ARTICLE 20

Contracts, Competitive Bidding, and Conflicts of Interest

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ISBN 978-1-56011-517-5. This article was last updated in 2006.

OBTAINING THE GOODS and services for the operation of counties and cities is a major administrative responsibility. In a legal sense this responsibility involves questions of proper authority, adequate authorization for the expenditure of funds, and the making of contracts in accordance with statutory requirements. Administratively the organizational arrangements should be both efficient and legally sufficient. Contracting procedures must also be designed to avoid violation of state conflict-of-interest laws, to promote fairness and objectivity, and to avoid the appearance of impropriety in contracting decisions.

Contracting Authority/Authorized Purposes

The statutes that delegate to counties and cities broad corporate powers necessary to govern and conduct their basic activities include a delegation of authority to contract.[1] Other statutes authorize counties and cities to perform particular functions and contain specific contracting powers.[2] These specific authorizations do not limit the general authority to contract. Indeed, parallel statutes for counties and cities authorize them to contract with a private entity to perform any activity the county or city has authority to engage in.[3]

An important legal requirement for local government contracts is that the person or persons who make the contract must have authority to contract on behalf of the entity that will be bound by the contract. A local government is not bound by a contract entered into by an individual who does not have authority to contract on its behalf. North Carolina law provides that the governing board of a county or city is the body that has authority to act for the local government, and this includes the authority to contract.[4] The governing board may delegate its authority to others within the organization unless a statute specifically requires action to be taken by the governing board or by another official. For example, the state competitive bidding laws require the governing board to award construction or repair contracts that are subject to the formal bidding requirements[5] and to approve a contract under certain exceptions to the bidding requirements,[6] so the board does not have authority to delegate authority to award these contracts. For contracts that are not subject to these types of limitations, however, the county or city governing board has discretion to delegate its contracting authority.

A delegation of authority to contract may be either *explicit* or *implicit.* An example of explicit delegation might be found in a city charter, a local act of the generally assembly, or county or city policy adopted by the governing board delegating to the manager or other official the authority to enter into contracts on behalf of the local government. A governing board might also adopt a resolution explicitly delegating authority for awarding purchase contracts as permitted under the formal bidding statute or in other circumstances, including informal contracts where the statutes do not require the governing board to award contracts. In addition, a job description or personnel policy could constitute an explicit delegation of contracting authority if it has been approved by the governing board. Thus a purchasing agent or department head may have authority to contract if it is part of his or her job responsibilities as defined by the board. Implicit authority might be found in cases where employees regularly make contracts with knowledge and tacit approval of the board, but without a formalized policy. Many local government contracts are made by local employees with implicit authority based on historical patterns of activity and consistent with assigned job responsibilities.

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1. GEN. STAT. § 153A-11 (hereafter G.S.); G.S. 160A-11.

2. For example, 153A-275 and 160A-312 authorize counties and counties respectively to contract for the operation of public enterprises.

3. G.S.153A-449 (counties); 160A-20.1 (cities).

4. G.S. 153A-12; G.S. 160A-12.

5. G.S. 143-129(b). G.S. 143-129(a) authorizes the board to delegate the authority to award purchase contracts in the formal range.

6. G.S. 143-129(e)(6)(sole sources); 143-129(g) (previously bid contracts/"piggybacking").

The extent to which contracting is delegated within a county or city is a function of local policy and management philosophy. Responsibility for contracting should be allocated in a manner that best balances the need for efficiency and flexibility with the need to comply with legal contracting and fiscal internal control requirements. Centralization of contracting for items that require bidding or that involve commonly used items helps to ensure compliance with legal requirements and can provide better value through economies of scale.

Multiyear Contracts

Counties and cities have specific authority to enter into contracts that extend beyond the current fiscal year.[7] The statutes allow the unit to enter into continuing contracts and require the board to appropriate the amount due in each subsequent year for the duration of the contract.

Contracts generally continue to bind the unit despite changes in board membership or philosophy. Courts have held that this rule does not apply, however, to any contract that limits essential governmental discretion, such as a contract that promises not to annex property, or a contract in which the unit promises not to raise taxes.[8] Most county and city contracts, however, involve basic commercial transactions and, assuming all other requirements for a valid contract are met, will be enforceable against the unit for the duration of the contract.

Expenditures Supported by Appropriations/Preaudit Certification

State laws governing local government finance require counties and cities to establish internal procedures designed to ensure that sufficient appropriated funds are available to pay contractual obligations. Contracts involving the expenditure of funds that are included in the budget ordinance must be "preaudited" to ensure that they are being spent in accordance with a budget appropriation and that sufficient funds remain available in the appropriation to pay the obligation created by the contract. All written contracts must contain a certification by the finance officer, as specified in G.S. 159-28(a), stating that the instrument has been "preaudited in the manner required by the Local Government Budget and Fiscal Control Act." Under the statute, a person who incurs an obligation or pays out funds in violation of the statute is personally liable for the funds committed or disbursed.[9] Obligations incurred in violation of this requirement are void and are not enforceable against the unit.[10]

Most local governments use computerized financial systems that automatically conduct the preaudit procedure. These programs keep track of appropriated funds by category or account and encumber obligations as they are created by removing them from the pool of available funds. With increasing use of automated contracting systems, counties and cities should be aware that the law requires governing board approval for the use of a "facsimile signature" for the preaudit certification.[11]

Contract Execution

As noted above, counties and cities have broad authority in allocating responsibility for contract approval. It is very important to distinguish, however, between the authority to *approve* a contract, and the authority to *execute* (sign) a contract. Execution of the contract is a formality that is used to prove assent. Contracts are sometimes but not always,

7. G.S.153A-13 (counties); 160A-17 (cities).

8. See David Lawrence, "Contracts that Bind the Discretion of Governing Boards," *Popular Government* 56(1) (Summer 1990): 38–42.

