The process for notifying the local board of all change orders submitted to authorized individuals and the resulting actions taken.

While the legislation does not require local board approval of all change orders, it does appear to require that the local board be advised of all change orders submitted by contractors and the actions taken by school personnel (approval, denial, modification, etc.).

The new requirement does not apply to *all* public school construction projects; subsection (h) specifically applies only to the following categories of construction projects: building construction projects costing more than \$300,000 ([G.S. 143-128](#)); construction management at risk projects ([G.S. 143-128.1](#)); design-build projects ([G.S. 143-128.1A](#)); design-build bridging projects ([G.S. 143-128.1B](#)); and public-private partnerships ([G.S. 143-128.1C](#)). Not covered under the new requirement are construction or repair projects of any cost not involving a

building and building construction or repair projects costing \$300,000 or less, so long as these projects are not contracted for under any of the methods included within the scope of the requirement – construction management at risk, design-build, design-build bridging, or public private partnership.

The legislation is effective October 1, 2016 and applies to all contracts awarded, extended, or renewed on or after that date. The North Carolina School Boards Association is developing a model policy that local school boards may use in complying with the new change order requirements.

## In-State Preference for School Food Purchases

Although local governments are not authorized to award contracts based on a preference for local vendors or contractors, the NC Farm Act of 2016 ([S.L. 2016-113; S770](#)) established just such an authorization. Under a new statute, G.S. 115C-264.4, local boards of education may adopt policies and procedures to maximize purchases of food grown or raised in North Carolina. The board's policy may include a percentage price preference, which is defined a "percent by which a responsive bid from a responsible bidder whose product is grown or raised in North Carolina may exceed the lowest responsive bid submitted by a responsible bidder whose product is not grown or raised in North Carolina." In other words, the board's policy may include a provision under which it may award a contract for food purchases to a North Carolina grower whose bid price is within a certain percentage of the bid price of the lowest responsive, responsible bidder who is not a North Carolina grower. For example, the policy could set a percentage price of 5%, meaning

that if the North Carolina grower's bid price was within 5% of the out-of-state grower who submitted the lowest responsive, responsible bid, the school board (or authorized employee) could award the contract to the North Carolina grower.

The legislation became effective on July 26, 2016.

State agencies have operated under a 5% in-state price-match preference since 2011 when Governor Beverly Perdue issued Executive Order No. 50. Under EO 50, a North Carolina bidder whose bid price is within 5% of that of an out-of-state lowest responsive, responsible bidder may be awarded the contract. Because EO 50 only applies to state agencies, local governments have not been legally permitted to adopt similar policies.

It is important to note that the scope of S770 is limited. It only applies to local school boards, not cities, counties, and other units of local government. It only applies to the purchase of food, so local schools must still comply with competitive bidding requirements for all other purchase contracts. Finally, it authorizes a percentage price preference for food growers anywhere in North Carolina; more limited geographic preferences such as food growers within a particular county or city are not authorized.

Some may wonder why the General Assembly authorized an in-state preference when bidding school food purchases in light of the exception to state competitive bidding requirements already authorized for the purchase of food for school nutrition programs ([G.S. 115C-264\(c\)](#)). While school food purchases are not subject to competitive bidding requirements under state law, federal competitive bidding requirements *do* apply when schools use federal funds to purchase school food. The

federal procurement regulations that apply to many categories of federal funds do not allow geographic preferences in awarding a contract. In 2008, however, Congress enacted the [2008 Farm Bill \(P.L. 110-246\)](#) which specifically authorizes institutions receiving federal child nutrition funds to use a geographic preference for procuring unprocessed agricultural products that are locally grown and locally raised. Enactment of an authorization under state law for an in-state food purchase preference will further facilitate the ability of local school boards to purchase eligible foods from North Carolina growers.

In considering an in-state food preference policy, school boards should be mindful of potential challenges that may be raised under federal law if the policy is not crafted properly. Former School of Government faculty member Eileen Youens authored a six-part blog series on local preferences that outlines these issues in detail ([click here for the sixth post](#) which includes links to the previous five installments). The North Carolina School Boards Association is developing a model policy which a local board may use if it wishes to consider adopting an in-state food preference policy.

The North Carolina Department of Agriculture and Consumer Services administers the NC Farm-To-School program. Under this program, the Department supplies school cafeterias with produce grown by North Carolina farmers. For more information on this program, see <http://www.ncfarmtoschool.com/>.

