



Why do local governments enter into contracts?



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Why are we talking about this?



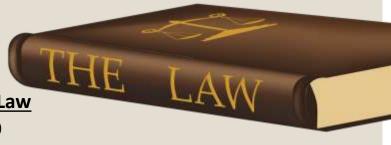




Local Government Law: A Few Basic Principles

Three Levels of Government

- Federal: Constitution and federal laws are supreme
- State: Inherent powers, but subordinate to federal law
- · Local: In NC, derive all authority from states, and actions cannot conflict with federal or state law



Three Main Sources of Law

- $^{\circ}\,$ Legislative (Federal, State, and Local)
- Regulatory (Federal and State)
- Courts (Federal and State)

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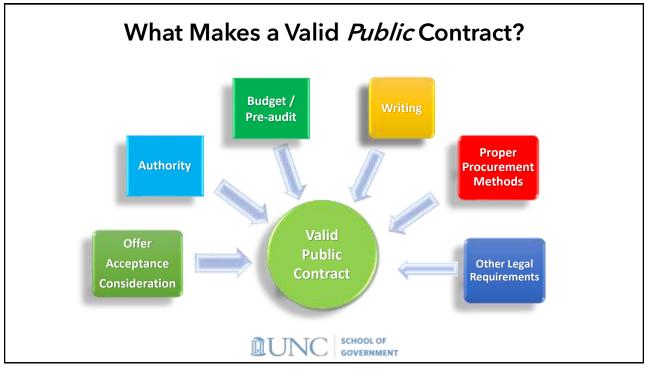
Laws Applicable to Local Government Contracts

Follow the
"Most Restrictive Rule"











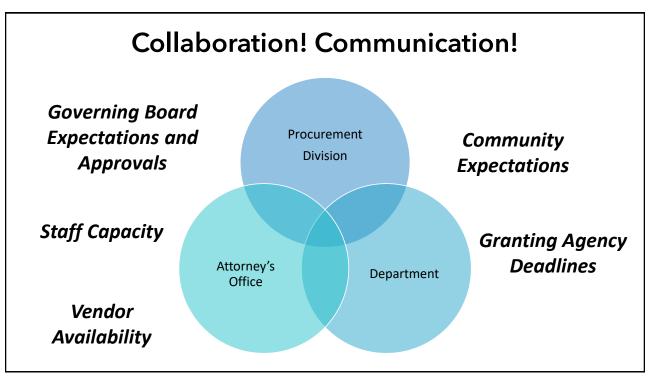


The Role of Procurement Officials

"Getting the right work done at the right time at the right price."

- Strategic partner in local government, with both internal and external "customers"
- Steward of public funds with the goal of maximizing the value of public spend
- Responsible for sourcing suppliers and materials for activities that benefit the public's health and safety
- Follow NC laws and federal regulations for procurement







The Procurement Puzzle: Essential Questions to Ask

WHAT...

- Is the authority for expenditure?
- Is the source of funding?
- Is being procured?
- Is the cost?

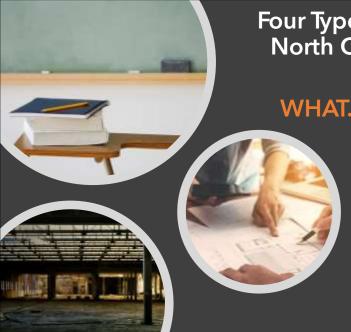
WHAT...



HOW...

Do we procure, step-by-step?





Four Types of Contracts Under North Carolina Competitive Bidding Law

WHAT...Is being procured?

- Purchases of Goods
- Construction or Repair
- Professional Services
- Everything else...

