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## Contracting, Purchasing, and Sale of County Property

Since a county governing authority “has the exclusive authority to control the fiscal affairs of the county,”<sup>1</sup> it generally has the authority to enter into a contract on behalf of the county. Despite the fact that the county governing authority is the fiscal authority, other elected county officers may enter into contracts on behalf of a county when authorized by law or when it is necessary for them to perform their duties.<sup>2</sup>

### REQUIREMENTS FOR COUNTY CONTRACTS

A county’s power to contract is subject to various limitations. In addition to being subject to the principles of general contract law, including immigration law,<sup>3</sup> contracts of the county commissioners must be in writing and entered into the minutes.<sup>4</sup> Also, the contracts are limited in their duration. If the county ignores any one of these limitations in making a contract, the contract may be deemed *ultra vires* (i.e., unlawful, illegal, or unauthorized).<sup>5</sup> Regardless of whether it is called a contract, agreement, lease, memorandum of understanding, memorandum of agreement, or letter of intent signed by both parties, it is considered a contract that is subject to the requirements of this chapter.

### Written Contracts Entered into the Minutes

With certain exceptions, any contract entered into by the county commissioners must be in writing, approved by the county governing authority in a meeting, and entered into the official minutes.<sup>6</sup> Any modifications or amendments to an existing contract must also be in writing and entered into the minutes.<sup>7</sup> If a contract is in writing and valid in all respects except that it has not been entered into the minutes, then the other party to the

contract can petition the courts to force the commissioners to enter the contract into the minutes.<sup>8</sup> Although the county may not be held liable for an implied contract,<sup>9</sup> it may be liable for the reasonable value of materials furnished and services rendered on an express contract.<sup>10</sup>

### **Length of Contract**

Except as will be explained, most county contracts must be for one year or less. In general, one board of commissioners may not bind itself or future boards to prevent free legislation in matters of local government.<sup>11</sup> However, the courts have recognized that this prohibition must not be too rigidly applied, so each individual contract should be considered individually<sup>12</sup> because certain contracts have been allowed to extend beyond one year.<sup>13</sup>

### **Multiyear Contracts**

Counties may enter into a contract with a private party that automatically renews for one or more years to lease, purchase, or lease-purchase goods, materials, real property, personal property, services, and supplies so long as certain minimum requirements are met.<sup>14</sup> First, the contract must absolutely terminate without any further obligation on the county by December 31 of the year it was executed and by December 31 of each year for which it is renewed.<sup>15</sup> Second, the contract must state the total obligation of the county for the calendar year for which it is executed and the total obligation for each calendar year for which the contract is renewed.<sup>16</sup> Third, the title to the property must either remain in the name of the vendor until it is fully paid for by the county,<sup>17</sup> or it may be in the name of the county so long as the county is authorized to transfer the title back to the vendor if the contract is not fully consummated.<sup>18</sup> Fourth, the amount of the contract plus the total amount of debt incurred by the county may not exceed 10 percent of the assessed value of all taxable property within the county.<sup>19</sup> Fifth, if the contract is for the purchase of property, then it may not have been the subject of a failed referendum (e.g., a referendum to approve a special purpose local option sales tax or bonded indebtedness to fund the purchase of the property) in the four calendar years prior to the contract unless the purchase is required by a court order or it is certified by the governing authority that such a court order is imminent.<sup>20</sup> Sixth, if the multiyear contract is for the purchase of real property, several other conditions must be met:

- *Public hearing.* The county must hold a public hearing that has been advertised for two weeks in a newspaper of general circulation in the county.<sup>21</sup>

- *Maximum amount.* The average annual payments on a contract to purchase real property may not exceed 7.5 percent of the governmental fund revenues of the county for the last calendar year plus any special purpose local option sales tax revenues,<sup>22</sup> and the total amount may not exceed \$25 million.<sup>23</sup> These restrictions do not apply to projects that have been approved in a special purpose local option sales tax referendum, to projects that state law allows to be paid from fine revenues, or to projects to build housing for court services.<sup>24</sup>

Finally, multiyear contracts may include a provision that the contract will terminate absolutely if funds for the contract are not appropriated by the county,<sup>25</sup> since the county is only obligated to pay the amount due during the calendar year in which it is executed or renewed.<sup>26</sup>

### **Other Exceptions**

Contracts with private firms may extend beyond one year when specifically provided by law. For instance, counties may enter into contracts to build, maintain, own, or operate a toll road or toll bridge that may exceed one year.<sup>27</sup> Additionally, counties may contract with private parties for up to 20 years to provide for the construction, operation, and maintenance of wastewater treatment systems, storm water systems, water systems, and sewer systems.<sup>28</sup> In evaluating proposals, counties must consider previous performance on projects of comparable magnitude, the environmental compliance record, and the five-year history of relevant civil or criminal penalties incurred by potential firms. If the contracts involve construction of a facility, the contract must comply with Georgia's Local Government Public Works Construction Law<sup>29</sup> discussed later in this chapter.

