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Purchasing and Contracting

The legislature did not make any significant changes in the public purchasing and contracting laws this session. Most of the legislation described below makes corrections and conforming changes relating to local school purchasing requirements. These requirements were changed significantly last session,¹ and some technical corrections included in a bill that failed last session were enacted this year. This summary does not include the purely technical changes but instead focuses on a few substantive corrections that will be of interest to local school officials. Several minor changes affecting public purchasing and contracting more broadly are included as well and will be of interest to local and state government purchasing officials.

As a result of a highly publicized misuse of funds by a nonprofit organization that received funds from the state, the legislature established some significant new reporting requirements for non-state agencies and legislators connected to nonprofit organizations that may be affected by legislative actions. These new provisions are summarized in this chapter.

School Purchasing Clarifications

Published Materials Exception

Until last year state law required local school administrative units to purchase supplies, materials, and equipment through the state Division of Purchase and Contract under the provisions applicable to state agency purchases handled by that division. The statutes governing these purchase procedures are generally contained in Article 3 of Chapter 143 of the North Carolina General Statutes. Last year the law was amended so that local school administrative units would be subject to the same purchasing laws as are other units of local government. These laws are generally contained in Article 8 of Chapter 143. One exemption, however, contained in Article 3 but not in Article 8, involved contracts regularly entered into by local school administrative units. The Article 3 exemption, included in G.S. 143-56, provided that bidding is not required for purchases of “published books, manuscripts, maps, pamphlets and periodicals.” Effective April 1,

1. For a summary of these changes, see Frayda S. Bluestein, “Purchasing and Contracting,” in *North Carolina Legislation 2003*, ed. William A. Campbell, 161–67.

2004, this exemption has been incorporated into G.S. 115C-522(a), which now provides that the Article 8 procedures are not mandatory for this category of purchases. [S.L. 2004-199 (S 1225), sec. 29.]

Beverage Contracts

Another correction of a provision enacted last year makes a clarification regarding beverage contracts entered into by local school administrative units. In 2003 the legislature enacted G.S. 143-64, which requires competitive bidding of all contracts involving the sale of juice or bottled water. In Section 38 of S.L. 2004-199, the legislature added language to that statute clarifying that contracts for the sale of bottled water must be bid separately from contracts for the sale of juice, and that each of these contracts must be bid separately from any other contract, including contracts for other beverages or vending machine services.

State Contract Preferences

Public officials at the state and local levels are very concerned about economic development and strive to promote, whenever possible, the use of local business. An existing law, G.S. 143-57, has required the State Purchasing Officer to make multiple awards on state requirements furniture contracts to at least three “qualified” vendors. S.L. 2004-115 (H 964) amends this law to specify that bids must be solicited on a historical weighted average of specific contract items. In addition, the statute now defines *qualified vendor* as one (1) whose products conform to the term contract specifications, (2) who is listed on the state’s qualified products list, and (3) who submits a responsive bid. Finally, the law now provides that if the three qualified vendors do not include vendors who offer furniture manufactured or produced in North Carolina or who are incorporated in the state, the State Purchasing Officer must expand the number of contracts to include such vendors. The statute provides, however, that the State Purchasing Officer is not required to exceed a total of six qualified vendors.

The legislature also enacted a mild preference in contracting for products made in the United States. An existing statute, G.S. 143-59(a), establishes a preference for goods manufactured or produced in North Carolina or furnished by or through North Carolina citizens. However, this “preference” does not actually authorize the award of a contract to an in-state bidder who does not submit the lowest responsible bid. The statute says that in giving a preference, “no sacrifice or loss in price or quality shall be permitted.” There is no statute that authorizes either state agencies or local governments to award a contract to a local contractor who is not the lowest responsible bidder. A new statute, G.S. 143-59.1A, is titled Preference Given to Products Made in United States, although it too falls short of actually authorizing a preference over a low bidder. Under the new law, which applies only to the state and not to local governments, if the state is unable to give preference to a North Carolina bidder under G.S. 143-59(a), it must give preference to products or services manufactured or produced in the United States. [S.L. 2004-124 (H 1414), sec. 6.1.] The statute qualifies this directive, however, by providing that the preference may be given only to the extent permitted by state law, federal law, or any federal treaty and that no sacrifice or loss in price or quality is permitted. Both statutes also provide that preference in all cases must be given to surplus products or articles produced and manufactured by other state departments, institutions, or agencies.