### Charter School Leases

Under current law, a local board of education is required to lease any

“available” school board property to a charter school within its jurisdiction upon the charter school’s request unless the school board demonstrates that the lease is not “economically or practically feasible or the local board does not have adequate classroom space to meet its enrollment needs.” ([G.S. 115C-218.35](#)). [S.L. 2016-79 \(H242\)](#) modified this requirement in two ways. First, it defines when public school property is considered “available” as being when the building or property is “closed, vacant, or otherwise unused for classrooms, administrative offices, or extracurricular activities.” Second, a local school board is now required to make a decision on a charter school’s request to lease public school property within 90 days of the request. If the local board fails to meet this 90-day deadline, it must provide a written explanation to the North Carolina Charter Schools Advisory Board and the Joint Legislative Education Oversight Committee.

The new lease requirements became effective on June 30, 2016, and apply beginning with the 2016-2017 school year.

### **School Construction Needs**

[The 2016 Appropriations Act \(S.L. 2016-94; H1030\)](#) directs the legislative Program Evaluation Division to contract with an outside consultant to perform an independent assessment of school construction needs and determine which local school units have the highest needs in relation to their capacity to generate revenue to meet those needs. The report must be submitted by March 15, 2017 to the Joint Legislative Program Evaluation Oversight Committee and the Joint Legislative Economic Development and Global Engagement Oversight Committee.

### **School Maintenance Plumbers**

In an amendment to [G.S. 115C-524, S.L. 2016-105 \(H742\)](#) authorizes local boards of education to employ personnel licensed to perform plumbing, heating, and fire sprinkler maintenance and repairs on school property. This authorization extends to employees with a plumbing and heating “technician license,” a new category of licensure for these trades authorized in the same legislation and which is discussed in the next paragraph below.

The legislation is effective October 1, 2016.

### **State and Local Government Plumbing and Heating Technician License**

Under current law, an individual who engages in the business of plumbing, heating, or fire sprinkler contracting must be licensed as a plumbing, heating, or fire sprinkler contractor by the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors ([G.S. 87-21](#)). [S.L. 2016-105 \(H742\)](#) requires the Board to create a new category of license for state and local government employees who perform plumbing and heating installation, repair, and replacement but are not licensed contractors in these trades. The new license categories, termed a “technician license,” may only be issued to employees of state and local government. The technician license also may be issued to a state or local government employee who is already licensed as a contractor in these trades but who does not wish to list his or her license in the name of the public employer. Licensed heating and plumbing contractors employed by state or local government who also obtain a technician license may work under their contractor’s license only during off-work

hours and only when personally performing the contracting work. For example, a licensed plumbing contractor may obtain a technician license and be employed by a county to perform plumbing work for the county, and during off-work hours may contract privately to perform plumbing work under his contractor's license.

The legislation is effective October 1, 2016.

### **State IT Contractor Liability Limits**

For contractors who enter into information technology contracts with state agencies, [S.L. 2016-85 \(S792\)](#) now limits a contractor's liability to the State for damages, including damages arising from the loss of, access to, or unauthorized disclosure of data. Contractor liability is limited to two times the value of the contract or, in certain instances based on findings made by the State Chief Information Technology Officer, three times the contract amount. The liability limitation does not extend to damages arising from the contractor's intentional or willful misconduct, damage to tangible personal property, physical injuries, and notification costs resulting from a personal information data security breach, nor does it limit the contractor's liability directly to third parties.

The legislation became effective on June 30, 2016.

## **II. Local Bills**

### **Clay County Courthouse Renovation**

Clay County was exempted from competitive bidding requirements applicable to contracts and leases for the renovation of the county's old courthouse. The exemption expires on June 30, 2018. [S.L. 2016-36; S795](#)

### **Davie County Correctional Center Property Transfer**

The former Davie County correctional center property (22 acres) was conveyed to the Davie County Board of Commissioners for \$1.00. [S.L. 2016-89; H984](#)

### **Henderson County Community College Building Construction**

Henderson County received authorization to construct or renovate community college buildings on the campus of Blue Ridge Community College. All projects are subject to competitive bidding requirements. The authorization expires December 31, 2020. [S.L. 2016-22; H956](#)

### **Lincolnton-Lincoln County Airport Long-Term Leases**

The Lincolnton-Lincoln County Airport Authority was authorized to enter into leases of airport property for terms of up to 50 years. [S.L. 2016-12; H1037](#)