

# Local Government Contracts with Nonprofit Organizations: Questions and Answers

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**N**onprofit organizations have long worked with governments to respond to community needs. The resulting partnerships have been powerful, combining the flexibility and service-delivery capabilities of the nonprofit sector with the financial and direction-setting capabilities of the public sector. They have resulted in improved local services in many areas, including human services, community development, economic development, and environmental protection.

Although they are touted as the wave of the future, these partnerships have not been without their fair share of challenges. This article follows other recent efforts by the Institute of Government, in partnership with the North Carolina Center for Nonprofits and the North Carolina Association of County Commissioners, to improve the relationships between local governments and nonprofits (see the sidebar, page 33). It focuses on the legal aspects of relationships between local governments and nonprofits, with particular attention to contracting. Although local governments and nonprofits work together or interact in many circumstances without contracting, contracts are the most common vehicles for these collaborations. It is important for representatives of both sectors to understand the requirements for and the limitations on these contracts. Discussed in the questions and answers that follow are three general topics: (1) the basic authority for and the limitations on local government contracts with nonprofits; (2) legal and practical consequences for nonprofits of receiving public funds from local governments; and (3) legal issues raised by contracts with faith-based organizations.

The following basic principles underlie most of the answers to the questions addressed in this article:

1. A local government has the authority to contract with and provide financial or in-kind assistance to any private organization to carry out any function for which the local government has authority to appropriate funds.
2. As a general rule, a nonprofit that receives funds from a local government does not become subject to the rules

that govern a public agency, but the public agency may require the nonprofit to comply with certain accountability and other requirements as a condition of receiving the funds.

3. A faith-based organization that receives public funds or property may not use them for a religious purpose.

In addition to answering the main questions about local governments' contracts with nonprofits, this article includes several examples of issues related to providing assistance to specific types of nonprofits, including faith-based organizations. These examples are interspersed in the article in the "Assistance to . . ." sidebars (see pages 35–39).

## **1. What authority do local governments have to contract with nonprofit organizations, and what are the limitations on the exercise of that authority?**

For North Carolina local governments, the authority to contract is directly related to the basic authority to spend money. A local government may contract for any purpose for which it may spend money. The three key legal limitations on the expenditure of funds by a local government are that (1) the expenditure be for a public purpose; (2) the activity supported be one in which the local government has statutory authority to engage; and (3) the expenditure not be inconsistent with the laws or the constitution of the state or federal government. The next three questions and answers discuss these limitations in turn.

## **2. What is a public purpose, and what is the source of this requirement?**

The North Carolina Constitution says that local governments may levy taxes only for "public purposes."<sup>1</sup> Courts have applied this limitation broadly, not only to the taxing power but also to the appropriation and spending powers.<sup>2</sup> So any expenditure by a local government must be for a public purpose. The North Carolina Constitution also specifically authorizes appropriations to and contracts with private entities (whether for profit or nonprofit) but repeats the limitation that the appropriation or the contract accomplish a public purpose.<sup>3</sup>

The definition of "public purpose" is difficult to pin down. The courts have recognized that the concept is not fixed in time but shifts as governments adapt their activities to changes in the population, the economy, and other conditions.<sup>4</sup> The

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*Local governments probably may donate funds or land to Habitat for Humanity, whose programs provide affordable housing to people who are truly needy.*



NEWS & OBSERVER / JOHN L. WHITE

## HELPING LOCAL GOVERNMENTS WORK MORE EFFECTIVELY WITH NONPROFITS

The Institute of Government, in partnership with the North Carolina Center for Nonprofits and the North Carolina Association of County Commissioners, has undertaken a project to help local governments and nonprofit organizations work together more effectively. The initiatives of the project include community assistance, training, and publications. The project's Web site, [www.nonprofit-gov.unc.edu](http://www.nonprofit-gov.unc.edu), provides a detailed overview of this work and answers frequently asked questions about government-nonprofit relationships.

**Community assistance.** The Association of County Commissioners' project Counties as Catalysts for Stronger Families has been the focus of the community assistance. Institute faculty and colleagues from the Jordan Institute for Families at UNC-CH's School of Social Work conducted fifteen "collaboration workshops" across North Carolina in April and May of this year to strengthen families and close the academic achievement gap. Eighteen counties are participating in these collaborative efforts, and a wide variety of government and nonprofit organizations serve as lead agencies.

**Training.** In June 2001, with the support of the Association of County Commissioners, the Institute offered its initial "school" for local government liaisons to nonprofit organizations, *Navigating Nonprofit-Government Relationships*. The school was designed to help city and county staff assess and improve their governments' relations with nonprofits.

The workshop has generated considerable interest. A second offering is planned for October 1-2 in Hickory. Institute faculty also have built consideration of government-nonprofit relationships into other schools and conferences throughout the state.

**Publications.** In the past year, the Institute published *20 Questions Nonprofits Often Ask about Working with Local Government*<sup>1</sup> and several articles on nonprofits in *Popular Government*, including "A Primer on Nonprofit Organizations," "How Local Governments Work with Nonprofit Organizations in North Carolina," and "Strengthening Relationships between Local Governments and Nonprofits."<sup>2</sup> Research for these and related publications was supported by a grant from the Jessie Ball duPont Fund, which provided seed money for the Institute's Project To Strengthen Nonprofit-Local Government Relationships.

—Gordon P. Whitaker

### Notes

1. LYDIAN ALTMAN-SAUER, MARGARET HENDERSON, & GORDON P. WHITAKER (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 2000).

2. Gita Gulati-Partee, *A Primer on Nonprofit Organizations*, POPULAR GOVERNMENT, Summer 2001, p. 31; Gordon P. Whitaker & Rosalind Day, *How Local Governments Work with Nonprofit Organizations in North Carolina*, POPULAR GOVERNMENT, Winter 2001, p. 25; Lydian Altman-Sauer, Margaret Henderson, & Gordon P. Whitaker, *Strengthening Relationships between Local Governments and Nonprofits*, POPULAR GOVERNMENT, Winter 2001, p. 33.

courts have used two guiding principles in determining whether a particular activity is for a public purpose: (1) whether it involves “a reasonable connection with the convenience and necessity of the [local government]” and (2) whether it “benefits the public generally, as opposed to special interests or persons.”<sup>5</sup> The first principle deals with the issue of whether the activity is “within the appropriate scope of governmental involvement and is reasonably related to communal needs.”<sup>6</sup> The courts have analyzed this issue by comparing the activity in question with others that have been approved by the courts, recognizing, again, that the appropriate scope of governmental activity shifts in response to the changing needs and issues in the community.