### **Intergovernmental Contracts**

Counties may contract with the state and other local governments in Georgia for a period not exceeding 50 years.<sup>30</sup> Examples include the following:

- Contracts with the state, a public agency, a public corporation, or a public authority to convey existing facilities to the state and to any public agency, public corporation, or public authority.<sup>31</sup>
- Contracts with the state, a public agency, a public corporation, or a public authority to provide care, maintenance, and hospitalization of its indigent sick.<sup>32</sup>
- Contracts with cities to provide police protection, fire protection, emergency medical services, animal control, hospital, ambulance, garbage and sewage disposal, libraries, building permit

issuance and building code enforcement, street and road maintenance, parks and recreation, and the treatment and distribution of water.<sup>33</sup> In fact, a county may not provide any of those services inside a city's boundaries without such a contract.<sup>34</sup>

- Contracts with cities, other counties, or municipalities to provide industrial wastewater treatment services, in order to comply with applicable state and federal water pollution control standards and to be eligible for grants-in-aid or other allotments.<sup>35</sup>
- Contracts with the State Personnel Board to provide health insurance coverage for county employees.<sup>36</sup>
- Contracts with the Georgia Ports Authority for the leasing, operation, or management of real or personal property in or adjacent to any seaport.<sup>37</sup>
- Contracts with contiguous counties and cities located either in a contiguous or the same county to develop regional facilities. These contracts may provide for allocation of proceeds of ad valorem taxes levied in an assessing county with other counties or municipalities with which it has contracted and for allocation of revenues generated by a regional facility. The allocation of the tax proceeds and the other revenues is to be determined by contract between the affected local governments.<sup>38</sup> Prior to entering into such a contract, a county must hold at least one public hearing, and notice of the public hearing must be published in a newspaper of general circulation within the county. The required public hearing may be held jointly with the other local government to be involved in the contract. If the proposed facility will be located outside a county but will require expenditure of public funds of that county, a financial feasibility study must be conducted prior to the county entering into such contract.<sup>39</sup>
- Contracts with public agencies and private nonprofit entities organized to provide services to persons of low and moderate incomes. Specifically, these are day-care services for children, services for the elderly, health education, literacy and English language instruction, mental health and disability services, legal assistance, and emergency food and medical assistance.<sup>40</sup>

## **CONSTRUCTION CONTRACTS**

When a county undertakes a public works or a road construction project, in addition to the general requirements for county contracts, some special procedures must be observed. The Georgia Local Government Public

Works Construction Law governs construction projects other than roads. Road construction contracts are subject to other requirements.

### **Public Works Construction Contracts**

The Georgia Local Government Public Works Construction Law<sup>41</sup> establishes the basic requirements that counties must follow when hiring private contractors to do construction projects (other than road construction) that cost more than \$100,000 to ensure that public works contracts are awarded in a fair and competitive manner.

### **Construction Projects Subject to the Law**

A determination must first be made that a contract is for the construction, alteration, repair, improvement, or demolition of a county building or structure (other than routine operation, repair, or maintenance).<sup>42</sup> The contract must also hold the other party responsible for construction by providing labor and building materials.<sup>43</sup> This means that if the contractor is using his own employees or is responsible for contracting with another firm for labor, the contract is subject to the requirement of the law.

