

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

S

D

SENATE BILL 960
PROPOSED COMMITTEE SUBSTITUTE S960-CSRO-72 [v.1]

7/8/2009 8:46:49 PM

Short Title: Ensure Accountability Re: Stimulus Funds.

(Public)

Sponsors:

Referred to:

March 26, 2009

A BILL TO BE ENTITLED
AN ACT TO FACILITATE EXPEDITED USE AND EXPENDITURE OF FEDERAL
FUNDS PROVIDED UNDER THE AMERICAN RECOVERY AND REINVESTMENT
ACT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-52 reads as rewritten:

"§ 143-52. Competitive bidding procedure; consolidation of estimates by Secretary; bids; awarding of contracts.

(a) As feasible, the Secretary of Administration will compile and consolidate all such estimates of supplies, materials, printing, equipment and contractual services needed and required by State departments, institutions and agencies to determine the total requirements of any given commodity. Where such total requirements will involve an expenditure in excess of the expenditure benchmark established under the provisions of G.S. 143-53.1 and where the competitive bidding procedure is employed as hereinafter provided, sealed bids shall be solicited by advertisement in a newspaper widely distributed in this State or through electronic means, or both, as determined by the Secretary to be most advantageous, at least once and at least 10 days prior to the date designated for opening. Except as otherwise provided under this Article, contracts for the purchase of supplies, materials or equipment shall be based on competitive bids and acceptance made of the lowest and best bid(s) most advantageous to the State as determined upon consideration of the following criteria: prices offered; the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record. Competitive bids on such contracts shall be received in accordance with rules and regulations to be adopted by the Secretary of Administration, which rules and regulations shall prescribe for the manner, time and place for proper advertisement for such bids, the time and place when bids will be received, the articles for which such bids are to be submitted and the specifications prescribed for such articles, the number of the articles desired or the duration of the proposed contract, and the amount, if any, of bonds or certified checks to accompany the bids. Bids shall be publicly opened. Any and all bids received may be rejected. Each and every bid conforming to the terms of the invitation, together with the name of the bidder, shall be tabulated and that tabulation shall become public record in accordance with the

rules adopted by the Secretary. All contract information shall be made a matter of public record after the award of contract. Provided, that trade secrets, test data and similar proprietary information may remain confidential. A bond for the faithful performance of any contract may be required of the successful bidder at bidder's expense and in the discretion of the Secretary of Administration. When the dollar value of a contract for the purchase, lease, or lease/purchase of equipment, materials, and supplies exceeds the benchmark established by G.S. 143-53.1, the contract shall be reviewed by the Board of Awards pursuant to G.S. 143-52.1 prior to the contract being awarded. After contracts have been awarded, the Secretary of Administration shall certify to the departments, institutions and agencies of the State government the sources of supply and the contract price of the supplies, materials and equipment so contracted for.

(b) All contracts for goods, equipment, or services awarded by the Department of Administration, State departments, institutions, agencies, universities, and community colleges using funds from the American Recovery and Reinvestment Act of 2009 ("ARRA") (Public Law 111-5) shall be awarded to the maximum extent practicable using fixed-priced contracts and competitive procedures. The Secretary of Administration in coordination with the Office of Economic Recovery ("OERI") shall adopt rules, regulations, and policies that will promote the efficient and expeditious award of ARRA contracts in compliance with the requirements of ARRA and ARRA's rules, regulations, directives, and guidance, as well as directives issued by OERI."

SECTION 2. G.S. 143-53 is amended by adding a new subsection to read:

"(e) The Secretary of Administration in coordination with the Office of Economic Recovery ("OERI") shall adopt rules and regulations regarding the requisition, issuance, advertising, opening, evaluation, award, protests, contract performance, contract administration, default, termination, and debarment for all contracts for goods, equipment, or services to be awarded by the Department of Administration, State departments, institutions, agencies, universities, and community colleges using funds from the American Recovery and Reinvestment Act of 2009 ("ARRA") (Public Law 111-5). The rules and regulations implemented under this section shall be exempt from the rule-making procedures set forth in the Administrative Procedures Act, G.S. 150B-1 through 150B-21.17, inclusive. The rules and regulations of the Secretary of Administration under this section shall comply with the publication requirements for exempt agencies as provided in G.S. 150B-21.21 and shall have the effect set forth in G.S. 150B-21.22 prior to official publication in the North Carolina Administrative Code. Such rules and regulations shall provide for a public comment period for at least 10 days after the publishing of the rules and regulations."