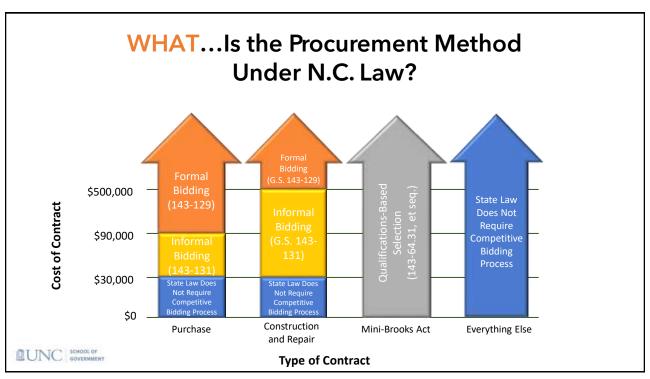
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More on That "Everything Else"

- ∘ Information Technology RFP, G.S. 143-129.8
- Purchases of real property, G.S. 160A-11
- Lease agreements, G.S. 160A-19 (lessee), G.S. 160A-272 (lessor)
- Economic development incentive agreements, G.S. § 158-7.1
- ∘ Interlocal agreements, G.S. 160A-460, et seq.
- Statutory development agreements, G.S. 160D-1001, et seq.

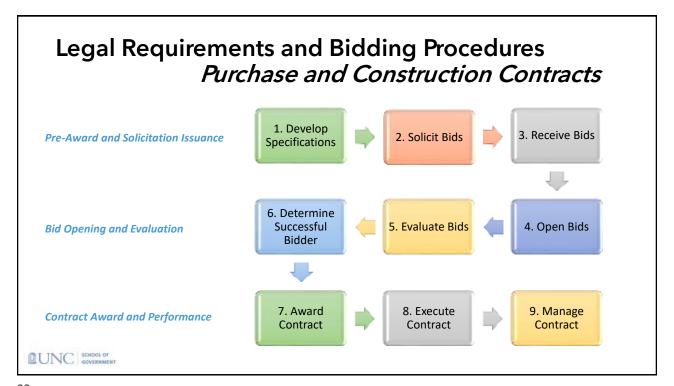










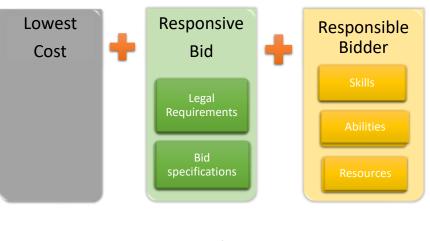


The "How": Summary of North Carolina Procurement Requirements

	Informal	Formal	QBS	RFP
Solicitation / Advertisement	Not required	Newspaper/ electronic at least 7 days before bid opening	Must "announce" requirements	Not required (IT—must advertise like formal bid)
Form / Minimum #	Any form; keep record; no minimum #	Sealed bids; 3-bid minimum for construction contracts	No specific form required; no minimum #	No form required (IT – sealed proposals)
Public bid opening	Not required	Required	Not required	Not required
Standard of Award	Lowest responsive, responsible bidder	Lowest responsive, responsible bidder	Best qualified, regardless of cost	Best meets criteria set in the RFP
Board Approval	Not required	Required (may delegate for purchases only)	Not required	Not required
Public Record	Record of bids not public until contract award	Bids public when opened	Proposals public when opened	Public when opened (IT – not public until contract award)

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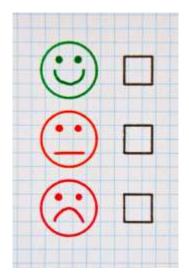
Lowest Responsive, Responsible Bidder Standard of Award for Informal & Formal Bidding





Responsive & Responsible Checklist

- 1. Is the lowest bid responsive?
 - Does it meet the statutory requirements?
 - Does it substantially conform to the specs?
- 2. Is the lowest bidder responsible?
 - Can the bidder perform the contract?
- 3. Accept or reject:
 - If lowest bid is responsive and lowest bidder is responsible, accept bid.
 - If not, document—then repeat checklist with next lowest bidder, and/or reject and re-bid
 - Can always reject all bids



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Bids Gone Bad! Rejection and Waiver