Not all construction contracts are subject to the requirements of the public works law.<sup>44</sup> Road construction contracts are subject to different requirements, explained later in this chapter.<sup>45</sup> Construction contracts that will cost under \$100,000 do not have to comply with the requirements of the public works law,<sup>46</sup> but counties may nevertheless choose to observe the requirements to obtain better competition.<sup>47</sup> Counties may use their own employees to construct the building or structure at any amount so long as any subcontracts with private firms costing over \$100,000 are competitively awarded in accordance with the public works law.<sup>48</sup> Professional service contracts (e.g., architect or engineering contracts) are not subject to the procurement requirements so long as the professional firm is not “responsible” for construction.<sup>49</sup> Contracts necessitated by an emergency are also exempt, except that the county must ratify the contract in a commission meeting and describe the nature of the emergency in the meeting minutes as soon as practicable.<sup>50</sup> Construction projects using inmate labor are exempt from the law.<sup>51</sup> Additionally, if the construction project is subject to a federal grant with special procurement requirements, the county does not have to comply with any requirements that conflict with federal grant requirements.<sup>52</sup> However, a special notice must be included in the advertisement of the project indicating that the project is subject to federal grant requirements.<sup>53</sup>

## **Advertising the Proposed Project**

Public works construction contract opportunities that are subject to the law must be posted conspicuously in the county governing authority's office and must be advertised.<sup>54</sup> The county may advertise by posting the notice on the Internet for four weeks<sup>55</sup> or may advertise by publishing a notice in the legal organ twice in the four weeks preceding the bid/proposal opening. The first advertisement must be at least four weeks before the bid/proposal opening, and the second advertisement must be at least two weeks after the first advertisement.<sup>56</sup> While these are the minimum requirements, counties may advertise in additional places or more frequently in order to reach a broader audience, creating greater competition and perhaps driving prices down. Defective notice and advertising may make a contract illegal,<sup>57</sup> as does inclusion of a provision that is unauthorized by law.<sup>58</sup> Failure of the advertisement to invite all reasonable competition voids the contract.<sup>59</sup> The price, exact or approximate, at which the contract will be let, need not be stated in the advertisement.<sup>60</sup> Further advertisement is necessary when proposals are rejected and plans are subsequently changed.<sup>61</sup>

## **Prequalification of Bidders and Offerors**

Counties may "weed out" unqualified firms before accepting a bid or proposal, eliminating the need to waste time and resources evaluating bids/proposals from firms that are not candidates for the contract. However, such prequalification procedures must meet certain minimum requirements.<sup>62</sup> For instance, the criteria to prequalify must either be related to the work or the contractor's ability to perform the work (such as related experience on similar projects or financial capability). Additionally, the procedure must include a process for disqualified bidders/offerors to respond to their disqualification. The inclusion of such a process does not mean that the disqualified bidder has the right to appeal his or her disqualification and be reinstated as a bidder; it is merely an opportunity for the disqualified bidder to clear his or her name.<sup>63</sup> The procedure may be as simple as allowing a disqualified bidder to submit a letter responding to the disqualification within a specified number of days to a designated official (i.e., the chairman, manager, clerk, or purchasing agent), or it may be more formalized by providing the opportunity for a hearing before the board.

## Competitive Sealed Bids and Proposals

Two methods may be used to procure a public works construction contract: the competitive sealed bid method and the competitive sealed proposal method.<sup>64</sup>

1. *Bid method.* Under the bid method, the county issues an “invitation to bid” that explains the requirements of the project. The contract, if awarded, must be to the lowest responsible bidder who meets all of the requirements of the invitation to bid. Bids are valid for only 60 days unless otherwise agreed by the county and the bidder.<sup>65</sup> Under the bid method, the county may negotiate only with the lowest responsive, responsible bidder if all responsive bids exceed the county’s budget.<sup>6</sup>
2. *Proposal method.* The proposal method allows the county to select an offer based upon evaluation factors established in the request for proposal (RFP). In the RFP, the county must list all of the factors that will be used to pick the best proposal. The RFP must also assign a relative weight for each factor. Each responsive proposal is scored according to only those factors listed in the proposals. Once all of the proposals are scored, the relative weight of each factor is applied, and the firm with the best score wins. The scoring sheets must be used to evaluate firms and are subject to open records requirements once the project is awarded. Because price does not have to be an evaluation factor, counties are not restricted to hiring the firm that offers the lowest price. If the contract is awarded, it must be to the firm determined in writing to be most advantageous to the county based upon the factors specified in the RFP.<sup>67</sup> Proposals are valid for as long as specified in the RFP, but offerors not on the short list must be released after 60 days.<sup>68</sup> If specified in the RFP, the county may negotiate with those firms on the short list for purposes of obtaining a best and final offer under the proposal method.

## Construction Delivery Systems

Which competitive award method is used depends largely upon the type of construction delivery system the county selects for the project. In order to make an informed selection, county officials should have an understanding of the various construction delivery systems available.