9. G.S. 159-28(e).

10. G.S. 159-28(a); L & S Leasing v. Winston-Salem, 122 N.C. App. 619, 471 S.E.2d 118 (1996).

11. G.S. 159-28.1.

executed at the same time that they are approved. In some cases, for example, the board may approve a contract that is later executed by the manager. Even if a contract is properly executed, it is not enforceable against the entity if it was not approved or authorized by someone with authority to contract on behalf of the entity. The fact that someone has authority to execute a contract does not necessarily mean he or she also has authority to approve a contract, although it may constitute evidence of implicit authority if there is no explicit delegation. Except for the preaudit certification by the finance officer, state laws do not dictate who must sign county and city contracts, so this is left to local discretion.

Form of Contracts/Electronic Contracts

In addition to the specific rules that apply to public contracts, all contracts must be enforceable under general common law and state-statutory requirements. Most importantly, contracts must be supported by adequate consideration, and there must be evidence to support any claim that the county or city actually agreed to be bound by the terms of an alleged contractual commitment. There is no general legal requirement, however, that all contracts must be in writing. Some contracts must be in writing because a statute requires it.

A state statute requires that all contracts made by or on behalf of cities must be in writing.[12] A city contract that is not in writing is void, but the governing board can cure this defect by expressly ratifying the contract. The North Carolina Supreme Court has held that the board's actions as recorded in the minutes do not satisfy a statutory requirement that a contract be in writing.[13] There is no parallel statute that requires county contracts to be in writing. The formal bidding statute, G.S. 143-129, however, requires all local government contracts that are within its scope to be in writing. (See the "Dollar Thresholds" chart in Appendix 20-A for information on which contracts are subject to formal bidding.)

Another important writing requirement is contained in the Uniform Commercial Code (UCC). The UCC was developed to modernize and standardize the law governing commercial transactions, eliminating variations from state to state and removing many of the technicalities in the common law of contracts. In North Carolina, the UCC has been adopted as Chapter 25 of the General Statutes. The provisions governing contracts for the sale of goods are contained in Article 2, beginning at G.S. 25-2-101. Article 2 requires that all contracts (not just local government contracts) for the sale of goods exceeding $500 must be in writing.[14] A contract that does not satisfy this requirement is still enforceable in certain situations specified in the statute if both parties are "merchants" within the definition of the statute.[15] In most cases local governments meet this definition. In addition, while the common law requires that contracts specify all of the essential terms of the agreement, the UCC modifies common law contract requirements relating to the contents of a writing and the formalities for a valid signature.[16]

Other writing requirements are found in Chapter 22 of the North Carolina General Statutes. Of most significance to local governments is the requirement of a writing for any contract or deed evidencing the sale of land or any interest in land, including an easement; any sale or lease of mining rights; and any other lease of more than three years in length.[17]

Even when not required by statute, a writing serves some important purposes, the most significant being the clear expression of the agreement between the parties. In addition, for local governments the written document, usually a purchase order, incorporates the fiscal and departmental approvals required by statute and by local policy, and provides documentation for the annual audit. Computers have eliminated much of the paper involved in the contracting process, but the information that was contained on paper contracts can still be created and preserved in electronic transactions and files.

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12. G.S. 160A-16.

13. Wade v. City of New Bern, 77 N.C. 460 (1877).

14. G.S. 25-2-201(1).

15. G.S. 25-2-104.

16. G.S. 25-1-201(39) (signature can be "any symbol executed or adopted by a party with present intention to authenticate a writing).

17. G.S. 22-2.

State and federal laws address the acceptability of electronic contracts, providing broad authority for the use of electronic transactions in general and in governmental contracting.[18] These laws generally provide that a contract may not be denied legal effect or enforceability solely because it has been created as an electronic document. It is up to the county or city to determine whether it wishes to use or accept electronic contracts and to develop systems for assuring their authenticity and enforceability.

Competitive Bidding Procedures

Contracts Covered by Bidding Laws

State law requires counties and cities to obtain competitive bids before awarding certain types of contracts. The competitive bidding process is designed to prevent collusion and favoritism in the award of contracts and to generate favorable pricing to conserve public funds. As discussed later, the law does not always require contracts to be awarded to the lowest bidder, and the bidding requirements are best viewed as requiring prudent investment of public dollars. This means that quality and value can be as important as initial price in evaluating products and contractors in competitively bid contracts.

The two key bidding statutes, G.S. 143-129 (formal bidding) and G.S. 143-131 (informal bidding), apply to two categories of contracts: (1) contracts for the purchase or lease-purchase of "apparatus, supplies, materials, or equipment" (hereinafter purchase contracts), and (2) contracts for construction or repair work. As discussed in the next section, many contracts do not fall within these two categories and are not subject to any mandatory competitive bidding requirements. Bidding requirements are triggered when expenditures of public funds for the two specified categories of contracts occur at the dollar thresholds specified in the statutes. The current dollar thresholds are set forth in Appendix 20-A.

The competitive bidding requirements described here apply to counties, cities, local school units, and other local government agencies. With respect to purchase contracts, state agencies, including universities and community colleges, are governed by Article 3 of Chapter 143 and the rules and policies of the State Department of Administration, Division of Purchase and Contract. With respect to construction or repair work, state agencies, including universities and community colleges, are governed by the statutes described here, along with rules and policies of the State Construction Office.