The North Carolina courts have offered at least two refinements of the second principle. First, it is not necessary to show that every citizen will benefit from an activity for it to be considered a public purpose.<sup>7</sup> Furthermore, the fact that one or more private individuals benefit does not eliminate the public purpose. In a case upholding a North Carolina local government’s payments and other assistance to a private business for economic development, the North Carolina Supreme Court held that “an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.”<sup>8</sup> In that case the court found that, even though the private business would receive funds and other direct benefits, they were incidental to the primary public goal (economic development) of the appropriation. In other words, a private individual or business may directly benefit from a contract or an appropriation. This does not extinguish the public purpose as long as the public will benefit and the private benefit does not outweigh the public benefit.

(For examples of the application of these principles, see the “Assistance to . . .” sidebars.)

### **3. Explain the requirement for “statutory authority.” Must there be a statute specifically authorizing the contract?**

North Carolina local governments do not have inherent authority. They operate under authority delegated to them by the state legislature through enabling laws. So, in addition to its serving a public purpose, a particular action of a local government (including an expenditure or a contract) must be authorized by a state statute.

This does not necessarily mean there must be a statute that specifically authorizes the local government to enter into a contract for every activity it might wish to support. The state constitution, as noted earlier, contains a general authorization for contracts with private entities. In addition, parallel statutes for cities and counties authorize them to contract with any private entity to carry out any public purpose in which they have statutory authority to engage.<sup>9</sup> This means that as long as a statute authorizes a particular activity, the local government has the choice of carrying out the activity itself or contracting with a third party to carry out all or part of the activity.

### **4. What about the limitation having to do with violations of state and federal laws or constitutions?**

Even if an activity serves a public purpose and is statutorily authorized, a local government may not engage in it if it violates

state or federal law, or is unconstitutional. This is true because of the supremacy of the state and federal governments over local governments. Simply put, local governments may not act in a way that is inconsistent with state or federal law. An example may help readers understand how this limitation works.

*A contract with a nonprofit community development organization to provide low-income housing may meet the requirements of public purpose and statutory authority. If, however, the paid executive director of the nonprofit is a member of the governing board of the local government, the contract will violate a state statute that prohibits conflicts of interest unless the procedures in that statute are complied with (see the discussion at question 16 about what constitutes a conflict of interest). A contract that violates the state conflict-of-interest law is unenforceable.*<sup>10</sup>

Contracts that violate state or federal constitutional provisions also are invalid and may expose the local government to liability (including monetary damages) for violations of individual civil rights, such as equal protection, due process, or freedom of speech. A full discussion of constitutional violations that might occur in the contracting context is beyond the scope of this article.<sup>11</sup> Because of the significant involvement of faith-based organizations in local government issues, a more detailed discussion of the limitation imposed by the federal constitution’s prohibition on government establishment of religion (commonly referred to as the requirement to separate church and state) follows.

### **5. Are local governments prohibited from contracting with religious (faith-based) organizations?**

No. Local governments may contract with faith-based nonprofits for services as long as those contracts do not violate the federal or state constitutions or other laws. Generally speaking, a contract with faith-based groups will be deemed lawful if the contract has a neutral purpose and effect both toward religion and among religions, and avoids excessive government entanglement with religion. In other words, the terms of the contract must have the effect of safeguarding (1) the religious freedom of beneficiaries, both those who are willing to receive services from religious organizations and those who object to receiving services from such organizations, and (2) the religious integrity and character of faith-based organizations that are willing to accept government funds to provide services to the needy. (The sidebar on page 40 explains in greater detail these and other restrictions on contracts with faith-based organizations.)

### **6. What, if any, limitations must a contract involving public funds impose on the activities of the religious organization? What limitations may the contract impose?**

Notwithstanding widespread thought to the contrary, there are few legal limitations on religious organizations that receive public funding for programs. Although the public funder is free to impose religion-neutral restrictions, the only generally applicable restriction is that public funds not be used to pay for worship services, sectarian instruction, or proselytization. An example may help illustrate these basic principles.

*A faith-based Welfare-to-Work training program uses county funding to buy Bibles and give Bible instruction. Several clients complain that they are being pressured to join the sponsoring church or change their religious beliefs. Under constitutional limitations, public funds may not be used to coerce any person to support or participate in any religion. Therefore the faith-based organization could lose the contract for making the purchases and appearing to condition services on religious activity.*

*Fearful of a lawsuit, the county amends the contract to provide that the same faith-based organization may run the program but must agree not to use county funds to buy Bibles and give Bible instruction and may not make conversion a requisite of the program. Those provisions are appropriate.*

*The amended contract also requires the organization to remove all religious art, scripture, and other symbols from the walls of the fellowship hall during program hours. These restrictions are illegal because they result in government control over the internal operation of the church. As such, they may not be imposed as conditions of the contract.*

A common misperception is that the use of public funds in program delivery automatically subjects the faith-based institution to the same standards as the public funder. That is not so. Religious institutions retain their autonomy even when under contract with local governments. So, for example, religious organizations retain their right to use religious criteria in hiring, firing, and disciplining employees. Although it would be illegal for local government employers to discriminate in employment on the basis of religion, it is permissible for them to fund a religious group that engages in such discrimination.

Another common misperception is that religious organizations are required to establish a separate organization as a prerequisite to receiving government funding. Again, that is not the case. However, many religious groups do establish a separate organization, or at least segregate government funds in a separate account, to limit the scope of fiscal audits and to protect the autonomy of their organization.

**7. The last several questions and answers have addressed limitations on contracting. What about grants and appropriations? Are there different rules for these transactions?**

No. Both the basic authority for local governments and the limitations discussed so far are the same regardless of the form of assistance being provided. Contracts, grants, appropriations, and in-kind contributions (such as donations of

property or land, procedures for which are discussed at question 17) are all subject to the same limitations. In effect, each of these involves an expenditure of public funds. A few differences among these forms of expenditure are worth noting, however.

**Grants.** Although grants and contracts often are thought of separately, a grant is really a kind of contract. It involves the public agency's providing funds in exchange for a promise by the grantee to carry out certain prescribed activities or to produce particular results.

There are, however, some practical differences between grants and other types of contracts. The process for awarding grants is usually different from the process for awarding other kinds of contracts. Competition is typically structured differently, and in many cases a grant may describe the required performance in less detail than other contracts.

Another important difference is that local government grants often involve "pass-through" funds from the state or federal government. Funds and eligibility standards for these grants originate with the state or federal government but are awarded at the local level. These types of grants may require that the local government include reporting, accounting, and other requirements and that it use specified procedures for awarding the grants. With other kinds of contracts, the local government has more discretion to include terms and requirements as it deems appropriate.