- Bids *must* be rejected when they do not meet statutory requirements
- Bids should be rejected if they do not meet the specifications—i.e., responsiveness
- Waiver of defects is not appropriate where the defect is material
- Material = beneficiary of the waiver is given an unfair advantage in the competitive process





Bid Withdrawal, NCGS 143-129.1

Timing of bid withdrawal request = Within 72 hours of bid opening

Basis for bid withdrawal request = Clerical error made in good faith

Unit obligations upon receiving request = Hold a hearing on withdrawal request

Benefit to the withdrawing bidder = Bid bond is not forfeited

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Applicable Federal Grant Regulations: Uniform Guidance, <u>2 CFR 200</u>

- Uniform Guidance is the set of rules applicable when federal financial assistance is used (e.g., grants, loans, CDBG funds)
- Uniform Guidance has three major components: administrative requirements (Subparts B through D), cost principles (Subpart E), and audit requirements (Subpart F)
- Our focus is Subpart D, Post Federal Award Requirements, Sections 200.317 through 327



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Applicable Federal Grant Regulations: Uniform Guidance, 2 CFR 200.317 to 327

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    Procurement Standards 200.317 - 200.327
    § 200.317 Procurements by states.
    § 200.318 General procurement standards.
    § 200.319 Competition.
    § 200.320 Methods of procurement to be followed.
    § 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.
    § 200.322 Domestic preferences for procurements.
    § 200.323 Procurement of recovered materials.
    § 200.324 Contract cost and price.
    § 200.325 Federal awarding agency or pass-through entity review.
    § 200.326 Bonding requirements.
    § 200.327 Contract provisions.
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Uniform Guidance, Bottom Line

As federal grant recipients, local governments must have written policies and procedures that comply with Uniform Guidance.

Subpart D provides procurement standards that differ from North Carolina law...



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The Uniform Guidance Does Not Apply Uniformly!

- FEMA's Procurement Disaster Assistance Team Manual expresses FEMA's views.
- EPA's Best Practices for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements expresses EPA's views.
- FTA's Best Practices Procurement & Lessons Learned Manual expresses FTA's views.
- Agencies routinely make exceptions or additions to the UG Procurement Standards...



Before You Get Started: Pre-Procurement Requirements

Conflict of Interest Policy, 2 CFR § 200.318(c)(1)

Maintain **written** standards of conduct covering conflicts of interest and governing the actions of employees engaged in the selection, award and administration of contracts.

Procurement Policy, 2 CFR § 200.318(a)

Have and use **documented** procurement procedures, consistent with federal, state, and local laws and regulations for the acquisition of property or services under a Federal award or subaward. Policy must conform to the procurement standards in §§ 200.317 – 200.327.



Uniform Guidance Procurement Methods, 2 C.F.R. 200.320



1. Informal Procurement Methods

- Micro-Purchase
- Small Purchases

2. Formal Procurement Methods

- Sealed Bids
- · Competitive Proposals

3. Non-Competitive Proposals

- Micro-purchase
- Single source (AKA sole source)
- Emergency
- · Approval by federal agency
- Inadequate competition after solicitation

"Micro-purchase"

 A purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold.

"Micro-purchase threshold"

- The dollar amount at or below which a non-Federal entity may purchase property or services using micro-purchase procedures under 2 C.F.R. 200.320.
- \$10,000, BUT option to increase per 2 CFR 200.320(a)(1)(iv)(C)

"Simplified Acquisition Threshold"

- The dollar amount below which a non-Federal entity may purchase property or services using small purchase methods.
- \$250,000 for construction and repair, services
- \$90,000 for goods

Subpart D Terminology:

Procurement Thresholds

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Pre-Procurement Requirements

Cost or Price Analysis, 2 C.F.R. § 200.324(a)

- Units must perform (and document!) a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications
- The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the NFE must make independent estimates <u>before</u> receiving bids or proposals
 - Comparing historical prices with current proposed prices
 - Comparing offers with competitively published catalog prices or published market prices
 - Using prices set by law or regulation
 - Comparing proposed prices with market research







Click logos for examples of federal agency guidance

Pre-Procurement Requirements

Affirmative Steps, 2 C.F.R. 200.321

"The non-Federal entity must take all necessary affirmative steps to assure that **minority businesses**, **women's business enterprises**, **and labor surplus area firms** are used when possible."