Private entities, whether nonprofit or for-profit, that contract with counties or cities, generally are not required to comply with bidding statutes even when they are spending funds they have obtained from counties or cities. The funds are no longer considered public once they are received by the private entity under a contract or grant from a public agency. A local government contracting with a private entity may, however, require compliance with bidding requirements. In addition, federal or state agencies administering grant programs may require as a condition of the grant that private subgrantees use competitive bidding procedures when expending grant funds.

Contracts Not Covered by Bidding Requirements/Optional Procedures

Contracts for services, such as janitorial, grounds maintenance, and solid waste collection, as well as contracts for professional services, such as attorneys and auditors, fall outside the scope of the competitive bidding statutes. (As discussed later, special rules apply to contracts for architectural, engineering and surveying, and construction management at risk services.) Contracts for the purchase of real property and contracts for the lease (rental) of real or personal property also fall outside the scope of the laws that require competitive bidding. It is important to note that contracts for the lease-purchase of personal property, the installment-purchase of personal property, or the lease with option to purchase personal property *are* subject to competitive bidding. Purchase contracts and contracts for construction or repair work that fall below the informal bidding range are not subject to competitive bidding, though many local polices require bidding at lower levels.

18. At the federal level, *see* the Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. §7001; at the state level, *see* the Uniform Electronic Transactions Act (UETA), G.S. 66-317(b), and the Electronic Commerce in Government Act, G.S. 66-58.1–66-58.12.

It is common for counties and cities to seek competitive bids on contracts even when state law does not require it. This is a good practice whenever there is competition for a particular service or product. Counties and cities often use the statutory procedures when seeking competition voluntarily, but this is not required. It is important for the unit to specify what procedures and standards it will use for awarding contracts in solicitations that are not subject to state statutes, especially if the procedures will be different from those set forth in the statutes. The unit is legally bound to adhere to the procedures it opts to use when bidding is not required by statute, or it may terminate the procedure and contract using some other procedure if it deems this to be in its best interest. The decision to competitively bid a contract when it is not statutorily required does not obligate the unit to use bidding in the future for that contract or for that type of contract.

Exceptions to Bidding Requirements

The state bidding laws contain a number of exceptions. County and city officials should be cautious when contracting without bidding to make sure that the contract falls within an exception. Courts have recognized the importance of the public policy underlying the bidding requirements and have strictly scrutinized local government justifications for claiming an exemption from bidding. Except as identified below, no specific procedures apply to contracts made under these exceptions.

The major exceptions to the competitive bidding requirements are as follows:

- Emergencies—G.S. 143-129(e)(2). An exception applies "in cases of special emergency involving the health and safety of the people or their property." The only North Carolina case interpreting the emergency exception indicates that it is very limited, applying only when the emergency is immediate, unforeseeable, and cannot be resolved within the minimum time required to comply with the bidding procedures.[19]
- Used apparatus, supplies, materials, or equipment—G.S. 143-129(e)(10). Competitive bidding is not required for the purchase of used items. The exception does not define what constitutes a used item, but specifically excludes items that are remanufactured, refabricated, or "demo" items.
- Purchases from other governments—G.S. 143-129(e)(1). Local governments may purchase directly from any other unit of government or government agency (federal, state, or local) and may purchase at government surplus sales.
- Sole sources—G.S. 143-129(e)(6). This exception applies to purchase contracts only, when performance or price competition is not available, when a needed product is available from only one source of supply, or when standardization or compatibility is the overriding consideration. The governing board must approve each contract entered into under this exception, even if the board has delegated authority to award purchase contracts under G.S. 143-129(a).
- Previously bid contracts ("piggybacking")—G.S. 143-129(g). Local governments may purchase from a contractor who has entered into a competitively bid contract with any other unit of government or government agency (federal, state, or local), anywhere in the country, within the past twelve months. The contractor must be willing to extend to the local government the same or more favorable prices and terms as are contained in the previously bid contract. This exception applies to purchase contracts only. The North Carolina local government's governing board must approve each contract entered into under this exception at a regular board meeting on ten days' public notice, even if the board has delegated authority to award purchase contracts under G.S. 143-129(a).
- State contract purchases—G.S. 143-129(e)(9). Local governments may purchase items from contracts awarded by any North Carolina state agency if the contractor is willing to extend to the local unit the same or more favorable prices, terms, and conditions as established in the state contract.
- Competitive group purchasing programs—G.S. 143-129(e)(3). A group purchasing program is sometimes created by a separate organization on behalf of public agencies, or by a group of public agencies in order to take advantage of economies of scale for commonly purchased items. Local governments may purchase without bidding items available under contracts that have been established using a competitive process undertaken as part of a group purchasing program.

19. Raynor v. Commissioners of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941).

- Voting systems—G.S. 163-165.8. Counties may purchase without competitive bidding voting systems that have been approved by the State Board of Elections.
- Gasoline, fuel, or oil—G.S. 143-129(e)(5). Purchases of gasoline, diesel fuel, alcohol fuel, motor oil, fuel oil, or natural gas are exempt from the formal bidding procedures but must be carried out using the informal procedures under G.S. 143-131.
- Force account work—G.S. 143-135. For construction or repair work, bidding is not required for projects to be completed using the local government unit's own employees. This exception actually operates as a limitation on the amount of work that may be done by local government employees. The exception limits such work to projects estimated to cost no more than $125,000 including the cost of labor and materials, or to projects on which the cost of labor does not exceed $50,000. The competitive bidding statutes still apply to materials to be used on force account projects. Some have argued that the exception to the bidding requirements does not limit the use of the unit's own forces as long as the local unit itself submits a bid. There does not appear to be any authority in the statutes for a local government to submit a bid to itself as a way of complying with bidding requirements and avoiding application of the force account limit.
- Change order work—G.S. 143-129(e)(4). For construction or repair work, competitive bidding is not required for work undertaken "during the progress" of a construction or repair project initially begun pursuant to the formal bidding statute. Change order work that is not within the scope of the original project could be challenged as an unlawful evasion of the bidding requirements.
- Alternative procedures—Requests for proposals. Several types of contracts are exempt from the formal bidding procedures, but are subject to alternative, usually more flexible competitive procedures. A more flexible "request-for-proposals" procedure is authorized for information technology goods and services, including computer software, hardware, and related services (G.S. 143-129.8), guaranteed energy savings contracts [G.S. 143-129(e)(8)], and solid waste and sludge management facilities (G.S. 143-129.2). Unless specifically authorized under an exception, local governments do not have authority to use a request for proposal procedure for contracts that are subject to the competitive bidding statutes.