**Appropriations.** Like a grant or other contract, a direct appropriation may be made to a nonprofit organization to carry out any activity for which the local government is authorized to spend money. An appropriation is a budgetary action

## ASSISTANCE TO A YMCA

### The local YMCA is seeking contributions to fund the construction of a new facility. May the city contribute funds for that purpose?

The city has authority to provide and appropriate funds for recreation programs under G.S. 160A-353. YMCAs typically provide at least some types of recreation programs that would fall within this authority.

The YMCA also may conduct programs for young people to deter delinquency or crime. Support for these programs could be justified under the city's general ordinance-making authority to protect the health, safety, and welfare of its citizens (G.S. 160A-274).

On the other hand, the YMCA may conduct programs that are religious in nature or that are otherwise outside the statutory authority or other limits of the city's power to appropriate

funds. If the city provided funds through a contract, it could limit the use of the funds to activities that fall within its authority. Establishing limits is harder to do with a contribution to support the construction of new facilities. Although no case provides guidance on this question, it seems reasonable that as long as the city obtains a contractual promise from the YMCA that it will use at least some part of the facility to conduct programs that are within the scope of the city's authority, the contribution to the building is a lawful expenditure. The fact that other parts of the building will be used for purposes outside the city's authority is probably not a bar to making the contribution.

## ASSISTANCE TO UNITED WAY

### May a local government make a donation to United Way?

One of the difficulties with contributions to United Way is that it works with many different organizations, some but not all of which carry out purposes that local governments may legally fund. For this reason a local government should earmark a contribution to United Way to guarantee that the funds will be used only for organizations that are within the scope of the unit's authority. An alternative would be for the local government to make the contribution directly to those organizations rather than through United Way.

that involves the governing board's approving the expenditure of funds for a particular purpose.<sup>12</sup> Although an appropriation may not be accompanied by the same paperwork as grants and other contracts, it really should be treated in the same way. In jurisdictions that require private entities to submit proposals when they are requesting appropriations, the proposals should form the basis for the obligations that bind successful applicants, along with any other conditions that the local government may impose (examples of these conditions are discussed at question 15). In practice, an appropriation is likely to be less specific than a grant or other contract. It may simply take the form of a lump-sum payment by the local government to the nonprofit organization. However, the legal limitations discussed at questions 1–4 still apply. Therefore the local government and the nonprofit organization must take care to ensure that the funds are used only for purposes that the local government has authority to support.

*Contracts for services.* As noted, a grant or an appropriation may take the form of a contract. In addition, local governments may contract for services with nonprofit organizations in the same way that they contract with other private entities to provide specific services, such as transportation or day care. These contracts may be made through the unit's regular contracting process, rather than through a competitive budgeting or grants process, and will have the same terms and conditions as those regularly imposed on the unit's service providers.

### 8. How does a local government decide which nonprofits it will support?

The decision-making process varies widely among local governments in North Carolina. In some jurisdictions the governing board appoints a committee to evaluate requests for support from nonprofit organizations as part of the budget development process. Other jurisdictions handle these requests informally, on a case-by-case basis.

If the form of support is an appropriation or a donation of property (see the discussion at questions 7 and 17), the local governing board must ultimately make the decision. However, many contracts, especially service contracts, may be awarded by the manager or department staff under a delegation of authority from the governing board (see the discussion at question 11). There is no legal requirement that support for nonprofit organizations be centralized or coordinated. The decision-making process is more likely to be determined by the type of support that the nonprofit seeks (appropriation, grant, or contract for services) than by the fact that a nonprofit is involved.

*DIG (Durham Inncity Gardeners) teaches youths to tend a garden and market produce. It is a project of SEEDS (Southeastern Efforts Developing Sustainable Spaces), a nonprofit that receives some funds from the Durham County government.*



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**9. Must all agreements between local governments and nonprofits be reduced to written contracts with original signatures?**

No, but it is a good idea to reduce the common understanding between the parties to writing in order to avoid conflicts in performance and administration of the project or the activity. Several statutory provisions require certain kinds of contracts to be in writing. A state statute requires all contracts by cities to be in writing but provides that the governing board may “ratify” (approve after the fact) contracts that fail to meet this requirement.<sup>13</sup> Another law requires contracts of \$500 or more for the sale of goods to be in writing, but again, there are exceptions recognized in the law.<sup>14</sup>

The courts have long recognized that the most important issue in determining whether an enforceable agreement exists is whether there is proof that the party against whom enforcement is sought intended to be bound by the agreement. The easiest way to prove that is to present something in writing, signed or otherwise authenticated by that person.<sup>15</sup> Oral agreements, even when allowed, may be difficult to enforce.

Recently enacted federal and state laws provide legal recognition of electronic contracts and signatures.<sup>16</sup> So even when a contract is required, it does not necessarily have to be a piece of paper with an original signature.

**10. Is it true that local governments may not enter into a contract that extends beyond the current fiscal year? Is there any limit to the length of time for which a local government may contract?**

The answer to both questions is no. Although local governments operate on a year-to-year budget, state law specifically authorizes them to enter into contracts for a term that extends into subsequent fiscal years.<sup>17</sup> State law also makes clear that when a local government does enter into a contract that obligates it to make payments in a subsequent fiscal year, the governing board is legally obligated to budget the funds necessary to pay those obligations in each subsequent fiscal year.<sup>18</sup> Although state law does not specifically require all continuing contracts to be approved by the governing board, in light of the obligation that these contracts place on the budgeting decisions of the board, it may be advisable to seek governing board approval.

There does not appear to be any limitation on the term for which a local government may contract, except that a contract that does not state a term will probably not be interpreted to be perpetual. Instead, a court would most likely interpret the contract to be for a “reasonable term” as indicated by the purpose of the contract and the apparent intent of the parties.<sup>19</sup>

**11. What procedures apply to contracts between local governments and nonprofit organizations?**

It is hard to account for every procedural requirement that might apply to a particular contract. Following is a discussion of the most common requirements to consider.

**Governing board approval.** The governing board of a local government has the basic authority to act for the unit.<sup>20</sup> This means that the authority to make contracts (and grants and appropriations) rests with the governing board. Unless a statute specifically requires the board to act, however, the board may delegate the authority for these actions to an appointed officer within the unit.<sup>21</sup> The governing body must make budgetary decisions, including appropriations to nonprofit organizations. Decisions on grants or other contracts generally may be made by the governing board or may be delegated to the manager, a department head, or another appointed official or board.

