

2018 Legislative Summary: Public Contracting and Property Disposal

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The North Carolina General Assembly adjourned the 2018 Short Session on June 29, 2018. Under the [adjournment resolution](#), the legislature will reconvene on November 27, 2018, during which time it may take up additional legislative business and reconvene again prior to the convening of the new 2019 legislative session. Legislation enacted during the 2018 Short Session affecting public contracting and property disposal is summarized below. Also included in this summary are bills still pending upon adjournment which remain eligible for consideration when the General Assembly reconvenes in November. Unless otherwise indicated, all bills became effective July 1, 2018.

I. Public Bills

Public School Capital Lease Authority

Section 5.3(e2) of the 2018 Appropriations Act ([S.L. 2018-5](#)) authorizes counties (not local school boards) that receive Needs-Based Public School Building Grant funds from the Department of Public Instruction [DPI] to enter into a capital lease for construction of school facilities. Only counties designated by the NC Department of Commerce as [development tier one or tier two areas](#) are eligible to receive funds from the Needs-Based Public School Building Grant program (for more information about

this program, see Kara Millonzi's blog post [here](#)).

The language of the budget provision requires four criteria be met when a county enters into a school capital lease under this new authorization:

1. The county must retain ownership of the real property on which the leased school is constructed.
2. The lease agreement must include a repairs and maintenance provision requiring the landlord (presumably, the developer who constructs and leases the school facility to the county) to bear the entire expense for all repairs, maintenance, improvements, or alterations to the structure, fixtures, appurtenances, and grounds of the property for the entire term of the lease (this requirement appears to prohibit the developer from passing on these costs to the county as part of the lease payments).
3. The term of the lease agreement must be for at least 15 years and no longer than 25 years (there is no authorization for extensions or renewal periods).
4. To receive reimbursement for lease payments, the county must provide a copy of the lease agreement to DPI and

periodically document that the county is satisfying its local match requirement (the Needs-Based Public School Building Grant program is subject to a local match that varies depending on the county's tier designation).

The new school capital lease authorized under the budget bill does not fall into the typical category of leases involving developed real property (such as leasing existing office space from a private company). Instead, the new authorization clearly contemplates a construction project to be undertaken on property owned by the county, as evidenced by the first criterion listed above requiring the county to retain ownership of the real property "on which the leased school is constructed." In addition, the law specifies that "ancillary agreements or predevelopment agreements entered into in anticipation of or in accordance with a lease" are considered part of the lease agreement. Predevelopment agreements typically relate to construction projects. Thus, while the language of the law does not explicitly define the scope of the new school capital lease arrangement, construction of school facilities is clearly contemplated.

Contracts under which construction or repair work is undertaken that involve the expenditure of public funds of \$30,000 or more are subject to either informal or formal competitive bidding requirements under state law ([GS 143-131](#) for informal bidding, and [GS 143-129](#) for formal bidding). A lease is a form of contract, and the new school capital lease is a contract under which construction work would be undertaken and

paid for in part, albeit over time through lease payments, with public funds. Since the law does not exempt the lease contract from competitive bidding requirements, school capital leases under which a public school facility would be constructed must be bid according to the statutory requirements in Article 8 of Chapter 143. If the school capital lease provides for construction work, a county does not have the legal authority to enter into the lease directly with a private developer without engaging in some form of competitive bidding authorized under state law.

The most frequently used method of bidding construction projects is [single-prime bidding](#), although use of the [construction manager at risk](#) method is not uncommon, especially for school construction. While both of these methods work well for traditional construction contracts, they are not a good fit for the new school capital lease arrangement, primarily because the new lease involves a financing obligation subject to approval by the Local Government Commission.

The budget provision makes the new school capital leases subject to the requirements of [Article 8 of Chapter 159](#). Under this Article, local government contracts that involve certain financing or debt obligations – including leases – are subject to approval by the Local Government Commission. The new school capital lease involves a long-term financial obligation by the county (at least 15 years up to 25 years). The only construction delivery method for which state law also authorizes financing arrangements between the parties as part of the contract is a [public-private partnership contract](#) (P3). [GS 143-](#)

[128.1C\(b\)\(3\)](#) authorizes a development contract between a unit of local government and a private developer to specify, among other arrangements, the “responsibilities of the governmental entity and all other participants with respect to financing of the project.” Since a P3 contract may include financing arrangements (such as lease payments), it is the most logical – and probably the most legally valid – procurement method to follow when an eligible county enters into a school capital lease under the new law.