Specifications

Competitive specifications are essential elements of a bidding process. On the other hand, there is no need for the county or city to invite bids on products that do not meet the unit's minimum quality standards or functional requirements. There are no statutory procedures governing the preparation of specifications for purchases. Local officials may develop specifications they deem most appropriate. They cannot, however, intentionally or unjustifiably eliminate competition by using overly restrictive specifications. If only one brand of product is suitable, the specification can be limited to that brand, although the unit may be called upon by competitors to consider products alleged to be comparable, or to justify the elimination of other products from consideration. A brand-specific specification is not necessarily a sole-source purchase since there may be more than one supplier of a particular brand.

A separate statute imposes specific limitations on the development of specifications for construction or repair projects. G.S. 133-3 requires that specifications for materials included in construction projects be described in terms of performance characteristics, and it allows brands to be specified only when performance specification is not possible. In such cases, at least three brands must be specified unless it is impossible to do so, in which case the specifications must include as many brands as possible. The unit must specifically approve in advance of the bid opening preferred products that are to be listed as alternates in specifications for construction projects.

Trade-ins

G.S. 143-129.7 authorizes local governments to include in bid specifications for a purchase an allowance for the trade-in of surplus property, and to consider the price offered, including the trade-in allowance, when awarding a contract for the purchase. This statute effects an exemption from otherwise applicable procedures for disposing of surplus property. See Chapter 21 for a full description of procedures for disposing of property.

Summary of Bidding Procedures

Informal Bidding

Informal bidding under G.S. 143-131 is required for contracts for construction or repair work, or for the purchase of apparatus, supplies, materials, or equipment costing between the minimum informal bid threshold and the formal bidding limit (see Appendix 20-A for current threshold amounts). No advertisement is required, and the statute does not specify a minimum number of bids that must be received. Informal bids can be obtained in the form of telephone quotes, faxed bids, or other electronic or written bids. The statute requires that the county or city maintain a record of informal bids received and specifies that such records are subject to public inspection after the contract is awarded. This prevents bidders from having access to bids already submitted when preparing their bids, a situation not present in formal bidding because bids are sealed until the bid opening. The standard for awarding contracts in the informal range is the same as the standard for formal bids and is discussed later in this article.

As noted below, for building construction or repair contracts in the informal range, counties and cities are required to solicit bids from minority firms and to report to the state Department of Administration on bids solicited and obtained for contracts in this dollar range.

Formal Bidding

Advertisement

The formal bidding statute, G.S. 143-129, requires counties and cities to advertise opportunities to bid on contracts for construction or repair, or purchase of apparatus, supplies, materials, and equipment, within the formal bid thresholds as described in Appendix 20-A. The minimum time period for advertisement under the statute requires that a full week must pass between the day of the advertisement and the day of the bid opening. It is common practice to place the advertisement more than once or for a longer period of time prior to the bid opening in order to provide sufficient opportunity for response. The advertisement must list the date and time of the bid opening, identify where specifications may be obtained, and contain a statement that the board reserves the right to reject any or all bids. For construction projects, the advertisement may also contain information about contractor licensing requirements that apply to the project.

The formal bid statute also authorizes the governing board to approve the use of electronic advertisement of bidding opportunities instead of published notice. The board may authorize electronic advertisement of bids for particular contracts or for contracts in general. Action to approve electronic notice of bidding must be taken by the county or city governing board at a regular meeting. No specific action is required to provide electronic notice *in addition* to published notice.

Sealed Bids

Bids must be sealed and must be submitted prior to the time of the bid opening. Bids must be opened in public. Under the "dual-bidding" method of construction contracting (discussed later), separate-prime bids must be received (but not opened) one hour before the single-prime bids. Staff generally conduct bid openings, and contracts must be awarded by the governing board except for purchase contracts in jurisdictions where the board has delegated the authority to award these contracts as authorized in G.S. 143-129(a).

Once formal bids are opened they are public records and are subject to public inspection. The only exception to this rule is contained in G.S. 132-1.2, which allows a bidder to identify trade secrets that are contained in a bid and protects that information from public disclosure.

Electronic Bids

Counties and cities have several alternatives to receiving paper, sealed bids for contracts in the formal bidding range. Under G.S. 143-129.9 formal bids for purchase contracts may be received electronically[20] or through the use of a "reverse-auction" process.[21] Under a reverse-auction procedure, bidders compete to provide goods at the lowest selling price in an open and interactive electronic auction process. An electronic bid or reverse-auction process can

20. G.S. 143-129.9(a)(1).

21. G.S.143-129.9(a)(2).

be conducted by the unit itself or by a third party under contract with the unit. The statute does not allow the use of reverse auctions for the purchase of construction aggregates, including crushed stone, sand, and gravel. This statute does not authorized the use of electronic bids for construction contracts in the formal bidding range.