It is important for a nonprofit contracting with a local government to make sure that the person or the board that approves the contract has the legal authority to do so. A contract made on behalf of a local government by someone who does not have authority to act on its behalf is not enforceable, even if the nongovernmental party (the nonprofit) reasonably believed that the person or the board did have authority.<sup>22</sup>

**Competitive bidding.**<sup>23</sup> For North Carolina local governments, only two categories of public contracts require bidding: (1) contracts for construction or repair work and (2) contracts for the purchase or lease-purchase of apparatus, supplies, materials,

**ASSISTANCE TO A NONRESIDENT NONPROFIT**

**May a city contribute money to a nonprofit that provides services outside the city's jurisdiction? For example, may a city support a nonprofit that operates a homeless shelter located outside the city?**

A key consideration in analyzing whether a local government may provide support in this circumstance is whether the nonprofit provides a benefit to the citizens of the local government (see questions 2 and 3 of the main article). It does not matter where the nonprofit is located, as long as there is a benefit enjoyed by the citizens of the supporting local government. In addition, it is not necessary that all citizens within the jurisdiction benefit. As long as the facility or the program is open to all citizens and there is some actual or expected participation or benefit by citizens of the supporting jurisdiction, the expenditure is lawful. The local board, of course, has the discretion to decide whether the likely participation justifies the financial support and, if so, in what amount.

The program also must be one for which the local government has authority to appropriate funds. For example, cities do not have authority to support county volunteer fire departments that provide fire services only in the unincorporated areas of the county. On the other hand, if there is an agreement between the city and the volunteer fire department for mutual aid or some other service that benefits residents of the city, a contribution will be legally justifiable. Applying these principles to the original question, since a local government has authority to provide shelter for the homeless (see G.S. 157-9), it may support a shelter located in another jurisdiction as long as citizens of the local government will derive some benefit from it.

## ASSISTANCE TO HABIT FOR HUMANITY

### May a local government donate land to Habitat for Humanity, which will use it to build a house for a private individual to own?

Both cities and counties have authority to support affordable housing, including through the conveyance of real property.<sup>1</sup> Of course, if the conveyance is without monetary consideration, there must be a promise in exchange for the property that it will be used for a public purpose. Even though a private individual will benefit from the new house, it is generally understood that the community as a whole benefits from having affordable housing available and from improving the living conditions of its citizens. Under this reasoning a court would likely uphold the contribution of funds or property to Habitat for Humanity, an organization that is dedicated to the goals just described and whose programs are designed to ensure that the benefit will go to people who are truly needy.

#### Notes

1. G.S. 153A-378 (counties); G.S. 160A-456(b) (cities). See the discussion in DAVID M. LAWRENCE, LOCAL GOVERNMENT PROPERTY TRANSACTIONS 138–39 (2d ed., Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 2000).

or equipment.<sup>24</sup> The specific procedures required for these contracts depend on the estimated amount of the expenditure.<sup>25</sup> Contracts that do not fall within these two categories or that fall below the minimum dollar thresholds do not require bidding. *Most contracts with nonprofit organizations involve services and are not subject to the competitive-bidding requirements.*

Many local governments seek competition even when they are not required to do so. This is certainly a good strategy if there is competition for the desired service. It promotes fairness and encourages competitive pricing. When local governments seek competition at their own option (rather than under state law requirements), the terms of the competition, including the basis for award of the contract, may be established in the discretion of the local unit. The unit may award the contract to the bidder who best meets the needs of the unit, rather than the one who submits the bid with the lowest price.

Contracts or grants that involve state or federal funds may have additional bidding requirements with which the local government must comply as a condition of receiving the funds.

**Fiscal approvals.** State law requires contracts by local governments to be “preaudited” to ensure that (1) the obligation created by the contract is supported by an appropriation (in other words, that the board has authorized the money to be used for the contracted purpose) and (2) uncommitted funds remain in the budget sufficient to pay the obligation.<sup>26</sup> This requirement is carried out through a “preaudit certificate,” a written statement signed by the finance officer that the two-part test (the preaudit) has been conducted. The statement must appear on every contract. According to the statute and to

cases applying it, if a contract does not contain the preaudit statement, it is void and may not be enforced by either party.

If a contract involves a financing agreement (a kind of transaction that involves a borrowing of money by the local government or payment over time for an asset), additional approvals—for example, by the state Local Government Commission—may apply.<sup>27</sup>

### 12. Is a local government required to determine whether it can provide the service in house before contracting with a private entity to provide the service?

No, although some may do so as a matter of local discretion. There is no legal requirement or preference for performing functions or delivering services using public employees rather than through contracts with private entities. When the bidding requirements apply (see the discussion on competitive bidding at question 11), the local government is required to give the private sector the opportunity to contract. In addition, some units of government have privatization or managed-competition programs in place, under which the units systematically compare the cost and the desirability of using the private sector with the cost and the desirability of public delivery. These programs are implemented as a matter of local policy, however, and are not mandated by law.

### 13. Do all the principles discussed so far also apply to contracts with for-profit organizations?

Yes. As a general rule, the subject of a contract, not the entity with whom the contract is made, is the most important consideration in determining whether the local government has the authority to make the contract. The procedural requirements and other limitations are the same, regardless of the profit status of the contracting entity. The fact that an entity receiving support from a local government is a for-profit organization may feature prominently in the analysis of whether the expenditure meets the public-purpose requirement, but the legal standard that a court would apply is the one discussed at question 2. Furthermore, a private for-profit entity is less likely than a nonprofit organization to be limited in its use of public funds. For example, a nonprofit organization will be prohibited from using public funds for religious or other purposes for which funds may not legally be appropriated.

### 14. What are some other ways in which a nonprofit's contract with a local government differs from a nonprofit's contract with a private entity?

A nonprofit should be prepared for the open and public nature of the public contracting process, which may not be present when the nonprofit contracts with private entities. When a local government board makes a decision on a contract, a grant, or an appropriation, that decision must be made in an open meeting. The board generally does not have the legal authority to conduct its discussion of this type of transaction in a closed session. There are a few exceptions to this rule, such as when the acquisition of property by the local government is involved or when the matter relates to litigation or something that is covered by the attorney-client privilege.<sup>28</sup>

In addition, all the documents associated with the transac-

tion, including proposals, correspondence, and contract documents, are public records.<sup>29</sup> Again, there are a few exceptions. Documents constituting trade secrets as defined by state law that are a part of a bid proposal may be confidential and excluded from public access.<sup>30</sup> In addition, tax returns and some financial information of a private organization may be covered by one or more exceptions to the public records law.<sup>31</sup> It seems unlikely, however, that any of these exceptions would apply to contracts typically entered into by nonprofit organizations, because their tax information already is subject to public scrutiny. Thus a nonprofit organization should assume that all or most of the documents held by a local government in connection with the nonprofit's work with that government are subject to public inspection.