Construction Contracting Changes

Clarification of Surety Bonding Requirements

For most major public construction projects, public agencies must secure bid, performance, and payment bonds from surety companies legally authorized to do business in North Carolina. (G.S. 44A-26, 143-129.) Last year, the legislature enacted G.S. 58-31-66 to restrict the ability of

public agencies to require a contractor, bidder, or proposer to procure a bid, performance, or payment bond from a particular surety, agent, producer, or broker. As originally enacted, subsection (b) of the new statute provided that public agencies were not prohibited from approving the form, sufficiency, or manner of bond execution, nor were they prohibited from disapproving bonds on a reasonable and nondiscriminatory basis because of a surety's financial condition. Subsection (c) provided that a violation of the statute would invalidate the construction contract.

This session, in Section 74(b) of S.L. 2004-203 (H 281), the legislature amended G.S. 58-31-66 by deleting subsections (b) and (c), leaving in place only the restriction on requiring a particular bonding company. These changes were effective October 1, 2004. It is unclear how a court would interpret the effect of the repeal, but a safe interpretation would be that there is no authority for public agencies to reject a bond for any of the reasons included in the repealed language.

Local Modifications

Each session local delegations receive requests from local governments for local modifications of certain general laws. For example, local governments sometimes request limited relief from construction bidding requirements in order to facilitate construction of particular projects. As is typical, several of these requests were approved this year. The city of Newton and Catawba County each received a limited expansion of the authority to use their own forces for construction of a park. [S.L. 2004-35 (H 1670).] The city of Greenville obtained a limited exception to the minority participation requirements in G.S. 143-128.2 and -128.3 for the construction of parking structures in the central business district. [S.L. 2004-10 (H 1426).] Yancey County obtained an exemption from the bidding procedures in Article 8 of Chapter 143 for a public-private project to develop a consolidated health care facility. [S.L. 2004-7 (H 1474).]

State Funds to Non-state Entities: New Reporting and Disclosure Requirements

A highly publicized misuse of state funds by a nonprofit organization with ties to a legislator and the ensuing investigation of these events prompted several legislative changes dealing with non-state entities that receive state funds and with legislators who have connections to nonprofit organizations. S.L. 2004-196 (S 1008) creates new reporting requirements for non-state entities that receive, use, or expend any state funds. Under new G.S. 143-6.2 non-state entities, including local governments, may use state funds only for the purposes for which the funds were appropriated. This limitation also applies to "flow through" funds that originate from the federal government. The new law requires the Office of State Budget and Management (OSBM) to adopt rules to promote and enforce accountability by grantees (defined to include those entities that receive grants as well as subgrantees, but excluding most local governments). The law also gives the State Auditor a role in auditing state grant funds and requires grantees and subgrantees to provide information to the auditor if requested. State agencies must submit to the auditor a list of all their grantees, and OSBM will report to the legislature on all grantees or subgrantees that fail to comply with the new requirements.

The legislature also made changes in the laws governing legislative ethics. The amended statutes will require legislators to include associations they have with nonprofit corporations or organizations as part of their ethical considerations under state law. Section 31 of S.L. 2004-199 amends provisions in Article 14, Part 1, of Chapter 120 to include associations with nonprofits in the definition of *economic interest*. This change will require legislators to consider these associations when determining whether to disqualify themselves from acting on particular matters under G.S. 120-88 and to include these associations in reporting their statements of interest as required under Part 2 of Article 14.

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