Number of Bids

According to G.S. 143-132, three bids are required for *construction or repair contracts* that are subject to the formal bidding procedures. If three bids are not received after the first advertisement, the project must be readvertised for at least the minimum time under the formal bidding statute (one week, not including the day of advertisement and the day of the bid opening) before the next bid opening. Following the second advertisement, a contract can be awarded even if fewer than three bids are received.

Note that the statute only applies to contracts for construction or repair work in the formal bidding range. This means that three bids are not required for purchase contracts in the formal range or for any contracts in the informal range. Some counties or cities may have local policies that require three bids for all contracts, but this is not required by state law.

Bid, Performance, and Payment Bonds

Bonds or statutorily authorized bond substitutes are required for construction or repair contracts in the formal bid range. A bid for construction or repair work submitted in the formal process must be accompanied by a bid deposit or bid bond of at least 5 percent of the bid amount. The bid bond or deposit guarantees that the bidder to whom a contract is awarded will execute a contract and provide performance and payment bonds when they are required. The statute specifies the forms in which the bid security may be submitted: a bid bond, a bid deposit in cash, a cashier's check, or a certified check. Specific procedures are set forth in G.S. 143-129.1 for the withdrawal of a bid. A bid may be withdrawn under those procedures without forfeiting the bid bond only if the bidder can demonstrate that he or she has made an unintentional error as opposed to an error in judgment. The law does not allow a bidder to correct a mistake, only to withdraw a bid if proof of an unintentional error is shown.

The formal bidding statute also requires that counties and cities obtain performance and payment bonds from the successful bidder on major construction or repair projects. A performance bond guarantees performance of the contract and provides the county or city with security in the event that the contractor defaults and cannot complete the contract. The payment bond is obtained for the benefit of subcontractors who supply labor or materials to the project and provides a source of payment to those contractors in the event that they are not paid by the general contractor. Performance and payment bonds are required on construction or repair projects that meet or exceed the dollar thresholds set forth in Appendix 20-A. The statute authorizes counties and cites to accept a deposit of cash, a certified check, or government securities in lieu of bonds.

Evaluation of Bids/Responsiveness

Once received, bids must be evaluated to determine whether they meet the specifications and are eligible for award—that is, whether they are responsive bids. The bid evaluation process is important to maintaining the integrity of the bidding process. If a county or city accepts bids that contain significant deviations from the specifications, the other bidders may object. Indeed, courts have recognized that a governmental unit receiving bids does not have unlimited discretion in waiving deviations from specifications. Courts have held that the unit must reject a bid that contains a "material variance" from the specifications, defined as a variance that gives the bidder "an advantage or benefit not enjoyed by the other bidders."[22] Even though specifications may reserve to the unit the ability to "waive minor irregularities," the unit's assessment of what constitutes a minor irregularity must be based upon the legal standard established by the courts. Thus if a bid offers something outside the scope of the specifications that the unit finds desirable, or omits a required feature that the unit feels it can live without, fairness may require that the unit nonetheless reject the defective bid. The unit then has the option of accepting the lowest responsive, responsible bid, or rejecting all the bids, revising or clarifying the specifications, if necessary, and rebidding the contract.

22. Professional Food Services Management v. NC Dept. of Administration, 109 N.C. App. 165, 169, 426 S.E.2d 447, 450 (1993). *See* "Understanding the Responsiveness Requirement in Competitive Bidding," *Local Government Law Bulletin* 102 (May 2002).

Standard for Awarding Contracts

Both the formal and informal bid statutes require that contracts be awarded to the "lowest responsible bidder, taking into consideration quality, performance, and the time specified in the proposals for the performance of the contract." Although this standard probably creates a presumption in favor of the bidder who submits the lowest dollar bid, it clearly does not require an award to the lowest bidder in all cases. The North Carolina Court of Appeals has held that the statute authorizes the board to request information from the bidders about their experience and financial strength and to consider this information in determining whether the low bidder is responsible.[23] The court held that the term *responsibility* refers to the bidder's capacity to perform the contract and that the statute authorizes the board to evaluate the bidder's experience, training and quality of personnel, financial strength, and any other factors that bear on the bidder's ability to perform the work.

It is somewhat less clear whether this standard of award allows the county or city to award a contract for the purchase of apparatus, supplies, materials, or equipment to a bidder who proposes a more expensive, higher-quality piece of equipment than the lowest bidder. Assuming all of the items proposed are within the scope of the specifications, it seems reasonable to interpret the statute as allowing the board to choose a higher-quality item if this is the best investment of public funds.

The unit must carefully document the factual basis for any award to a bidder who did not submit the lowest bid and be diligent in investigating the facts to make sure that the information it relies upon is accurate and reliable. The county or city does not necessarily have to demonstrate that a contractor is not responsible generally, only that the contractor does not have the skills, experience, or financial capacity for the contract in question.

Construction or repair contracts that are subject to the formal bidding requirements must be awarded by the governing body. For purchase contracts, G.S. 143-129(a) authorizes the board to delegate to the manager or chief purchasing official the authority to award contracts or to reject bids and re-advertise. The informal bidding statute does not dictate who must award contracts. This responsibility is usually delegated to the purchasing agent or other employees responsible for handling informal contracts.