Q: The UG does not define any of these terms... What to do?
A: Confer with federal grantor agency.



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Pre-Procurement Requirements Affirmative Steps, 2 C.F.R. 200.321

Applies to ALL procurements above the micro-purchase threshold regardless of contract type!

Units must take affirmative steps to ensure that small businesses and MWBE firms are used "when possible":

- 1. Place qualified MWBE firms on solicitation lists
- 2. Solicit MWBE firms when such firms are potential sources
- 3. Divide procurement into multiple segments to permit maximum participation by small and MWBE firms, where economically feasible
- 4. Establish delivery schedules which might permit small and MWBE participation, where feasible
- 5. Use services of federal or state agencies to publicize opportunities (e.g., NC Office for Historically Underutilized Businesses in Department of Administration)
- 6. Require prime contractors to take steps #1 through #5 when subs are used



IT Procurement RFP Option G.S. 143-129.8

- Statutory Request For Proposals procedure for IT "goods and services"
- Optional—either bid or use RFP method



What is Information Technology?

Goods and Services for:

- Electronic data processing
- Telecommunications
- Security systems
- Microprocessors
- Software
- Information processing
- Office systems

Services include:

- Consulting
- Design
- Installation
- Training
- Maintenance
- Operation

GS 147-33.81

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IT RFP Procedures

- Formal advertisement
- •Evaluate proposals based on RFP criteria
- •Standard of Award = "best overall proposal" (not low bidder)
- •May negotiate with any proposer within scope of RFP
- Proposals not public until contract awarded
- •Governing board approval not statutorily required



When might you use the IT Procurement RFP Option?

- Forsyth County: ERP System
- <u>Surry County:</u> "A comprehensive, fully integrated, public safety information management solution that includes Computer Aided Dispatch (CAD), Records Management System (RMS), and a Jail Management System (JMS)"
- Gastonia: Server Environment Refresh Project
- AppalCART: Real-Time Passenger Information System (includes federal funding and clauses)
- <u>City of Durham:</u> Audio Visual (AV) Design and Implementation Services

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How do you judge the best overall proposal?

- Software Functionality
- Implementation Methodology and Approach
- Vendor Capability and Background
- Technology
- Total Cost
- Software Demonstration
- Implementation Interview
- Compliance with Terms and Conditions
- Data Conversion and Ownership
- Warranties
- Maintenance





What is a competitive bidding exception? Offer G.S. 143-129(e) **Acceptance** tells us that "[t]he Consideration Writing requirements of this Article do not apply..." **Authority Other Legal** So, what *does* Requirements continue to apply? Budget / Pre-audit



Sole Source Exception, G.S. 143-129(e)(6)

Special Circumstances

- Applies to purchase contracts in the formal and informal range
- · Applies when:
 - (1) performance or price competition for a product are not available;
 - (2) a product is available from only one source of supply; or
 - (3) standardization or compatibility is the overriding consideration
- Governing board approval required for contracts in formal and informal range



Emergency Exception, G.S. 143-129(e)(2)

Special Circumstances

- Applies to purchase and construction and repair contracts in the formal and informal ranges
- Applies in the event of a special emergency involving the health and safety of the people or their property
- Emergency must be imminent or existing, not generally anticipated to occur in the future
- Cannot rely upon emergency exception if competitive bidding will not exacerbate harm
- For contracts anticipated to be repaid by FEMA reimbursement, FEMA procurement rules apply and may require competitive solicitation process after immediate emergency conditions are mitigated
- Governing board approval not required