#### **15. What requirements are imposed on a nonprofit when it contracts with a local government?**

Although relatively few legal requirements *automatically* apply to a nonprofit by virtue of its contract with a local government, the local government may impose requirements on a nonprofit through the contract itself or otherwise, as a condition of receiving the funds. As a general rule, a nonprofit's receipt of public funds does not make it subject to the rules that govern public agencies, such as those pertaining to bidding, public personnel, public records, and open meetings. Only when the nonprofit is significantly controlled by the public agency have the courts extended these types of requirements to a private nonprofit entity.<sup>32</sup>

Some examples of requirements that do apply or might be imposed follow.

**Fiscal accounting.** State law specifically authorizes local governments to require that a nonprofit that receives \$1,000 or more in any fiscal year have an audit performed for the fiscal year in which the funds are received.<sup>33</sup> Local governments also may be responsible for administering state or federal programs that contain fiscal accounting requirements. Finally, a local government may require nonprofits to account for funds they receive, in whatever manner the local government deems appropriate as a condition of providing funds. A nonprofit that receives funds under a grant, a contract, or an appropriation that contains this requirement is legally bound to comply with it. When fiscal accounting is not required by state or federal law, a local government has flexibility in designing the reporting requirement, and should consider ways of requiring account-

## **ASSISTANCE TO FAITH-BASED ORGANIZATIONS**

### **May a local government enter into an exclusive contract with a faith-based organization to provide job placement if the organization is the only one in the area that can provide the services?**

Yes, under limited conditions. Neither federal nor state law absolutely prohibits a local government from contracting with a faith-based organization to be the sole provider of services in a particular area. However, beneficiaries of the services are entitled to an alternative provider if they object to the religious character of the sole provider. If someone objects, the local government must itself provide the services to those who choose not to participate with the religious organization, or engage an acceptable provider outside the area to provide an equivalent and accessible service in a timely manner.

### **May a local government make funds to build houses available to some nonprofits but refuse to make such funds available to a qualified church group because of its religious character?**

No. If the local government elects to involve nonprofit providers in the delivery of services, then it may not automatically exclude providers because of their religious character. In a recent case, the Fourth Circuit Court of Appeals wrote,

*We recognize the sensitivity of this issue, and respect the constitutional imperative for government not to impermissibly advance religious interests. Nevertheless, by refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith. The First Amendment requires government neutrality, not hostility, to religious belief.<sup>1</sup>*

### **May a local government require as a part of its contract with a faith-based institution running an abstinence program for teenagers that the advisory council reflect the diverse demographics of the community?**

No. A series of specific constitutional protections would prohibit such a requirement. Faith-based providers may not be required to alter their form of internal governance to be eligible for participation in a government program. The structural form of a religious organization often is dictated by religious doctrine, and "ecclesiastical polity" (the political organization of a church) is protected by the state and federal constitutions.

### **Notes**

1. *Columbia Union College v. Oliver*, \_\_\_ F.3d \_\_\_ (No. 00-2193, June 26, 2001) [state funding case finding adequate safeguards against diversion of money to sectarian use under *Mitchell v. Helms*, 530 U.S. 793 (2000)].

ability that strike a balance between the government's needs and the nonprofit's capacity (see the sidebar, page 43).

**Conflicts of interest.** As noted at question 16, state law prohibits a public official who has responsibility for contracting, from benefiting from a contract with the unit of government that he or she represents. A person who contracts on behalf of a nonprofit (and who is not a public official) is not subject to this law, even when funds that came from a public entity are being spent. A local government may, however, require a nonprofit organization to adopt a conflict-of-interest policy as a condition of receiving a contract, a grant, or an

*Continued on page 42*

## CONTRACTS WITH FAITH-BASED ORGANIZATIONS

ANITA R. BROWN-GRAHAM

The Establishment Clause of the First Amendment to the U.S. Constitution ultimately controls the legality of contracts with faith-based organizations. It dictates that “Congress shall make no law respecting an establishment of religion.” Although some have viewed the First Amendment as a wall of separation between the government and religion, the courts never have interpreted it so literally.<sup>1</sup> This sidebar addresses the tests employed by the courts to assess the legality of government contracts with faith-based organizations.

### The *Lemon* Test

The only recent U.S. Supreme Court case considering the legality of public contracts with religious organizations is *Bowen v. Kendrick*.<sup>2</sup> In *Bowen* the Court upheld the constitutionality of the Adolescent Family Life Act (AFLA), which offered federal grants to public and private (including religious) agencies to curtail teenage sexuality and pregnancy and to assist unwed mothers. The *Bowen* Court applied a three-part test that it had set forth in *Lemon v. Kurtzman* for determining when a governmental practice violates the Establishment Clause. Under *Lemon* a local government may contract with a faith-based institution if the contract (1) has a secular purpose, (2) has a primary effect of neither advancing nor inhibiting religion, and (3) does not create an excessive entanglement between the government and religion.<sup>3</sup> Although the Supreme Court has modified the *Lemon* test, it still appears to set the parameters for analyzing government contracts with religious institutions.

### Secular Purpose

In considering whether a contract has a secular purpose, the courts may ask whether the government “has abandoned neutrality and acted with the intent of promoting a particular point of view in religious matters.”<sup>4</sup> The *Bowen* Court deferred to Congress’s declaration that the legitimate secular purpose behind the AFLA was the elimination or the reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood.

Similarly, courts will usually defer to a local government’s sincere articulation of a secular purpose. However, when there is no question that the purpose behind the contract is either to endorse or to disapprove religion, courts will find the contract to violate the First Amendment.<sup>5</sup>

### Primary Effect

The “primary effect” prong of the *Lemon* test focuses on the effect of the local government’s action, irrespective of purpose. If the primary effect is to advance or inhibit religion, the action is unconstitutional. The *Bowen* Court concluded that the primary effect of the AFLA was not to advance religion. Although many of the “necessary services” mentioned by the

AFLA involved education or counseling, areas in which religious organizations might arguably infuse “proselytization” (efforts to convert clients to their beliefs), the Court found “nothing inherently religious about these activities.”<sup>6</sup>

The second prong mandates that local governments not show favoritism for religion or among religions, or discriminate against religion. In determining the effect of the local government’s action, a court may look to factors such as whether the aid is available to religious and nonreligious organizations alike, whether the aid to religious organizations is direct or indirect, and whether the religious organizations would likely divert the aid to advance religion.<sup>7</sup>

### Excessive Entanglement

The “excessive entanglement” prong of the *Lemon* test prohibits governments from excessive entanglement in religious affairs. Local governments risk excessive entanglement when they become partners with organizations in programs that are pervasively religious. If the programs require obedience to religious dogma, mandatory attendance at religious services, and study of a particular religious doctrine, local governments should beware. To ensure that their funding is not used to advance religion, they must engage in ongoing surveillance of the programs, which may well constitute excessive entanglement. In *Bowen* the Court acknowledged that grant monitoring might require a review of the educational materials or a visit to the site, but it summarily dismissed the idea that such inspections would intrude on religion. Because no grantees were presumed to be “pervasively sectarian,” the Court found intensive monitoring unnecessary.