Local governments also have broad authority to reject any or all bids for any reason that is not inconsistent with the purposes of the bidding laws.[24]

Local Preferences

Local governments in North Carolina do not have specific statutory authority to establish preferences in awarding contracts, such as preferences for local or minority contractors. A local preference would conflict with the legal requirement in both the formal and informal bidding range that contracts be awarded to the lowest responsible bidder. Although some may think it economically or politically desirable, it is not legal to assume that a local contractor is more responsible than others under this standard for awarding contracts. Preferences or targeted contracting efforts for local government may be permissible, however, for contracts that are not subject to the competitive bidding requirements, such as service contracts, or contracts below the minimum bid threshold (see Appendix 20-A). Counties and cities can also establish procedures to identify local and minority contractors and notify them of contracting opportunities.

Special Rules for Building Contracts

Bidding and Construction Methods

In addition to the bidding requirements for construction or repair work described above, there are several special requirements for building construction contracts. First, state law limits the bidding and construction methods counties and cities may use for major building construction. For building construction projects that are above the dollar threshold contained in G.S. 143-128 (see Appendix 20-A), local governments may use any of the following contracting

23. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. 383, 386, 416 S.E.2d 607, 609 (1992).

24. G.S. 143-129(a)

methods: separate prime,[25] single prime,[26] or construction management at risk.[27] The *prime contract* is the contract directly between the owner (the unit of government) and the contractor. In a *single-prime contract*, the general contractor has the prime contract with the owner and all other contracts are subcontracts with the general contractor. Under the separate-prime (also called multiple-prime) system, contractors in the major trades (general contracting, plumbing, electrical, and heating, ventilating, and air conditioning) submit separate bids to and contract directly with the owner. Under the construction-management-at-risk system, the county or city selects a construction manager at risk using the qualification-based process that applies to design and related services (described below). The construction manager at risk contracts to oversee and manage construction and to deliver the completed project at a negotiated guaranteed minimum price. The construction manager is required to solicit bids and award contracts for all of the actual construction work (including general contracting work) to prequalified subcontractors. Other construction methods, such as design-build, may be used only for projects below the threshold in the statute, or with special approval from the State Building Commission or by authority of local legislation enacted by the General Assembly.[28]

Bids may also be received on a "dual-bidding" basis, under which both separate-prime and single-prime bids are solicited. Under dual bidding, the unit may consider cost of construction oversight, time for completion, and other factors it deems appropriate in determining whether to award a contract on a single-prime or separate-prime basis.

Minority Business Enterprise Participation

Public agencies, including counties and cities, are required to establish a percentage goal for participation by minority contractors in major building construction or repair projects, to make efforts to include minority contractors in these projects, and to require prime contractors to either meet or make good-faith efforts to attain the established minority participation goal.[29] The current dollar thresholds for minority participation requirements are set forth in Appendix 20-A. The law does not establish or authorize a set-aside of particular contracts for minority contractors or a preference for minority contractors in awarding contracts. Failure to meet the goal or to make the statutorily mandated minimum good-faith effort is grounds for rejection of a bid.[30] The statute specifically states, however, that contracts must be awarded to the lowest responsible, responsive bidder and prohibits consideration of race, sex, religion, national origin, or handicapping condition in awarding contracts. Counties and cities are required to establish a minority business participation outreach plan, and to report data regarding minority outreach and participation on specific projects to the State Department of Administration.

Counties and cities also have authority under G.S. 160A-17.1 to comply with minority business enterprise program requirements that may be imposed as a condition of receiving federal or state grants and loans.

Requirements for Design and Related Services

State law specifies when plans and specifications for public building projects must be prepared by a registered or licensed architect or engineer.[31] The statutory thresholds, set forth in Appendix 20-A, apply based on whether the project involves new construction or renovation that calls for foundation or structural work, or that affects life safety systems. This requirement applies even if the work is to be done by the unit's own forces, subject to the force account limits discussed earlier.

25. G.S. 143-128(b).

26. G.S. 143-128(d).

27. G.S. 143-128.1.

28. For a comparison of various construction methods, *see* Valerie Rose Riecke, "Public Construction Contracting: Choosing the Right Project-Delivery Method," *Popular Government* 70(1) (Fall 2004): 22–31.

29. G.S. 143-128.2. See Fleming Bell, *Construction Contracts with North Carolina Local Governments*, 4th ed. (Chapel Hill, N.C.: Institute of Government, University of North Carolina at Chapel Hill, 2006.

30. G.S. 143-128.2(c).

31. G.S. 133-1.1(a).

Another statute, G.S. 143-64.31 requires that public agencies select architects, engineers, surveyors, and construction managers at risk based on qualifications instead of bid prices. The statute prohibits counties and cities from asking for pricing information, other than unit prices (understood to mean hourly rates) until after the best qualified person or firm is identified. Then fees are negotiated to develop a final contract. Local government units that do not wish to use the qualification-based process required under the statute have the ability under G.S. 143-64.32 to approve an exemption for any particular project (1) where the design fee is less than $30,000, or (2) in the sole discretion of the board (regardless of the amount of the fee), if the unit states the reasons and circumstances for the exemption. The statute requires the unit to exempt itself in writing. Once exempt, the board can either negotiate a contract or conduct a competitive bidding or other process to select the contractor for services in these categories.

Protests and Legal Challenges

Unlike the laws governing state and federal contracting, North Carolina laws governing local government contracting do not establish protest procedures. North Carolina courts have held that if a contract is subject to the statutory competitive bidding procedures and those procedures are not followed, the contract is void.[32] If a bidder is dissatisfied with a decision of the county or city—for example, to award a contract to the second-lowest bidder or to accept a bid that does not meet specifications—the bidder can register his or her complaint with the local official responsible for the contract or directly with the governing board. As a practical matter, it is best for the unit to attempt to resolve the matter, but there is no legal requirement for a hearing or other formal disposition of the complaint. If the matter is not resolved administratively, the only legal option is for the aggrieved party to sue the unit of government, typically for an injunction to prevent the unit from going forward with an illegal contract.[33] It is not unusual for protests to be lodged with local government officials or with the governing boards, although legal challenges are rare.

