

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009**

**SESSION LAW 2009-475
SENATE BILL 960**

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 and Investment (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 and Investment (OERI), shall adopt rules, policies, 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 and to meet the goals of the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5). The rules adopted under this subsection shall be adopted in accordance with G.S. 150B-21.1B."

SECTION 3. Chapter 150B of the General Statutes is amended by adding a new section to read:

"§ 150B-21.1B. Adoption of rules to implement the American Recovery and Reinvestment Act.

(a) Purpose. – This section establishes an expedited procedure for the adoption of new or the amendment of existing rules implementing the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5), including any federal rules, regulations, policies, guidance, or goals for the implementation of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. The provisions of this section shall be liberally construed to allow agencies maximum flexibility in implementing the ARRA.

(b) Adoption. – An agency may adopt a rule under this section by using the procedure for adoption of an emergency rule set forth in G.S. 150B-21.1A(a) and (b). The provision in subsection (a) of G.S. 150B-21.1A that requires a finding of a serious or unforeseen threat to public health or safety shall not apply to rules adopted under this section. In lieu of the written statement of its findings of need as provided in subsection (b) of G.S. 150B-21.1A, the agency must prepare a written statement of its findings that the rule is needed to implement the ARRA. The emergency rule becomes effective when it is entered into the North Carolina Administrative Code. When an agency adopts an emergency rule under this section, the agency must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a3). For purposes of this section, all references to business days in G.S. 150B-21.1(a3) shall be deemed to be calendar days. If the agency receives written comment objecting to the temporary rule, the temporary rule shall be reviewed in accordance with subsection (c) of this section. If the agency receives no written comment objecting to the temporary rule, the agency shall deliver the rule to the Codifier of Rules. The Codifier of Rules shall enter the temporary rule into the North Carolina Administrative Code on the sixth business day after receipt of the rule, and the temporary rule becomes effective upon entry into the Code.

(c) Review. – If the agency receives written objection to the temporary rule, the agency must submit the temporary rule and a written statement of its findings that the rule is needed to implement the ARRA to the Director of the Office of Economic Recovery and Investment (Director). The Director shall have 14 calendar days to review the statement and the rule to determine whether the rule meets the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly or Congress, including the ARRA and any federal rules, regulations, policies, guidance, or goals for the implementation of the ARRA. The Director shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with this section.

If the Director finds that the temporary rule meets all of the criteria set forth in this subsection, the Director shall deliver the rule to the Codifier of Rules for entry into the North Carolina

Administrative Code. If the Director finds that the temporary rule fails to meet any of the criteria set forth in this subsection, the Director shall return the rule to the agency with a statement of the Director's objections. The agency may change the rule to satisfy the Director's objections and submit the revised rule to the Director. If the agency fails to satisfy the Director's objections, the rule shall not be entered in the North Carolina Administrative Code. If the Director fails to make a final finding within 14 calendar days of receipt of the statement and rule, the rule shall not be entered in the North Carolina Administrative Code.

(d) Emergency Rule Expiration Date. – An emergency rule adopted in accordance with this section expires on the earliest of the following dates:

- (1) The date specified in the rule.
- (2) The effective date of the temporary rule adopted to replace the emergency rule, if the Director approves the temporary rule.
- (3) The date the Director returns to an agency a temporary rule adopted to replace the emergency rule, if the agency fails to satisfy the Director's objections.
- (4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Codifier of Rules.

(e) Temporary Rule Expiration Date. – A temporary rule adopted in accordance with this section expires on the earliest of the following dates:

- (1) The date specified in the rule.
- (2) The effective date of a permanent rule adopted in accordance with G.S. 150B-21.2 to replace the temporary rule.
- (3) June 30, 2012.

(f) The Director's determination that a temporary rule meets the criteria set forth in subsection (c) of this section and that the rule is required by ARRA is a final agency decision and may be reviewed in accordance with Article 4 of this Chapter."