- *Design-bid-build.* Under the traditional design-bid-build method, the county hires either an architect or engineer to design the project. Once the design is complete, the county hires a contractor to build the project. This method may take longer than some of the others, but it can provide the county more control over the design and construction of the project as well as a more accurate price. Additionally, counties receive the benefit of the architect watching for construction errors and the contractor watching for design errors.
- *Design-build.* Using the design-build method, the county hires one firm to be responsible for both design and construction. The firm may provide this service with in-house resources or may contract with another firm to provide the design and/or the construction portion of the contract. This method is faster because construction of the project begins before the design is complete. It may also result in a more efficient project because of the builder's input into the design phase. However, because the design team and the construction team are employed by the same firm, the county does not receive the same "watchdog" benefit that it receives in design-bid-build. Also, the county may not have as much control over either design or construction because of the additional layer between the county and the design and construction teams.
- *Construction manager or program manager.* Under this method, the county hires a firm to coordinate and supervise the project as well as to represent the county under both the construction manager (CM) method and the program/project manager methods. The county has a separate contract or contracts with either a general contractor or the trade contractors for construction. If the county utilizes the CM method, the firm performs the same services as the CM agency but is also responsible for construction of the project.
- *Fast track.* Under the fast-track method, design and construction occur at the same time. In fact, construction begins as soon as the first phase of design is completed, offering the advantage of quick project completion. However, this method requires a great deal of coordination to ensure that contract documents are complete and accurate and that nothing is overlooked.

### **Method of Competitive Award and Construction Delivery**

The bid method works very well with the traditional design-bid-build method. Because the project design is complete when it is time to select a builder, the only remaining factor in the decision is price. The proposal

method of competitive award works well with the design-build method and the fast-track method because price is not a required factor. Because design and construction of the project are integrated in the proposal method, the county needs some flexibility in selecting a firm. Innovativeness of proposal, timeliness of projected completion, and quality of past projects and key personnel designated for the project become more important factors in the decision. Also, until there is a final design, it is difficult to have an accurate total price for the project. Similarly, the proposal method works well for both the CM agency and the CM at risk. Because one of the major benefits of using CM is the coordination and supervision of the project, the quality of the firm generally becomes a more important factor in the decision to hire a construction manager than does the price.

### **Choosing a Construction Delivery System**

There is not one “best” construction delivery system because one method may be better suited than another to a particular project. It is very important to understand the various methods as well as their strengths and weaknesses before selecting a construction delivery system. A county governing authority should consider various basic questions when selecting a construction delivery method.

First, does the county governing authority have a clear idea of what the project will look like, or does it want a firm to provide some ideas on what should be included in the project? Design-bid-build works very well when the scope of the project is fairly well established.

Second, will the project need to be completed faster than an average construction schedule will allow? Fast track and design-build are good methods for rapid project completion. Third, does the county have personnel who can supervise and coordinate the project as well as prepare the contract documents? Program/project manager and CM agency work well when the county does not have the in-house resources to manage the project.

Finally, what level of control does the county governing authority want to have over the project? A county will have a greater level of control in the design-bid-build method than in some variations of design-build and CM agency.

### **Bond Requirements**

Bid, payment, and performance bonds protect the county when a contractor fails to meet his or her obligations. These bonds are required on all projects costing over \$100,000 that are subject to the public works con-

struction law, although a county may require contractors to submit them on any project.<sup>69</sup> Bid bonds protect the county if the selected bidder/offeror fails to execute the contract. The county will be able to collect the difference between the selected bid/proposal and the next highest bid/proposal, protecting the county financially if the selected bidder/offeror fails to execute a contract. Performance bonds provide the county with reimbursement if the builder/firm fails to complete the project according to the contract. Payment bonds protect the subcontractors and suppliers of the contractor. If the contractor fails to pay the subcontractors and suppliers who assisted in the project, the subcontractors and suppliers seek recovery against the payment bond, not the county.<sup>70</sup> However, if a county fails to obtain a payment bond on a contract that is over \$100,000, it may be held liable to pay the subcontractors or suppliers.<sup>71</sup>

### **Contractor's Oath**

Before beginning work on the project, a contractor must make an oath in writing stating that he or she has not directly or indirectly attempted to prevent competition in the procurement of the contract.<sup>72</sup> The local government official responsible for making payments to the contractor must file the oath. If the oath is false, the contract is void, and the local government is entitled to recover any monies paid to the contractor.