Under the P3 statute, a local government has a great deal of flexibility in structuring the terms and conditions of its contractual relationship with its private developer partner. Details such as long-term property interests of the parties, responsibilities in development of the project, bidding the construction, and, as discussed above, financing arrangements, are largely left to negotiation between the local government and its private development partner.

Although flexible with respect to the details of the development contract, the P3 statute does impose some specific requirements on the local government and the private developer. Significantly, the private developer is required to provide at least 50% of the financing of the total costs of the project, and that 50% cannot include any payments by the local government or private financing where the source of repayment is the local government. Accordingly, a private developer wishing to enter into a school capital lease arrangement with a county under the new law must provide at least 50% of the financing of the total cost of the project, and this at least 50% cannot include

any lease payments or other monies received from the county. While it is possible that the developer’s obligation to “to bear the entire expense for all repairs, maintenance, alterations, or improvements to the structure, fixtures, appurtenances, and grounds of the property for the entire term of the lease” (one of the lease requirements discussed above) might count toward the developer’s financing obligation (especially since the developer cannot pass these costs on to the county), the P3 statute is unclear on whether future, anticipated costs that are not firmly calculated or verifiable at the time the contract is entered into can count toward the at-least 50% financing requirement. What is clear is that if the developer attempted to recoup repair and maintenance costs through lease charges to the county, those costs could not count toward the developer’s at-least 50% financing requirement, and most likely would also violate the requirements of the lease under the new law itself.

To enter into a P3 with a qualifying private developer, the local government must follow the procedural requirements of the P3 statute which include making written findings of the need for the project, determining its programming needs, and conducting a qualifications-based selection process through which interested private developers respond to a request for qualifications (RFQ) submitting information required by statute and requested by the local government. The local government then selects the developer it determines to be the best qualified and negotiates the development contract (or, in the case of a school capital lease project, the lease). The

development contract (or lease) must be approved by the county board of commissioners after 30 days public notice. For more information on these procedural requirements, see the summary available [here](#) and this [blog post](#).

Someone who wished to avoid bidding requirements might propose that the developer construct the school on his own accord and without any agreement with the county, and then, in a separate formal agreement, lease the completed school facility to the county. Under this scenario, one might argue that the lease is now a simple lease of fully developed real property that is not subject to competitive bidding requirements. The county doesn't have to bid the lease, the developer doesn't have to compete for the lease, and the county gets lottery funds to pay for it. While it may sound good, this arrangement violates state law.

Our state's appellate courts have held that a private construction project undertaken for intended future conveyance to a local government for compensation must comply with competitive bidding requirements. *Styers v. City of Gastonia*, 252 N.C. 572, 114 S.E.2d 348 (1960). If a developer constructs a school building and receives compensation from a county for the construction costs either up front or over time through lease payments, that contract is subject to competitive bidding requirements. Absent this rule, any local government could avoid competitive bidding requirements by negotiating an informal "gentlemen's agreement" with a developer to construct a project for the local government which, once completed, is leased back to the local

government, thus evading competitive bidding requirements.

The requirements of the law itself involve the county in the construction project, thus making the project one undertaken on the county's behalf. One of the requirements of the lease is that the county retain ownership of the real property on which the school building is constructed. This requirement necessarily includes the county in the construction project, at a minimum requiring a formal agreement between the county and the contractor authorizing the contractor to undertake construction work on county-owned property. To be eligible to receive Needs-Based Public School Building Grant funds, the agreement must be a lease of the school facility. Since the project must be constructed on county-owned property and would be paid for, in part, with public funds, it is essentially a public construction project, thus making it subject to competitive bidding requirements. Any attempt to divide the projects into separate components runs afoul of state law and could render the lease agreement void. *Hawkins v. Town of Dallas*, 229 N.C. 561, 50 S.E.2d 561 (1948).