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

"(8) Except as provided in G.S. 150B-21.1B, 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 the Office of Economic Recovery and Investment, 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 within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

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

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

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

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

SECTION 9. G.S. 66-58(b) is amended by adding a new subdivision to read:

"(27) 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 10. 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 11. 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 12. G.S. 136-28.1(a) and (b), as amended by Section 1 of S.L. 2009-266, 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 13. 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 organizations, and residents~~ in North Carolina with information and assistance in undertaking energy conserving capital improvement projects to enhance efficiency.
- (2) ~~To establish a revolving fund within the Department for the purpose of providing secured loans in amounts not greater than five hundred thousand dollars (\$500,000) per entity to install energy efficient capital improvements (i) within businesses or nonprofit organizations located within or translocating to North Carolina, and (ii) within local governmental units. To~~ establish one or more revolving funds within the Department for the purpose of providing secured loans in amounts not greater than one million dollars (\$1,000,000) per entity to install or to an entity that installs energy-efficient and renewable energy improvements (i) within business or nonprofit organizations located within or translocating to North Carolina, (ii) within

local governmental units, (iii) within buildings classified as multifamily residential, (iv) within buildings designated as multiuse that include residential units, and (v) within single family residences, however, in this instance the amount of the loan shall not exceed fifty thousand dollars (\$50,000). In providing these loans, priority shall be given to entities already located in the State.

- (2a) To develop and adopt rules to allow State-regulated financial institutions to provide secured loans to corporate entities, nonprofit organizations, and local governmental units and residents in accordance with terms and criteria established by the ~~Department~~ State Energy Office.
- (3) To work with appropriate State and federal agencies to develop and implement rules and regulations to facilitate this program.
- (4) To contract with persons or entities, including other State agencies and United States Treasury certified Community Development Financial Institutions (CDFI), to administer the Energy Loan Fund. Contracts for the procurement of services to manage, administer, and operate the Energy Loan Fund shall be awarded on a competitive basis through the solicitation of proposals and through the procedures established by statute and the Division of Purchase and Contract.

(c) The annual interest rate charged for the use of the funds from the revolving fund established pursuant to subdivision (b)(2) of this section shall be a percentage not to exceed three percent (3%) per annum, to be established by the State Energy Office, excluding other fees required for loan application review and origination. The term of any loan originated under this section may not be greater than 10 20 years.

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

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

(e) For purposes of this section:

- (1) "Local governmental unit" means any board or governing body of a political subdivision of the State, including any board of a community college, any school board, or an agency, commission, or authority of a political subdivision of the State.
- (2) "Nonprofit organization" means an organization that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code."

SECTION 14.(a) G.S. 62-133.8 is amended by adding a new subsection to read:

"(k) Tracking of Renewable Energy Certificates. – No later than July 1, 2010, the Commission shall develop, implement, and maintain an Internet Web site for the online tracking of renewable energy certificates in order to verify the compliance of electric power suppliers with the REPS requirements of this section and to facilitate the establishment of a market for the purchase and sale of renewable energy certificates."

SECTION 14.(b) The North Carolina Utilities Commission shall use available funds for the 2009-2010 fiscal year to implement this section.

SECTION 14.(c). The Energy Policy Council and the North Carolina Utilities Commission shall jointly study and design an online renewable energy certificates trading exchange to facilitate the establishment of a market for purchase and sale of renewable energy certificates. The study shall explore how to implement an exchange that will not require appropriated funds from the State and shall examine all costs to the consumer. The Energy Policy Council and the North Carolina Utilities Commission shall report their findings and recommendations to the General Assembly by April 1, 2010.

SECTION 15. The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the

economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors.

SECTION 16. This act becomes effective February 17, 2009. Sections 1 through 8 of this act expire June 30, 2012.

In the General Assembly read three times and ratified this the 7th day of August, 2009.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 1:15 p.m. this 26th day of August, 2009