### **Penalties for Failure to Comply with Public Works Law**

Compliance with the public works law is mandatory.<sup>73</sup> Any public works contract that is subject to the law and that is entered into without properly using either the bid method or proposal method is invalid.<sup>74</sup> It is considered a misdemeanor for a county commissioner to receive or agree to receive any pay or profit, directly or indirectly, from a public works contract.<sup>75</sup> If the contractor knows that the local government failed to properly advertise the contract opportunity and/or use competitive sealed bids or proposals, the contractor is not entitled to payment for any of the work performed under the contract.<sup>76</sup>

## **ROAD CONSTRUCTION CONTRACTS**

When counties contract with private contractors to build or maintain a county road, the contract is subject to different requirements than those mandated by the Georgia Local Government Public Works Construction Law.

### **Projects Subject to the Law**

Contracts with private firms to build, rebuild, or maintain a road that costs \$20,000 or more must be let to the lowest bidder according to the requirements of state law.<sup>77</sup> Contracts with the state, a city, or another county are not subject to the bidding law.<sup>78</sup> If a county performs the road project itself, the purchase of materials, supplies, and equipment is not subject to the state bidding laws.<sup>79</sup> Professional services, such as engineering, are also not subject to the bidding law.<sup>80</sup> Additionally, projects necessitated by an emergency (i.e., bridge repairs, snow and ice removal, flood damage, etc.) are not subject to bidding requirements.<sup>81</sup>

### **Advertising the Proposed Project**

Road construction contract opportunities subject to the bidding law must be advertised in the legal organ or in any other newspaper that will ensure adequate publicity.<sup>82</sup> Unlike public works construction contracts, there is no provision for advertisement on the Internet. While a Web site could be used as a supplemental method of advertising a road construction contract opportunity, a local government must still advertise in the legal organ or other newspaper. The advertisement must run at least two times during the two weeks before the bid opening, with the first advertisement appearing two weeks before the bid opening. The second advertisement must appear one week after the first advertisement.<sup>83</sup> It must include a description of the project; the time allotted for performance; the terms and time of payment; the procedure for and costs of obtaining detailed plans and specifications; the amount of the proposal guaranty; the time and place for the submission and opening of bids; the right to reject any or all bids; and any bonds required other than performance and payment bonds (e.g., public liability and property damage bonds).<sup>84</sup>

### **Award of Contract**

Unlike public works construction projects, only one method—the bid method—can be used to obtain road construction projects. If the contract is awarded, it must be to the lowest reliable bidder.<sup>85</sup> However, the county may choose to reject any and all bids, re-advertise the project, perform the work in-house, or abandon the project.<sup>86</sup> Contracts must be approved by resolution of the board of commissioners, and the resolution must be entered into the minutes.<sup>87</sup> If the successful bidder fails to sign the contract or furnish the bonds, the contract may be re-advertised, performed in-house, or abandoned.<sup>88</sup>

### **Bond Requirements**

Bonds are required on road construction contracts to protect the county. With bids on all road construction contracts, regardless of the dollar amount, the bidders must submit a “proposal guaranty” (certified check or other security) payable to the county in an amount necessary to ensure that the successful bidder will execute the contract (except for contracts for engineering or other professional services only).<sup>89</sup> Similar to bid bonds for public works construction projects, proposal guaranties ensure that the successful bidder honors his or her bid. Failure to sign the contract or furnish the bonds by the successful bidder will result in forfeit of the proposal guaranty.<sup>90</sup> Proposal guaranties must be returned to a bidder if a written withdrawal of his or her bid is received before the scheduled bid opening.<sup>91</sup> When a contract is awarded, proposal guaranties must be returned to all bidders except the lowest reliable bidder.<sup>92</sup> If no contract is awarded within 30 days of the bid opening, then all bids and all proposal guaranties will be returned unless the county and the lowest reliable bidder agree to a longer period of time.<sup>93</sup>

On road construction contracts that are over \$5,000, the contractor must provide a performance bond in the amount of the bid for the faithful performance of the contract and to indemnify the county for any damages should the contractor fail to perform the contract on time.<sup>94</sup> On road construction contracts that are over \$5,000, the contractor must provide a payment bond in the same manner as for public works construction contracts.<sup>95</sup> If the county fails to obtain a required payment bond, it may be liable to any unpaid subcontractors, laborers, or materialmen.<sup>96</sup> In the case of construction or reconstruction to a bridge or the approach to a bridge, counties may require a contractor to provide a bond to keep the bridge in good condition for at least seven years.<sup>97</sup> The county will be liable for all injuries caused by a defective bridge for seven years if it fails to obtain a bridge-repair bond.<sup>98</sup> Counties may require additional bonds, such as public liability and property damage bonds so long as the project advertisement provided notice of the required additional bonds.<sup>99</sup>