Conflicts of Interest

Several state laws place limits on the ability of elected officials and public employees to derive personal benefit from contracts with the governmental units they serve. These laws reflect the public's need to ensure that contracting and other decisions are made in a neutral, objective way, based on what is in the public interest and not in consideration of actual or potential benefit to the decision maker. However, these laws do not prohibit all activity that the public might consider improper. Instead, they identify particular activities that the legislature has identified as serious enough to constitute a criminal offense. Situations that are not illegal may nonetheless be inappropriate, so public officials should always consider the public perception of their actions as well as the legal consequences.

Contracts for Personal Benefit

A criminal statute, G.S. 14-234, prohibits a public official or employee from obtaining a direct benefit from any contract in which he or she is involved on behalf of the public agency he or she serves. The statute contains two additional prohibitions. Even if a public official or employee is not involved in making a contract from which he or she will derive a direct benefit, he or she is prohibited from influencing or attempting to influence anyone in the agency who is involved in making the contract. In addition, all public officers and employees are prohibited from soliciting or receiving any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract. Violation of the statute is a Class 1 misdemeanor. Key definitions contained in the statute, along with several important exceptions are discussed below.

As defined in the statute, a person directly benefits from a contract if the person, *or his or her spouse* (1) has more than a 10 percent interest in the company that is a party to the contract; (2) derives any income or commission directly from the contract; or (3) acquires property under the contract.[34] Note that while the statute includes a benefit to a

32. Raynor, 220 N.C. at 353, 17 S.E.2d at 499.

33. See Frayda S. Bluestein, "Disappointed Bidder Claims Against North Carolina Local Governments," *Local Government Law Bulletin* 98 (May 2001).

34. G.S. 14-234(a1)(4).

spouse, it does not extend to other family members or friends. If there is no benefit to the employee or official or his or her spouse, a contract with a family member or friend does not violate the law. Another important aspect of the definition is that it does not make illegal a contract with an entity in which a county or city official is an employee, as long as there is no commission or other direct benefit from the contract.

Since the definition of direct benefit includes acquisition of property, board members and employees who are involved with the process of disposing of surplus property are prohibited from purchasing at surplus-property sales for their unit of government unless they are within the "small jurisdiction exception" described below.

The law also specifies what it means to be involved in making or administering the contract, which is a necessary element in the statutory prohibition. Individuals who are *not* involved in making or administering contracts are not legally prohibited from contracting with their unit of government. Activity that triggers the prohibition includes participating in the development of specifications or contract terms, or preparation or award of the contract, as well as having the authority to make decisions about or interpret the contract.[35] The statute also makes clear that a person is involved in making the contract when the board or commission on which he or she serves takes action on the contract, even if the official does not participate. Simply being excused from voting on the contract does not absolve a person with a conflict from potential criminal liability. If an exception (discussed below) applies, the interested party be excused from voting and legally contract. Being excused from voting does not by itself, however, eliminate a conflict under the statute.

As noted above, public officials or employees may legally benefit from a contract with the unit of government they serve as long as they are not involved in making or administering it. Thus, for example, employees who are not involved in the process of disposing of surplus property may legally purchase items from the unit, and the unit may legally contract to acquire goods or services from employees whose county or city job does not involve them in making or administering the contract.

The broad prohibition in G.S. 14-234 is modified by several exceptions. In any case where an exception applies, a public officer who will derive a benefit is prohibited from deliberating or voting on the contract or from attempting to influence any other person who is involved in making or administering the contract.[36] Contracts with banks, savings and loan associations, and regulated public utilities are exempt from the limitations in the statute[37] as are contracts for reimbursement for provision of direct assistance under state or federal public assistance programs, provided certain conditions are met.[38] An officer or employee may, under another exception, convey property to the unit, but only through a condemnation proceeding initiated by the unit.[39] An exception in the law also authorizes a county or city to hire as an employee the spouse of a public officer.[40]

A final exception applies only in cities with a population of not more than 15,000, and counties in which there is no incorporated municipality with a population of more than 15,000.[41] Population figures are based on the most recent federal census. In these jurisdictions, governing board members as well as certain members of the social services, local health or area mental health boards, members of a board of directors of a public hospital, and of the local school board, may lawfully contract with the units of government they serve, subject to several limitations contained in the exception. First, the contract may not exceed $12,500 for medically related services and $25,000 for other goods or services in any twelve-month period. In addition, the exemption does not apply to any contract that is subject to the competitive bidding laws (see Appendix 20-A for applicability and current thresholds). Contracts made under this

35. G.S. 14-234(a1)(2), (3).

36. G.S. 14-234(b1).

37. G.S. 14-234(b)(1).

38. G.S. 14-234(b)(4).

39. G.S. 14-234(b)(2). The statute specifically authorizes the conveyance to be undertaken under a consent judgment, that is, without a trial, if approved by the court.

40. G.S. 14-234(b)(3).

41. G.S. 14-234(d1).

exception must be approved by special resolution of the governing board. The statute imposes additional public notice and reporting requirements for these contracts and prohibits the interested board member from participating in the development of or voting on the contract.

Contracts entered into in violation of G.S. 14-234 violate public policy and are not enforceable. There is no authority to pay for or otherwise perform a contract that violates the statute unless the contract is required to protect the public health or welfare and limited continuation is approved by the Local Government Commission.[42] Prosecutions under the statute are not common, but situations in which board members or public officials stand to benefit from contracts involving public funds often make headlines.