The form of aid and the funding process also may result in excessive entanglement. Although there is no prohibition against annual funding to religious organizations, the risk of entanglement is lessened when a payment is one-time.<sup>8</sup>

A final concern in determining excessive entanglement is the possibility of political divisiveness. To date, this concern has been confined to cases in which a government pays direct financial subsidies to parochial schools or to teachers in parochial schools.<sup>9</sup> However, with the increased incidence and criticism of government partnerships with religious organizations, the concern soon may be raised in other types of cases.

### Other Tests

In addition to using the *Lemon* test, courts may analyze challenges to government contracts with religious organizations under an endorsement test, a neutrality test, a coercion test, and a free-speech test.<sup>10</sup> Because the Supreme Court has not mandated that courts use a particular test when analyzing Establishment Clause cases, courts are free to select the test that best fits the case.

# **A**lthough some have viewed the First Amendment as a wall of separation between the government and religion, the courts never have interpreted it so literally.

The endorsement test requires courts to consider the following: (1) “whether the government [subjectively] intends to convey a message of endorsement or disapproval of religion” and (2) whether the government practice actually has had “the effect of communicating a message of government endorsement or disapproval of religion.”<sup>11</sup>

The neutrality doctrine demands that the government remain neutral toward religion. In 1995 the Supreme Court relied on this doctrine to declare that, by failing to provide school funds to a religious student group in a limited public forum, the University of Virginia engaged in discrimination against viewpoints and violated the students’ free speech rights.<sup>12</sup>

The coercion test makes clear that “government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way ‘which establishes a [state] religion or religious faith, or tends to do so.’”<sup>13</sup> Clearly, a Welfare-to-Work program that is mandated by the county would run afoul of this test if participation was mandatory and the only service provider was a religious organization that made its religious tenets a core of its program.

The free-speech test requires governments that provide public funds to groups to refrain from showing a preference between religious and nonreligious groups.<sup>14</sup>

## **Other Authorities**

In considering the limitations on a local government’s ability to contract with a faith-based organization, officials also must take the North Carolina Constitution into consideration. Article I, Section 13, states that “all persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.” Although the state and federal constitutional provisions are not identical, state courts have said that the two provisions secure similar rights. Thus, cases involving the state constitution are usually analyzed using the federal tests discussed earlier.

Despite similar analyses a challenge to a local government’s contract with a religious organization may come under the

federal or state constitution, or both. For example, the North Carolina Supreme Court recently struck down a state law that provided a tax exemption for religious or Masonic organizations operating homes for senior citizens but denied the benefit to secular institutions offering the same services.<sup>15</sup> The court found that the provision violated both the state and the federal constitution.

Finally, federal or state law may impose nondiscriminatory restrictions on a faith-based institution that receives funds. For example, the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, which coined the now-popular term “charitable choice,” provides that, although states and local governments may use federal Welfare-to-Work funds to contract with religious organizations to provide services, (1) those funds may not be expended for sectarian worship, instruction, or proselytization; (2) participants must be provided with notice that they have a right to an accessible, nonsectarian alternative; and (3) voluntary programs must be truly optional.<sup>16</sup>

## **Notes**

1. See *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding, on their face, federal grants for teenage sexuality counseling, including counseling offered by faith-related centers).

2. *Id.*

3. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The *Lemon* test was modified for cases involving aid to religious schools in *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997).

4. *Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 288 (4th Cir. 2000). See also *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (striking down Louisiana law that forbade teaching of evolution in public schools unless accompanied by teaching of creationism).

5. See, e.g., *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980).

6. *Bowen*, 487 U.S. at 602.

7. See *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

8. See Christopher Bass, *Appropriations to Church-Affiliated Organizations*, LOCAL GOVERNMENT LAW BULLETIN No. 75 (Nov. 1996).

9. *Id.*

10. Deborah L. Ross, *The Religious Clauses: Protecting the Rights of Religious Minorities in a Diverse Society*. TRIAL BRIEFS 10 (Jan. 2001).

11. *Lynch v. Donnelly*, 465 U.S. 688, 690–92 (1984).

12. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829–32 (1995).

13. See *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 96, 97 (5th Cir. 1992).

14. See, e.g., *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that if school opened its classroom to certain secular community and civic groups after school hours, it could not deny use to religious group).

15. *In re Springmoor, Inc.*, 348 N.C. 1, 498 S.E. 177 (1998).

16. 42 U.S.C. § 604a. The act extends coverage of the charitable choice provision to Temporary Assistance for Needy Families, Welfare-to-Work, Community Services Block Grants, and drug treatment funds for 2000 (part of Block Grants in Children’s Health, Substance Abuse and Mental Health Services Administration).

*Continued from page 39*

appropriation from the local government. This has become a common requirement for state grants to local governments and also may be a requirement for state or federal pass-through grants or contracts awarded by local governments.

**Purposes for which funds or property may be used.** As noted at questions 1 and 2, a major limitation imposed on a nonprofit that accepts public funds is that the funds be used only for the purpose for which they were awarded. This is a particularly important limitation for faith-based organizations but applies equally to others. This limitation does not necessarily mean that each dollar must be traced, but it does mean that the nonprofit organization must be prepared to account for the use of the money and to show that the terms of the contract, the grant, or the appropriation have been met, and that the funds have not been used for a different, unauthorized purpose. As noted at question 17, if a local government donates property to a nonprofit, it must ensure that the property is used only for purposes for which the local government may appropriate funds.