SECTION 3. G.S. 150B-1(d) is amended by adding a new subdivision to read:

"(19) Any agency in adopting new or amending existing procedures for implementing the American Recovery and Reinvestment Act of 2009 (Public Law 111-5)."

SECTION 4. G.S. 150B-1(e) is amended by adding a new subdivision to read:

"(17) Any agency with respect to contracts, disputes, protests, and/or claims arising out of or relating to the implementation of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5)."

SECTION 5. G.S. 143-53.1 reads as rewritten:

"§ 143-53.1. Setting of benchmarks; increase by Secretary.

(a) On and after July 1, 1997, the procedures prescribed by G.S. 143-52 with respect to competitive bids and the bid value benchmark authorized by G.S. 143-53(a)(2) with respect to rule making by the Secretary of Administration for competitive bidding shall be no more than twenty-five thousand dollars (\$25,000); provided, the Secretary of Administration may, in his or her discretion, increase the benchmarks effective as of the beginning of any fiscal biennium of the State commencing after June 30, 1999, in an amount whose increase, expressed as a percentage, does not exceed the rise in the Consumer Price Index during the fiscal biennium

next preceding the effective date of the benchmark increase. For a special responsibility constituent institution of The University of North Carolina, the benchmark prescribed in this section shall be as provided in G.S. 116-31.10. For community colleges, the benchmark prescribed in this section shall be as provided in G.S. 115D-58.14.

(b) The benchmarks set by the Secretary of Administration, The University of North Carolina, and the State Board of Community Colleges in subsection (a) of this section shall be applicable to all contracts for goods, equipment, or services awarded by the Department of Administration, State departments, institutions, agencies, universities, and community colleges, using funds from the American Recovery and Reinvestment Act of 2009 (Public Law 111-5)."

SECTION 6. G.S. 143-54 reads as rewritten:

"§ 143-54. Certification that bids were submitted without collusion.

(a) The Director of Administration shall require bidders to certify that each bid is submitted competitively and without collusion. False certification is a Class I felony.

(b) The certification required by subsection (a) of this section shall be applicable to all bids and proposals for contracts for goods, equipment, or services awarded by the Department of Administration, State departments, institutions, agencies, universities, and community colleges using funds from the American Recovery and Reinvestment Act of 2009(Public Law 111-5)."

SECTION 7. G.S. 143-55 reads as rewritten:

"§ 143-55. Requisitioning for supplies by agencies; must purchase through sources certified.

(a) Unless otherwise provided by law, after sources of supply have been established by contract and certified by the Secretary of Administration to the said departments, institutions and agencies as herein provided for, it shall be the duty of all departments, institutions and agencies to make requisition or issue orders on forms to be prescribed by the Secretary of Administration, for all supplies, materials and equipment required by them upon the sources of supply so certified, and, except as herein otherwise provided for, it shall be unlawful for them, or any of them, to purchase any supplies, materials or equipment from other sources than those certified by the Secretary of Administration. One copy of such requisition or order shall be furnished to and when requested by the Secretary of Administration.

(b) The acquisition of supplies, materials, goods, equipment, or services using funds from the American Recovery and Reinvestment Act of 2009 ("ARRA") (Public Law 111-5) shall be exempt from the contracts certified by the Secretary of Administration in subsection (a) of this section. However, the Secretary of Administration, in coordination with OERI, may approve the use of term contracts in limited circumstances where such contracts provide the best means to accomplish the goals of ARRA. In addition, the Secretary of Administration shall provide notice to the vendors on the certified contracts of the opportunity to submit bids or proposals for contracts using ARRA funds."

SECTION 8. G.S. 6-19.1 reads as rewritten:

"§ 6-19.1. Attorney's fees to parties appealing or defending against agency decision.

(a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees

1 within 30 days following final disposition of the case. The petition shall be
2 supported by an affidavit setting forth the basis for the request.

3 Nothing in this section shall be deemed to authorize the assessment of attorney's fees for the
4 administrative review portion of the case in contested cases arising under Article 9 of Chapter
5 131E of the General Statutes.

6 Nothing in this section grants permission to bring an action against an agency otherwise
7 immune from suit or gives a right to bring an action to a party who otherwise lacks standing to
8 bring the action.