Gifts and Favors

Another criminal statute, G.S. 133-32, is designed to prevent the use of gifts and favors to influence the award and administration of public contracts. The statute makes it a misdemeanor for a current contractor, a contractor who has performed under a contract with a public agency within the past year, or a person who anticipates bidding on a contract, to give any gift or favor to public officials who have responsibility for preparing, awarding, or overseeing contracts. The statute also makes it a misdemeanor for those officials to receive the gift or favor.

The statute does not define gift or favor. A reasonable interpretation is that the statute prohibits gifts and the receipt of anything of value unless it is covered by a statutory exception. Items excepted from the statute include advertising items or souvenirs of nominal value, honoraria for participating in meetings, and meals at banquets. Inexpensive pens, mugs, and calendars bearing the name of the donor firm clearly fall within the exception for advertising items and souvenirs. A gift of a television set, use of a beach cottage, or tickets to a professional sports event is probably prohibited. Some local governments have adopted local policies establishing a dollar limit for gifts that may be accepted. Since meals at banquets are allowed, free meals offered by contractors under other circumstances, including lunch, should be refused.

The statute also allows public officials to accept customary gifts or favors from friends and relatives as long as the existing relationship, rather than the desire to do business with the unit, is the motivation for the gift. The statute specifies that it does not prohibit contractors from making donations to professional organizations to defray meeting expenses, nor does it prohibit public officials who are members of those organizations from participating in meetings that are supported by such donations and are open to all members.

It is important to distinguish between gifts to individuals and gifts to the government entity itself. A contractor may legally donate goods to the local government for use by the unit. For example, a local business can legally donate products to the unit for its own use or for the unit to raffle to employees for an employee appreciation event. Gifts or favors delivered directly to individuals for their personal use should be returned, or in some cases, may be distributed among employees such that each person's benefit is nominal. The latter approach is common for gifts of food brought to a department by a vendor. Public officials should inform contractors and vendors about the existence of the gifts-and-favors statute, and about any local rules in effect within the unit addressing this issue.

Misuse of Confidential Information

G.S. 14-234.1 makes it a misdemeanor for any state or local government officer or employee to use confidential information for personal gain, to acquire a pecuniary benefit in anticipation of his or her own official action, or to help another person acquire a pecuniary benefit from these actions.

42. G.S. 14-234(f).

Additional Resources

Bell, A. Fleming, II. *Construction Contracts with North Carolina Local Governments*, 4th ed. Chapel Hill, N.C.: Institute of Government, University of North Carolina at Chapel Hill, 2006.

Bell, A. Fleming, II. *Ethics, Conflicts, and Offices: A Guide for Local Officials*, 2d ed. Chapel Hill, N.C.: Institute of Government, University of North Carolina at Chapel Hill, 2006.

Bluestein, Frayda S. *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 2d ed. Chapel Hill, N.C.: Institute of Government, University of North Carolina at Chapel Hill, 2004.

Bluestein, Frayda S. *An Overview of Contract Bidding Requirements for North Carolina Local Governments*. Chapel Hill, N.C.: Institute of Government, University of North Carolina at Chapel Hill, 2002. Available electronically at http://ncpurchasing.unc.edu/bidlaw.htm.

Haney, Donald. *Service Contracting: A Local Government Guide*. Washington, D.C.: International City/County Management Association, 1992.

School of Government Web materials on purchasing and construction contracting at www.ncpurchasing.unc.edu.

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The author wishes to express her appreciation to the late Warren Jake Wicker, whose work in public purchasing and authorship of this article in the previous editions of this book are reflected in this edition's article.

Appendix 20-A. *Dollar Thresholds in North Carolina Public Contracting Statutes*

Dollar limits and statutory authority current as of June 1, 2007.

Requirement	Threshold	Statute
Formal bids		
Construction or repair contracts	$300,000 and above (estimated cost of contract)	G.S. 143-129
Purchase of apparatus, supplies, materials, and equipment	$90,000 and above (estimated cost of contract)	G.S. 143-129
Informal bids		
Construction or repair contracts	$30,000 to formal limit	G.S. 143-131
Purchase of apparatus, supplies, materials, and equipment	$30,000 to formal limit	G.S. 143-131
Construction methods authorized for building projects		
Separate Prime Single Prime Dual Bidding Construction Management at Risk	Over $300,000 (estimated cost of project)	G.S. 143-128
Minority-business enterprise requirements		
Building projects		
Projects with state funding	$100,000 or more	G.S. 143-128.2(a)
Locally funded projects	Over $300,000	G.S. 143-128.2(a)
Projects in the informal range	$30,000 to $300,000	G.S. 143-131(b)
Limit on use of own forces Construction or repair projects	Not to exceed $125,000 (total project) or $50,000 (labor only)	G.S. 143-135
Bid bond or deposit		
Construction or repair contracts	Formal bids (see above)	G.S.143-129(b)
Purchase contracts	Not required	
Performance/payment bonds		
Construction or repair contracts	Projects over $300,000 for each contract over $50,000	G.S. 143-129(c); G.S. 44A-26
Purchase contracts	Not required	
General contractor's license	$30,000 and above	G.S. 87-1
Use of registered architect or engineer required		
Nonstructural work	$300,000 and above	G.S. 133-1.1(a)
Structural repair or new construction	$135,000 and above	
Repair work affecting life safety systems	$100,000 and above	
Selection of architect, engineer, surveyor, or construction manager at risk "Best qualified" selection procedure Exemption authorized	All contracts unless exempted Projects where estimated fee is less than $30,000 or other projects in sole discretion of unit	G.S. 143-64.31 G.S. 143-64.32