**16. What about conflicts of interest? For example, if a county commissioner also serves on the board of a nonprofit, is the county legally barred from contracting with that nonprofit?**

State law makes it unlawful for a public official to benefit from a contract with the unit he or she represents.<sup>34</sup> For example, a local government generally may not contract with a business owned by one of its board members. A number of exceptions apply, however, including one that allows a limited amount of contracting in small jurisdictions.<sup>35</sup>

The conflict-of-interest laws do not apply if the public official does not receive any financial benefit from the contract. Also, a public official is not considered to have an interest in a contract if he or she is an employee, rather than an owner, of the entity that contracts with the local government. So it is legal for a local government to contract with or provide other support to a nonprofit when a member of the local government's board is a volunteer (unpaid) member or salaried employee of the nonprofit board. In addition, it is legal under the "employee" exception for a local government to contract with a nonprofit whose paid executive director also is a member of the local government board, provided that the local government complies with the statutory requirements for approving contracts under that exception.<sup>36</sup>

The board members and the employees of both the local government and the nonprofit always must consider the non-legal issues that might arise when a person is involved on both sides of a contract. There may be negative publicity from this type of transaction, and citizens as well as members of the nonprofit may question whether the board member or other person can adequately execute his or her responsibilities to both organizations, especially if a conflict was to arise over the contract. Thus even when the law does not prohibit a contract, avoiding it may be advisable if an ethical issue or perception of conflict of interest might arise.

Other kinds of connections might exist between a local government official and people who are involved with a nonprofit that wishes to contract with the local government.

Relatives or spouses of public officials from a particular local government are not legally barred from doing business with that nonprofit, but government officials and nonprofit staff should weigh the possibilities of negative publicity, public perception, and difficulty in administration before they enter into these types of undertakings.

**17. May a local government donate property to a nonprofit or provide other in-kind support of nonprofit activities?**

Yes. Subject to the requirements of public purpose and statutory authority, discussed at questions 1–3, local governments may provide in-kind support of whatever nature they choose. This includes not only the sale or the donation of property but also technical support or other assistance that may be provided using the unit's employees, building space, land, or equipment. Although the state constitution generally prohibits a local government from giving public money or property to a private person or entity,<sup>37</sup> North Carolina court cases have recognized that a promise to use property for a public purpose is legally sufficient consideration to support its conveyance.<sup>38</sup> This means that as long as the proposed use is one for which the local government has authority to spend money, the local government may provide in-kind support as an outright donation in lieu of or in addition to a cash appropriation. The local government also may convey property at less than fair market value in exchange for cash or a promise of public services. Finally, the local government may choose to sell property to nonprofit organizations using the procedures designed to get fair market value, in the same manner as it would for (and in competition with) other private entities.

There is a special statutory procedure under which local governments may convey property to nonprofit entities without having to receive competition from other private entities. Under G.S. 160A-279 a city or a county may convey property to any entity that carries out a public purpose for which a local government has authority to appropriate funds.<sup>39</sup> Conveyances under this statute must be approved by the governing board. Notice of the proposed action must be advertised, and the unit must wait ten days after the notice is published before completing the transaction.<sup>40</sup> The statute also requires that the local government place conditions on the conveyance to ensure that the property will be put to a public use. In the case of real property, the condition could be embodied in a deed limitation providing that the property reverts to the government if it ceases to be used for a public purpose. For personal property the condition would likely take the form of a contractual agreement with the recipient, who promises to return or pay fair value for the goods if the use changes. Property acquired through the exercise of eminent domain may not be conveyed under this statute.

There are other statutory authorizations for donations of property for specific purposes. For example, state law specifically authorizes local governments to sell or donate real property to volunteer fire departments or volunteer rescue squads that provide services to the local government.<sup>41</sup> State law also sets out procedures for conveying surplus automobiles to entities that will convey them to Work First participants, subject to certain limitations described in the statute.<sup>42</sup> Further, state

## ACCOUNTABILITY: IT'S MORE THAN AN AUDIT

Requiring nonprofits to account for their use of public funds is standard practice. The most common form that this requirement takes is an audit. An audit, however, is a very limited tool for obtaining accountability. Technically an audit is an independent verification that financial statements follow generally accepted accounting principles. It does not provide information about how funds have been used, nor does it measure what results have been achieved.

To be useful, accountability measures should be incorporated into the contracting process before and during the contract. Also, they should be designed to ensure that the desired outcomes of the contract are achieved.

Two key aspects of a local government contract with a nonprofit affect the type of accountability measures that are appropriate: nature and size.

**Nature of the contract: a purchase of services or general program support.** Accountability measures for a contract to purchase services from a nonprofit should be tied to the services to be delivered. Such measures may be similar to those that would be required in contracts with for-profit entities. Contracts to provide more general programmatic support, however, are likely to demand a different type of accountability. Thus a grant to a local arts organization to promote cultural activities in the community should be treated differently than a contract to provide meals or transportation to needy people. (For an illustration of different outcome measures for these two types of contracts, see the bulleted item titled "Develop performance-based contracts.")

**Size of the contract: one size doesn't fit all.** Accountability measures should be consistent with the level and the type of support involved. A contract that involves a small amount of money may not justify detailed accountability measures. For example, a small, inexperienced nonprofit may seek funds for a service that is important to the community, and it may be the sole provider of that service—such as a mission that provides shelter or food for the homeless. In such a case, taking some risk with a small contribution of funds may be justifiable, weighing the lack of a competitive market, the strong need for the service, and the limited investment involved against the potential instability associated with the nonprofit.

With these factors in mind, local governments should consider taking the following steps to increase the effectiveness of local government contracts with nonprofits.

- **Evaluate capacity:** Determine whether the nonprofit has the capacity to carry out the contract before entering into it. Obtain information about staff resources, experience, prior contracts or projects completed, references, and current funding. As noted earlier, the extent of this evaluation should be based on the size and the type of contract. In addition, in determining whether the contracting option itself is the most desirable arrangement, the local government should consider its own capacity to monitor the contract. Neither party benefits if the contract requires nonprofits to provide information that the local government does not have the capacity to review and evaluate in a timely manner.
- **Develop performance-based contracts:** Contracts should identify the outcomes that the nonprofit will be responsible for delivering. These may be defined quite specifically (for example, "Provide two meals a day to an average of 200 people per day") or stated in more general terms (for example, "Promote downtown development through support of cultural events downtown"), but both parties should have a common understanding of what they expect the nonprofit to produce. Ideally these results would be priorities for the local government and be agreed on by both parties. They are best if jointly developed, and expressed in writing in terms that minimize the need for clarification or interpretation during the contract period.
- **Monitor during performance:** Develop milestones and interim dates for monitoring performance. Such benchmarks allow both parties to evaluate the contract and identify trouble spots early in the process. Consider developing periodic reporting requirements, which may be used as a basis for making partial or progress payments for work completed. This benefits nonprofits, which often have cash flow problems and cannot afford to wait until the end of the contract period to be reimbursed for their expenses. It improves their ability to meet their obligations under the contract.

law authorizes a local government to donate to a 501(c)(3) nonprofit any bicycles that are held by law enforcement agencies and that remain unclaimed after notice has been provided according to the statute.<sup>43</sup>

Local governments also may include nonprofit organizations and their staff in other activities. For example, a local unit might include nonprofit staff in its training programs or use its purchasing power to purchase goods or services on behalf of the nonprofit for use in programs that the local govern-

ment has authority to fund. Further, a local government may make the expertise of its staff available to the nonprofit as a form of in-kind assistance that might save money for both the local government and the nonprofit. In each case the basic legal limitations on these types of in-kind assistance are the same as those discussed at the beginning of this article. If the activity of the nonprofit is one that the local government has legal authority to support, it can provide in-kind support in a wide variety of ways.