9 Any attorney's fees assessed against an agency under this section shall be charged against
10 the operating expenses of the agency and shall not be reimbursed from any other source.

11 (b) No party shall be entitled to recover attorneys' fees in any civil action regarding any
12 claim, dispute and/or protest relating to: (i) the implementation of the American Recovery and
13 Reinvestment Act of 2009 ("ARRA") (Public Law 111-5); (ii) the award of contracts or grants
14 thereunder by the State and its departments, institutions, offices, agencies, universities,
15 community colleges, counties, municipalities, and local education authorities; (iii) a vendor's
16 default under an ARRA contract; and/or (iv) a vendor's debarment resulting from a default of
17 an ARRA contract."

18 **SECTION 9.** G.S. 1-485 reads as rewritten:

19 **"§ 1-485. When preliminary injunction issued.**

20 (a) A preliminary injunction may be issued by order in accordance with the provisions
21 of this Article. The order may be made by any judge of the superior court or any judge of the
22 district court authorized to hear in-chambers matters in the following cases, and shall be issued
23 by the clerk of the court in which the action is required to be tried:

- 24 (1) When it appears by the complaint that the plaintiff is entitled to the relief
25 demanded, and this relief, or any part thereof, consists in restraining the
26 commission or continuance of some act the commission or continuance of
27 which, during the litigation, would produce injury to the plaintiff; or,
- 28 (2) When, during the litigation, it appears by affidavit that a party thereto is
29 doing or threatens or is about to do, or is procuring or suffering some act to
30 be done in violation of the rights of another party to the litigation respecting
31 the subject of the action, and tending to render the judgment ineffectual; or,
- 32 (3) When, during the pendency of an action, it appears by affidavit of any
33 person that the defendant threatens or is about to remove or dispose of his
34 property, with intent to defraud the plaintiff.

35 (b) The provisions of subsection (a) of this section do not apply to the award or
36 performance of contracts or grants under the American Recovery and Reinvestment Act of
37 2009 (Public Law 111-5), and the right to any injunction, restraining order, or stay is limited by
38 G.S. 1-493(b)."

39 **SECTION 10.** G.S. 1-493 reads as rewritten:

40 **"§ 1-493. What judges have jurisdiction.**

41 (a) All judges of the superior court and judges of the district court authorized to hear
42 in-chambers matters have jurisdiction to grant injunctions and issue restraining orders in all
43 civil actions and proceedings pending in their respective divisions.

44 (b) Notwithstanding subsection (a) of this section, with respect to the award of contracts
45 or grants under the American Recovery and Reinvestment Act of 2009 (Public Law 111-5), the
46 judges of the superior court and judges of the district court are not authorized to grant any
47 injunction, restraining order, stay, or in any other way issue an order that will delay, prevent, or
48 stop the award or performance of any ARRA contract or grant, unless the party seeking such
49 relief: (i) raises a challenge to the award based on a constitutional violation or alleges criminal
50 or ethical misconduct of the State officials/employees making the award; and (ii) provides the
51 court with a commercial surety bond or such other similar collateral that will fully compensate

the State for all ARRA funds that the State may lose if the judge grants an injunction, restraining order, stay and/or delay in the award or performance of the ARRA contract or grant."

SECTION 11. Rule 65 of the Rules of Civil Procedure, as contained in G.S. 1A-1 is amended by adding a new subsection to read:

"(f) Exemptions. – Except for the limited circumstances set forth in G.S. 1-493(b), no court in this State shall have subject matter jurisdiction to issue, grant, or order any stay, preliminary injunction, temporary restraining order, permanent injunction, or any other type of order that will, in effect, prevent, stop, or delay the award or performance of a contract or grant that is funded under the American Recovery and Reinvestment Act of 2009 (Public Law 111-5)."

SECTION 12. G.S. 66-58(b) is amended by adding a new subdivision to read:

"(26) The North Carolina Office of Economic Recovery and Investment and State agencies in the implementation of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) funded projects."

SECTION 13. Recovery funds not specified in the American Recovery and Reinvestment Act of 2009 ("ARRA") may be expended upon approval by the Office of Economic Recovery and Investment. The Office of Economic Recovery and Investment will report any authorizations of ARRA funds to the Joint Legislative Commission on Governmental Operations at its next meeting.

