
Coates' Canons Blog: To Bid or Not to Bid? How to Buy Hardware and Software

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Is your local government still using 10-year-old desktop computers? Do you need to buy new anti-spyware software? Or do you need to update your phone system? If the answer to any of these questions is yes, and you decide to buy new computers, or anti-spyware software, or a new phone system, do you need to solicit bids? What options for purchasing information technology are available to local governments in North Carolina? The answer will depend on whether you're buying custom software or if you're buying hardware, off-the-shelf software, or a combination of hardware and software.

Custom Software

If you're planning to buy software designed specifically for your use, and you're not purchasing any hardware (or if you can separate out the hardware purchase from the software purchase), then the software purchase could arguably be considered a services contract. Services contracts are not subject to the competitive bidding laws, so you would not have to bid out this type of contract. However, you may still want to bid out the purchase if there is competition available—something you'll only be able to determine by doing some research first. And if you have any doubt as to whether the software program is customized for you, it's safer to use one of the options described below.

Hardware, Off-the-Shelf Software, or a Combination of Software and Hardware

If you're buying hardware, a software program that's not customized, or if your purchase involves a combination of hardware and software, you have as many as eight options:

1. Use the "RFP" procedure found in G.S. 143-129.8 for information technology purchases. For purposes of this statute, the definition of information technology is the one contained in G.S. 147-33.81(2): "electronic data processing goods and services, telecommunications goods and services, security goods and services, microprocessors, software, information processing, office systems, any services related to the foregoing, and consulting or other services for design or redesign of information technology supporting business processes."
2. Use the competitive bidding procedures for the purchase of apparatus, supplies, materials, and equipment. If the estimated cost is \$90,000 or above, you will need to use the formal bidding process as required in G.S. 143-129. If the estimated cost is \$30,000 or more but below \$90,000, you'll need to use the informal bidding process outlined in G.S. 143-131. (Note that the General Statutes don't require bidding for purchases costing less than \$30,000, so if the total contract cost of whatever you're buying is less than \$30,000, you do not have to bid it out unless your local policies require it.)
3. If the software or hardware is only available from one source of supply (that is, if there's only one supplier from whom you can purchase the software or hardware—not just that there's only one manufacturer's product that will meet your needs), you may be able to use the sole-source exception. This exception (found in G.S. 143-129(e)(6)) provides that a local government is not required to bid out the purchase of apparatus, supplies, materials, or equipment costing \$30,000 or more when:
 - (i) performance or price competition for a product are not available; (ii) a needed product is available from only one source of supply; or (iii) standardization or compatibility is the overriding consideration.

Note that governing board approval is required for sole source purchases.

4. If the State's Office of Information Technology Services (ITS) has awarded a contract for the hardware or software you need, you can buy off of that contract without going through the competitive bidding process using an exception found in G.S. 143-129(e)(7). You can find more information on these contracts on ITS's procurement website. (Board approval is not required for these purchases under the General Statutes, but your local policies may require board approval.)
5. If you can find the software or hardware through a competitive bidding group purchasing program, such as U.S. Communities, H-GAC, or NCLGISA, you can purchase it from that program using the competitive bidding group purchasing program exception in G.S. 143-129(e)(3). (Board approval is not required for these purchases under the General Statutes, but your local policies may require board approval.)
6. If you can find the software or hardware on a federal contract, you can purchase the software or hardware from the same vendor on that federal contract as long as the vendor is willing to give you the same or better prices, terms, and conditions as are available on the federal contract thanks to a relatively new exception found in G.S. 143-129(e)(9a).
7. If another state agency or local government (anywhere in the U.S.) has, within the past year, purchased the same software or hardware that you're planning to purchase, G.S. 143-129(g) allows you to "piggyback" on that purchase if the same vendor is willing to sell the software or hardware to you for the same or better prices, terms, or conditions as those provided to the other entity. Notice and board approval is required. You can find more information about piggybacking [here](#).
8. If you're planning to lease the software or hardware rather than purchase it, you may not have to bid it. However, you cannot avoid bidding by calling something a lease if:
 - it's a lease purchase or installment purchase;
 - the lease has an option to purchase (even if you don't intend to exercise the option);
 - you will own the software or hardware at the end of the lease; or
 - the lease term equals or exceeds the useful life of the software or hardware.

If none of these descriptions applies to the software or hardware lease, you do not have to bid it.

Remember: always check your local policies, which may require bidding even when the general statutes do not. You can read more about software contracts in Frayda Bluestein's Legal Guide to Purchasing and Contracting (available for purchase [here](#)), on pages 25 and 26. And if you're looking for a summary of the bidding laws generally, take a look at my Local Government Law Bulletin, *Local Government Purchasing and Contracting Update: Statutory Requirements and Local Policies*, available for free download [here](#).

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.8.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_147/GS_147-33.81.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-131.html
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