Wired and Wireless Network Leases

Section 37.1(c) of the 2018 Appropriations Act ([S.L. 2018-5](#)) amended GS 160A-272 in two ways related to leases of government-owned property for internet and telecommunications services. First, the budget provision creates a new GS 160A-272(c)(3) authorizing leases of up to 25 years of government-owned property for the operations and use of wired or wireless networks where the local government has partnered with a private broadband provider

or cooperative to provide broadband service in unserved or economically distressed areas with grant funds allocated by the Broadband Infrastructure Office of the NC Department of Information Technology (this grant program, named the Growing Rural Economies with Access to Technology Fund, is authorized in the budget bill under a new GS 143B-1373). Leases authorized under this new subdivision may be for a term of up to 25 years without having to treat the lease as a sale of the government-owned property (generally, leases of government-owned property for terms of more than 10 years must be treated as a sale of property under Article 12 of Chapter 160A).

The second amendment to GS 160A-272 adds a new subsection (d) requiring a lease of government-owned property that is a component of a wired or wireless network meet the following conditions:

1. The lease must be entered into on a nondiscriminatory and competitively neutral basis;
2. The lease must be made available to similarly situated providers on comparable terms and conditions; and
3. The lease cannot be used to subsidize the provision of competitive service.

Although the phrase “wired or wireless network” is not defined in the new provision, it is commonly understood to mean systems through which telecommunications services or internet access is provided via some form of wire or cable (such as fiberoptic cables) or by wireless means (such a radio waves).¹ It is

unclear what a “component” of a wired or wireless network means in the context of this provision, but this term is generally understood to mean “constituent parts that serve to form, compose, or make up a unit or whole.”²

The conditions imposed on leases of government-owned property used as components of wired or wireless networks apply to *all* such leases regardless of the length of the lease term and the source of funding for the project (the conditions are not limited to leases associated with the new broadband grant program). Potentially, these conditions apply to a variety of situations ranging from leases of local government dark fiber for internet service to government-owned land or facilities on which telecommunications towers or antennae are located.

Of the three conditions imposed on network leases, the prohibition against the lease being used to subsidize the provision of competitive service may prove the most difficult to implement. The term “subsidize” (which is not defined in the provision), is generally understood to mean “a grant or gift of money; to aid or promote with public money.”³ If the lease has the effect of saving the private provider money, it could be viewed as an impermissible subsidy of competitive service. Examples might include leasing government-owned dark fiber in an amount that enables an internet provider to charge its customers below-market rates, or leasing government-owned property on which telecommunications providers install

¹ <https://www.fcc.gov/general/glossary-telecommunications-terms>.

² <https://www.merriam-webster.com/dictionary/component>.

³ <https://www.merriam-webster.com/dictionary/subsidy>.

antennae in lieu of having to construct their own towers. Local governments should evaluate the lease rates charged to private providers to ensure that they are not subsidizing the services provided by private companies (even if that subsidy otherwise serves a constitutionally permissible public purpose).

The lease restrictions contained in the new subdivision (d) appear to apply to the long-term leases authorized under the new subdivision (c)(3). Since broadband projects involving these long-term leases are funded with state grant funds, it is unclear how the leases limitations required under the new subsection (d), especially the prohibition against subsidizing competitive services, will impact the ability of local governments to fully utilize the new Growing Rural Economies with Access to Technology Fund.

New Construction Delivery Method Authorized for NC DOT

Section 34.13(a) of the 2018 Appropriations Act ([S.L. 2018-5](#)) authorized a new construction project delivery method as a pilot program for the NC Department of Transportation. The new method, called “construction manager-general contractor,” allows the use of a construction manager during the design phase of a construction project to provide input on the design. The construction manager may give advice on matters such as constructability review, scheduling, pricing, and phasing to help make the project more efficient and cost-effective. The construction manager also may serve as the general contractor on the project if he and the department reach agreement on a guaranteed maximum price for the project (making this method somewhat similar to construction

management at-risk). NC DOT is required to develop guidelines for awarding contracts under this new method and may only do so for up to five projects each of which must cost less than \$100,000,000.