SECTION 14. Contracts or grants entered into for the use of funds from the American Recovery and Reinvestment Act of 2009 ("ARRA") may include remedies sufficient to protect the State in the event such funds are not used in a manner consistent with ARRA or State requirements. Such remedies may include, but are not limited to, withholding State revenues to local governments and monetary penalties for nonprofits or for-profit entities.

SECTION 15.(a) If Senate Bill 828, 2009 Regular Session does not become law, G.S. 136-28.1 (a), (b), and (f) read as rewritten:

"§ 136-28.1. Letting of contracts to bidders after advertisement; exceptions.

(a) All contracts over one million two hundred thousand dollars (\$1,200,000) that the Department of Transportation may let for ~~construction~~ construction, maintenance, operations, or repair necessary to carry out the provisions of this Chapter shall be let to a responsible bidder after public advertising under rules and regulations to be made and published by the Department of Transportation. The right to reject any and all bids shall be reserved to the Board of Transportation. Contracts for construction or repair for federal aid projects entered into pursuant to this section shall not contain the standardized contract clauses prescribed by 23 U.S.C. § 112(e) and 23 C.F.R. § 635.109 for differing site conditions, suspensions of work ordered by the engineer or significant changes in the character of the work. For those federal aid projects, the Department of Transportation shall use only the contract provisions for differing site conditions, suspensions of work ordered by the engineer, or significant changes in the character of the work developed by the North Carolina Department of Transportation and approved by the Board of Transportation.

(b) In those cases in which the amount of work to be let to contract for ~~highway transportation infrastructure construction, maintenance, construction~~ or repair is one million two hundred thousand dollars (\$1,200,000) or less, and for transportation infrastructure maintenance that is one million two hundred thousand dollars (\$1,200,000) per year or less, at least three informal bids shall be solicited. The term "informal bids" is defined as bids in writing, received pursuant to a written request, without public advertising. All such contracts shall be awarded to the lowest responsible bidder. The Secretary of Transportation shall keep a record of all bids submitted, which record shall be subject to public inspection at any time after the bids are opened.

...

(f) Notwithstanding any other provision of law, the Department of Transportation may solicit proposals under rules and regulations adopted by the Department of Transportation for all contracts for professional engineering services and other kinds of professional or specialized services necessary in connection with ~~highway construction, maintenance, or repair. the~~ planning, design, maintenance, repair, and construction of transportation infrastructure. In order to promote engineering and design quality and ensure maximum competition by professional firms of all sizes, the Department may establish fiscal guidelines and limitations necessary to promote cost-efficiencies in overhead, salary, and expense reimbursement rates. The right to reject any and all proposals is reserved to the Board of Transportation.

...."

SECTION 15.(b) If Senate Bill 828, 2009 Regular Session becomes law, then G.S. 136-28.1 (a) and (b), as amended by that act, read as rewritten:

"§ 136-28.1. Letting of contracts to bidders after advertisement; exceptions.

(a) All contracts over one million two hundred thousand dollars (\$1,200,000) that the Department of Transportation may let for construction, maintenance, operations or repair necessary to carry out the provisions of this Chapter shall be let to a responsible bidder after public advertising under rules and regulations to be made and published by the Department of Transportation. The right to reject any and all bids shall be reserved to the Board of Transportation. Contracts for construction or repair for federal aid projects entered into pursuant to this section shall not contain the standardized contract clauses prescribed by 23 U.S.C. § 112(e) and 23 C.F.R. § 635.109 for differing site conditions, suspensions of work ordered by the engineer or significant changes in the character of the work. For those federal aid projects, the Department of Transportation shall use only the contract provisions for differing site conditions, suspensions of work ordered by the engineer, or significant changes in the character of the work developed by the North Carolina Department of Transportation and approved by the Board of Transportation.

(b) For contracts let to carry out the provisions of this Chapter in which the amount of work to be let to contract for transportation infrastructure construction or repair is one million two hundred thousand dollars (\$1,200,000) or less, and for transportation infrastructure maintenance, excluding resurfacing, that is one million two hundred thousand dollars (\$1,200,000) per year or less, at least three informal bids shall be solicited. The term "informal bids" is defined as bids in writing, received pursuant to a written request, without public advertising. All such contracts shall be awarded to the lowest responsible bidder. The Secretary of Transportation shall keep a record of all bids submitted, which record shall be subject to public inspection at any time after the bids are opened.

....."

SECTION 16. Part 3 of Article 36 of Chapter 143 of the General Statutes reads as rewritten:

"Part 3. Energy ~~Improvement-Loan Program-Fund.~~

"§ 143-345.16. Short title.