## Conclusion

Nonprofit organizations have cooperated with the public sector since colonial times to provide food, medical care, and social services to those in need. The recent movement toward enhancing that partnership presents both opportunities and challenges. To many local governments, reducing agreements to written contracts only serves to codify an existing relationship. For others it requires a new level of detail and accountability. In either event the contract provides important parameters for both the local government and the nonprofit

organization. Contracts should focus on the services to be provided but also must be consistent with state and federal law. The legal parameters take on constitutional dimensions when questions regarding the freedom of religion or speech arise. Without the guidance and protection of a good contract, a local government funder and its nonprofit partner may run into legal or practical problems despite their shared good intentions. Working within the limitations discussed in this article, local governments and nonprofits can continue and expand their collaborative efforts to improve the lives of the people in their communities.

## Notes

1. N.C. Const. art. V, § 2(1).
2. *Hughey v. Cloninger*, 37 N.C. App. 107, 245 S.E.2d 543 (1978), *aff'd*, 297 N.C. 86, 253 S.E.2d 898 (1979).
3. N.C. Const. art. V, § 2(7).
4. *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).
5. *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989).
6. *Maready v. City of Winston-Salem*, 342 N.C. 708, 722, 457 S.E. 2d 615, 624 (1996).
7. *Briggs v. City of Raleigh*, 195 N.C. 223, 226, 141 S.E. 597, 599–600 (1928).
8. *Maready*, 342 N.C. at 724, 467 S.E. 2d at 625.
9. N.C. GEN. STAT. §§ 160A-20.1, 153-449. Hereinafter the General Statutes will be referred to as G.S.
10. *Lexington Insulation Co. v. Davidson County*, 243 N.C. 252, 90 S.E.2d 496 (1955).
11. For more information on liability for local government officials, *see* ANITA R. BROWN-GRAHAM, A PRACTICAL GUIDE TO THE LIABILITY OF NORTH CAROLINA CITIES AND COUNTIES (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1999).
12. *See* LYDIAN ALTMAN-SAUER, MARGARET HENDERSON, & GORDON P. WHITAKER, 20 QUESTIONS NONPROFITS OFTEN ASK ABOUT WORKING WITH LOCAL GOVERNMENT 13, 15–16 (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 2000).
13. G.S. 160A-16.
14. G.S. 25-2-201(1).
15. "Otherwise authenticated" means indicated by some mark or symbol as being adopted by the party to be charged. *See* G.S. 25-1-201(39) (definition of "signed" as explained in the amended official comment).
16. 15 U.S.C.A. § 7001(a); G.S. 66-317.
17. G.S. 160A-17, 153A-13.
18. G.S. 159-13(15). Similar language exists

in the budgeting requirements for local school units. This fact suggests that there is implicit authority for local school units to enter into continuing contracts. *See* G.S. 115C-432(b)(4).

19. JOHN N. HUTSON, JR., & SCHOTT A. MISKIMON, NORTH CAROLINA CONTRACT LAW § 2-30-2 (New York: LEXIS Publishing, 2001).

20. *See* G.S. 160A-12, 153A-12.

21. An example of a statute that requires board action is G.S. 143-129, which requires contracts for construction or repair work estimated to cost \$100,000 or more to be awarded by the governing body.

22. *L&S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 471 S.E.2d 118 (1996). The rule on this issue is different for public agencies than for private ones. With private entities the doctrine of "apparent authority" allows the enforcement of a contract made by an agent who seemed to but did not actually have authority to bind the entity.

Courts have declined to apply this rule to public agencies. *See* FRAYDA S. BLUESTEIN, A LEGAL GUIDE TO PURCHASING AND CONTRACTING 6–7 (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1998).

23. For a complete discussion, *see* BLUESTEIN, A LEGAL GUIDE.

24. G.S. 143-129, -131.

25. Currently, advertisement and sealed bids are required for construction and repair contracts estimated to cost \$100,000 or more, and for purchase contracts estimated to cost \$50,000 or more. G.S. 143-129. Informal bids (no advertisement or sealed bids required) are required for contracts costing between \$5,000 and the formal limit. G.S. 143-131.

26. G.S. 159-28(a).

27. *See* G.S. 158-143, 160A-20.

28. *See* G.S. 143-318.9 through -318.11.

29. G.S. 132-1.

30. G.S. 132-1.2. For a discussion of what constitutes a trade secret, *see* DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS ch. 9

(Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1997).

31. LAWRENCE, PUBLIC RECORDS LAW, at 133–36, ch. 11.

32. *See* News and Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981).

33. G.S. 159-40.

34. G.S. 14-234.

35. G.S. 14-234(d1) (allowing contracts for most services up to \$25,000 per year in cities with a population of 15,000 or less, and in counties with no incorporated municipality with a population of 15,000 or more). For a detailed analysis of the conflict-of-interest laws and of ethics for public officials, *see* A. FLEMING BELL, II, ETHICS, CONFLICTS, AND OFFICES: A GUIDE FOR LOCAL OFFICIALS (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1997).

36. *See* G.S. 14-234(c1).

37. N.C. Const. art. I, § 32 ("No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services").

38. *See* *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281 (1945) (upholding conveyance of city property to private veterans' organization for recreational use of veterans).

39. This provision does not apply to local school units, which must receive monetary consideration when disposing of property because of the constitutional requirement that all school funds be used exclusively for public school systems. N.C. Const. art. IX, § 7; DAVID M. LAWRENCE, LOCAL GOVERNMENT PROPERTY TRANSACTIONS 93 (2d ed., Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 2000).

40. G.S. 160A-279 requires compliance with the procedures of G.S. 160A-267 (private sale).

41. G.S. 160A-277.

42. G.S. 160A-279(a).

43. G.S. 15-12(b).