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Fuel Purchases, G.S. 143-129(e)(5)

Special Circumstances

- · Applies to purchases of
 - Gasoline
 - Motor fuel
 - Diesel Fuel
 - · Alcohol fuel
 - Fuel Oil
 - · Natural gas
- Must use informal bidding process for purchases of \$30,000 or more (formal bidding not required for purchases above \$90,000)
- Board approval is not required to rely upon this exception



Change Order Exception, G.S. 143-129(e)(4)

Special Circumstances

- Applies to construction or repair contracts
- Applies to work undertaken after the contract is awarded
- Not permitted for work identified prior to contract award
- Cannot be used by a bidder to correct its mistakes
- Board approval is not required to rely upon the exception



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Force Account Exception, G.S. 143-135

Existing Contracts

- · What is it?
 - Construction or repair work performed by a unit's own officers or permanent employees.
- · Applies when:
 - (1) total cost, direct and indirect, cost of project is less than \$500,000; or
 - (2) total cost of labor is less than \$200,000.
- Permanent employees must perform all work. No temporary laborers.
- If acting as own general contractor, must file ownercontractor affidavit. See G.S. 87-14(a)(1).
- · Governing board approval is required.



State & Federal Contracts, G.S. 143-129(e)(7), (e)(9), (e)(9a)

Existing Contracts

- Applies to formal and informal purchases (not construction or repair work)
- Must purchase same item from same vendor on state or federal contract
- Vendor must agree to sell to unit at the same or more favorable prices, terms, and conditions
- Includes N.C. State term contracts, IT purchases through NC DIT, and federal agency contracts (e.g., GSA)
- Board approval is not required to rely upon the exemption.



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"Piggybacking" Exception, G.S. 143-129(g)

Existing Contracts

- · Applies to purchase contracts in the formal range.
- · Applies when:
 - Vendor on a contract competitively bid in previous 12 months by another unit of government (federal, state, or local) agrees to sell to your unit at the same or more favorable prices, terms, and conditions
- · Governing board approval required.
 - Approval at a regular meeting, with no fewer than 10 days notice of intention to piggybacking.
 - Notice may be in newspaper of general circulation, or electronic, or both.
 - · Electronic only requires approval by a governing board.



Purchases from Other Units of Government, G.S. 143-129(e)(1)

Direct Purchases

- Applies to formal and informal purchases
- May purchase directly from federal, state, or local government anywhere in the United States
- Includes bidding on sales of surplus personal property
- Board approval is not required to rely upon this exception



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Purchases Through Competitive Bidding Group Purchasing Programs, G.S. 143-129(e)(3)

Direct Purchases

- Applies to formal and informal purchases only (and does not apply to construction or repair)
- The statute permits purchases if:
 - 1. A formally organized program;
 - 2. Purchases are obtained through a competitive process; and
 - 3. Items are offered at discount prices to at least two public agencies
- Purchase must be for the exact items and prices offered through the program
- Board approval is not required to rely upon this exception



Used Item Exception, G.S. 143-129(e)(10)

Direct Purchases

- Applies to formal and informal purchases
- Can purchase used items from public or private entities, as long as the item is not:
 - · Remanufactured;
 - · Refabricated; or
 - · A "demonstration" item
- Board approval is not required to rely upon this exception.





More Below the Surface

- Local school units are exempt from competitive bidding requirements for supplies and food for food services programs (but federal funding may require compliance with federal bidding rules)
- Hospitals have additional allowances for using the sole source exception (e.g., particular medical item or prosthetic is needed)