This Part shall be known as the Energy ~~Improvement-Loan Program-Fund.~~

"§ 143-345.17. Legislative findings and purpose.

The General Assembly finds and declares that it is in the best interest of the citizens of North Carolina to promote and encourage energy efficiency within the State in order to conserve energy, promote economic competitiveness, and expand employment in the State.

"§ 143-345.18. Lead agency; powers and duties.

(a) For the purposes of this Part, the Department of Administration, State Energy Office, is designated as the lead State agency in matters pertaining to energy efficiency.

(b) The Department shall have the following powers and duties with respect to this Part:

- (1) To provide industrial and commercial concerns doing business in North Carolina, local governmental units, ~~and nonprofit organizations operating~~

1 organizations, and residents in North Carolina with information and
2 assistance in undertaking energy conserving capital improvement projects to
3 enhance efficiency.

- 4 (2) ~~To establish a revolving fund within the Department for the purpose of~~
5 ~~providing secured loans in amounts not greater than five hundred thousand~~
6 ~~dollars (\$500,000) per entity to install energy efficient capital improvements~~
7 ~~(i) within businesses or nonprofit organizations located within or~~
8 ~~translocating to North Carolina, and (ii) within local governmental units. To~~
9 establish one or more revolving funds within the Department for the purpose
10 of providing secured loans in amounts not greater than one million dollars
11 (\$1,000,000) per entity to install energy-efficient and renewable energy
12 improvements (i) within business or nonprofit organizations located within
13 or translocating to North Carolina, (ii) within local governmental units,
14 (iii) within buildings classified as multifamily residential, (iv) within
15 buildings designated as multiuse that include residential units, and (v) within
16 single family residences, however, in this instance the amount of the loan
17 shall not exceed fifty thousand dollars (\$50,000). In providing these loans,
18 priority shall be given to entities already located in the State.

- 19 (2a) To develop and adopt rules to allow State-regulated financial institutions to
20 provide secured loans to corporate entities, nonprofit organizations, and
21 local governmental units and residents in accordance with terms and criteria
22 established by the ~~Department~~ State Energy Office.

- 23 (3) To work with appropriate State and federal agencies to develop and
24 implement rules and regulations to facilitate this program.

- 25 (4) To contract with persons or entities, including other State agencies, to
26 administer the Energy Loan Fund. Contracts for the procurement of services
27 to manage, administer, and operate the Energy Loan Fund shall be awarded
28 on a competitive basis through the solicitation of proposals and through the
29 procedures established by statute and the Division of Purchase and Contract.

30 (c) The annual interest rate charged for the use of the funds from the revolving fund
31 established pursuant to subdivision (b)(2) of this section shall be a percentage not to exceed
32 three percent (3%) per annum, to be established by the State Energy Office, excluding other
33 fees required for loan application review and origination. The term of any loan originated under
34 this section may not be greater than 20 years.

35 (c1) Notwithstanding subsection (c) of this section, the ~~Department~~ State Energy Office
36 shall adopt rules to allow loans to be made from the revolving loan fund and by State-regulated
37 financial institutions at interest rates as low as ~~one percent (1%)~~ zero percent (0%) per annum
38 for certain renewable energy, recycling and energy efficient and conservation projects ~~such as~~
39 ~~recycling and renewable energy~~ to encourage their development and use.

40 (d) In accordance with the terms of the Stripper Well Settlement, administrative
41 expenses for activities under this section that are subject to the Stripper Well Settlement shall
42 be limited to five percent (5%) of funds ~~appropriated~~ allocated for this purpose. In accordance
43 with the provisions of the American Recovery and Reinvestment Act of 2009 (Public Law
44 111-5), administrative expenses for activities under this section that are subject to the ARRA
45 shall be limited to 10 percent (10%) of funds allocated for this purpose.

- 46 (e) For purposes of this section:

- 47 (1) "Local governmental unit" means any board or governing body of a political
48 subdivision of the State, including any board of a community college, any
49 school board, or an agency, commission, or authority of a political
50 subdivision of the State.

- 1 (2) "Nonprofit organization" means an organization that is exempt from federal
2 income taxation under section 501(c)(3) of the Internal Revenue Code."
3 **SECTION 17.** This act becomes effective February 17, 2009. Sections 1 through
4 12 of this act expire June 30, 2012.