Contract Management Training for State Purchasing Officers

Section 31.1(a) of the 2018 Appropriations Act ([S.L. 2018-5](#)) requires the NC Department of Administration to develop a certification program for state purchasing officers who are involved in contract management. Certification is mandatory for all state employees who are responsible for awarding contracts or monitoring contract compliance (this requirement does not apply to local government personnel). The contract management training and certification program is to be developed by the Division of Purchasing and Contracting and administered by the Office of State Human Resources. P&C must report on its progress by November 1, 2018.

II. Public Bills Still Pending

Auto-Renewal Contracts

[H502](#) would define the term “consumer” for purposes of the requirements for automatic renewal contracts under [GS 75-41](#) to mean “any natural person who purchases or leases any products or services pursuant to a contract containing an automatic renewal clause for personal, family, household, or agricultural purposes.” Although this definition would not resolve the challenges for local governments created by legislation enacted in 2016 ([S.L. 2016-113](#); [S770](#)) strengthening vendor notice requirements, the bill does provide an opportunity to amend GS 75-41 to alleviate local

government concerns about contracts rendered automatically void if the vendor fails to comply with the notice requirements. *Status: Passed House and pending in Senate; remains eligible for consideration in the 2018 reconvened session.*

The 2018 Regulatory Reform Bill ([S.L. 2018-114](#); [H374](#)) amended the auto-renewal contract law to exempt contracts with licensed real estate professionals from the law's auto-renewal requirements. Since this exemption only applies to this category of contracts, it has no impact on local governments unless the local government contracts with a licensed real estate professional.

E-Verify

[H306](#) would apply the E-Verify contracting prohibition (and the necessary compliance requirements) to *all* government contracts with *all* contractors and vendors. [H35](#) would lower the E-Verify hiring threshold from 25 workers to 15, thus increasing the number of vendors and contractors subject to the E-Verify contracting requirements with local governments. *Status: Both H306 and H35 passed the House and are pending in the Senate; both remain eligible for consideration in the 2018 reconvened session.*

Public School Building Bond Act of 2017 **([H866/S542](#))**

Bills introduced in both the Senate and House proposed \$1.9 billion for public school construction needs to be funded by general obligation bonds subject to voter approval. The bond question would be placed on the ballot in the November 2018 general election. *Status: Each bill remains pending in its chamber of introduction; both remain*

eligible for consideration in the 2018 reconvened session.

Consumer Protection/Roofing Contracts **([H816](#))**

This bill would establish consumer protection measures for roofing contractors, including a requirement that all roof repair contracts be in writing and prohibitions against insurance scamming in disaster situations. *Status: Passed House and pending in Senate; remains eligible for consideration in the 2018 reconvened session.*

State Surplus Equipment Auctions ([S510](#))

This bill would require the State Surplus Agency to conduct 3 pilot live public auctions of state-owned equipment and vehicles. The auction must include live simulcast interactive bidding with at least seven days' prebidding. *Status: Passed Senate and pending in House; remains eligible for consideration in the 2018 reconvened session.*

Job Order Contracting ([S607](#))

This bill would establish a "Job Order Contracting" (JOC) method for contracting for construction and repair services. *Status: Pending in Senate (not yet considered by the House); unclear whether eligible for consideration in the 2018 reconvened session.*

Interior Design Profession Act ([H590](#))

This bill would create a voluntary (not mandatory) registration program within the Department of Insurance for individuals engaged in the practice of interior design and decoration. *Status: Passed House and pending in Senate; unclear whether eligible for consideration in the 2018 reconvened session.*

Internet Infrastructure

Two bills seek to address the need for increased access to internet services, especially in rural areas. [H68](#) would grant authorization for broad-band public-private partnerships, and [H390](#) would grant clear authority for counties to fund infrastructure for high-speed internet access. *Status: H68 passed House and pending in Senate; remains eligible for consideration in the 2018 reconvened session. H309 remains pending in House.*

Public Authority Permanent Plates ([H15](#))

This bill would have authorized the Division of Motor Vehicles to issue permanent registration plates for vehicles owned and operated by water and sewer authorities created pursuant to Article 1 of Chapter 162A. During the 2018 Short Session, the bill was converted to one authorizing the conveyance of state-owned property to the Town of Wrightsville Beach and enacted without reference to permanent registration plates for water and sewer authority vehicles.

IV. Local Bills

There were no local bills enacted during the 2018 Short Session that related to purchasing and contracting.