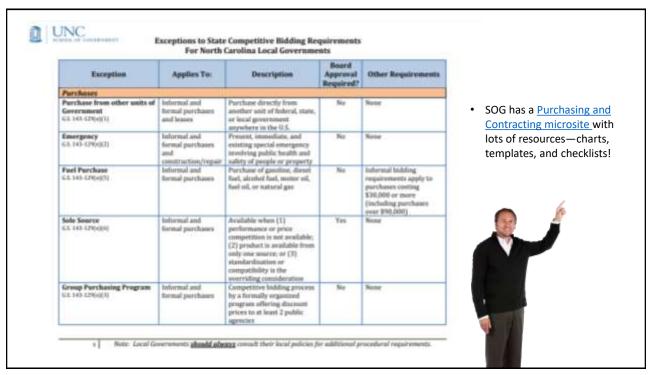


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More Below the Surface

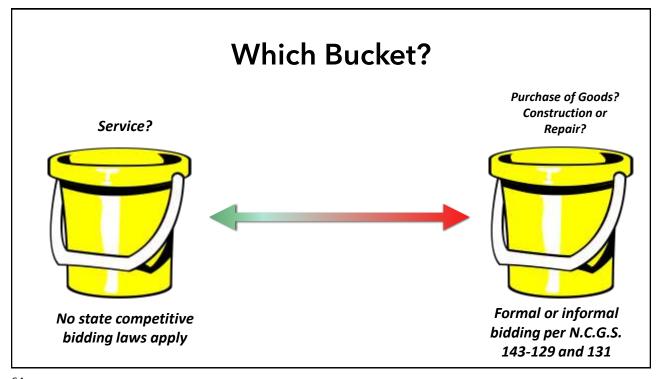
- Trade-In of Items for Purchase, G.S. 143-129.7
- Transportation Authority Purchases, G.S. 143-129(h)
- Nonprofit Work Centers for Blind and Severely Disabled, G.S. 143-129.5
- Guaranteed Energy Savings Contract, G.S. 143-129.5
- Solid waste management facilities, G.S. 143-129.5











Wait, why is this question so difficult?

- North Carolina's competitive bidding laws do not define "construction" or "repair"
- This means that the answer is open to interpretation
- Methods of statutory interpretation include...
 - Plain meaning = "ordinary" or "reasonable" person
 - · Dictionary definitions
 - · Related statutes canon
 - · Judicial interpretations through case law
 - · Agency interpretations through regulations
 - · Legislative history...

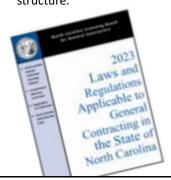


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Agency Regulations: General Contractor Licensure

 G.S. 87-1(a) requires GC licensure if cost of the undertaking is \$40,000* or more and involves "construction of any building, highway, public utilities, grading or any improvement or structure." Under state law, is general contractor licensure required to complete the scope of work?

(G.S. 87-1; 21 N.C. Admin. Code 12A.0100, et seq.)



YES:

Treat the contract as a contract for "construction or repair work" for competitive bidding purposes.

NO:

Treat the contract as a service contract for competitive bidding purposes.

Procurement Professionals Weigh In: Other Rules of Thumb for Construction

- Does the work require a building permit?
- Is the work simply maintaining the asset (rather than extending its useful life)?
- Does the work require an OSHA safety zone to protect the public?
- Does the work require special knowledge and a specialized license (e.g., PU)?
- Do the vendors who normally perform the work hold a GC license?



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So? What To Do?

To the extent that it is unclear whether a particular project involves a service as opposed to construction or repair work, the safest course of action is to follow the competitive bidding requirements for a construction or repair contract.





School of Government Resources Purchasing Listserv!

- · Getting rid of surplus ammunition
- Performing a cost or price analysis per UG
- Prequalification policy for CMAR
- State contract questions and updates
- Amazon Business Prime account options

Feeling some FOMO? Sign up here!

https://www.sog.unc.edu/resources/listservs/purchasing-agentsncpurchasing

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- Public Contracts Checklist
- Construction Contracting Legal Outline
- Surplus Property Disposal Options Chart (and forms!)
- Mini Brooks Act exemption form template

...AND MUCH MORE!



https://www.sog.unc.edu/resources/microsites/local-government-purchasing-and-contracting

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Thank You!



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