### **Contractor’s Oath**

The successful bidder must execute a written oath stating that he or she has not unlawfully restricted competitive bidding on the project.<sup>100</sup>

### **TOLL ROAD CONTRACTS**

Counties may enter into contracts with private companies to finance, construct, maintain, improve, own, or operate private toll roads and bridges.<sup>101</sup>

## **TRANSIT CONTRACTS**

Counties may contract with transit agencies for transit services or transit facilities for up to 50 years.<sup>102</sup> If fares alone will not cover the cost, any tax increase levied to subsidize the transit service must be approved by the voters of the county before the county governing authority enters into such a contract.<sup>103</sup> The county governing authority and the governing authority of any affected city must adopt a transit service plan.<sup>104</sup>

## **PURCHASING**

### **Local Purchasing Requirements**

Very little state regulation exists for county purchasing other than procuring public works and road construction services. The majority of purchasing requirements are found in a county's local legislation and ordinances. Local legislation, sometimes referred to as enabling legislation, is adopted by the General Assembly and dictates what a county governing authority can and cannot do.<sup>105</sup> For instance, local legislation or a county ordinance may require that purchases that exceed a designated monetary amount must be made pursuant to legal advertisement and competitive bidding.<sup>106</sup> Often it is required that a minimum number of bids be obtained, that the bids be formal and sealed, and that they be kept on file.<sup>107</sup> Usually, purchases must be made from the lowest "responsive" and "responsible" bidder.<sup>108</sup> In some counties, purchases in excess of a specified amount must first be approved by the board of commissioners.<sup>109</sup> The law governing one county provides that purchases costing under \$15,000 may be made by the purchasing agent on the open market, but a purchase costing over \$15,000 may be made only after it has been advertised in the official county newspaper and has received the approval of the board of commissioners.<sup>110</sup> When making purchases, commissioners should examine their local legislation as well as their ordinances to avoid legal complications.

### **State Law Requirement for Purchases by Counties**

There are few requirements for county purchasing under state law. Counties must give preference "as far as may be reasonable and practicable" to items manufactured or produced in Georgia when buying supplies, materials, equipment, and agricultural products, unless giving such a preference will sacrifice quality.<sup>111</sup> For purchases over \$100,000, if submitted in writing by a bidder, the county must consider the multiplier effect on the gross state domestic product and the effect on public rev-

enues to purchase a Georgia-manufactured good rather than something produced out of state.<sup>112</sup>

Finally, it is a misdemeanor to purchase beef that was not raised and produced in the United States with county funds. Canned meats not available from a source within the United States and not processed in this country may be purchased without penalty.<sup>113</sup>

### **Purchasing Agreements**

Counties are specifically authorized by law to enter into certain purchasing agreements with other governments. For instance, counties may contract with the state and federal government to purchase or lease equipment, supplies, and property.<sup>114</sup> Counties may buy various supplies, materials, and equipment, including motor vehicles “off of the state contract,” through the Georgia Department of Administrative Services.<sup>115</sup> Georgia’s Correctional Industries Administration may sell items such as washing powders, insecticides, picnic tables, park benches, parking bumpers, and street signs and markers and other products manufactured by state inmates to counties.<sup>116</sup> Finally, counties may increase their buying power by joining other counties, cities, school districts, and other governmental jurisdictions to purchase various items.<sup>117</sup>

### **Conflicts of Interest**

To prevent private gain from public office, the county may not purchase from any county official, from any store in which the county official is an employee or is directly or indirectly interested, or from any person or partnership of which a county official is a member or by which he or she is employed unless such purchases are authorized by the governing authority or it is clearly apparent that the individual, partnership, or owner of the store will sell the goods or property as cheaply or more cheaply than they can be bought elsewhere.<sup>118</sup> A contract made in violation of this prohibition is illegal, and the official who commits the violation may be removed from office.<sup>119</sup> Additionally, it is a felony for any county official or employee to sell any real or personal property, directly or on behalf of a business entity, to the county or the school board unless the sale price is less than \$800 per calendar quarter or by competitive sealed bid.<sup>120</sup> However, in the case of real property, such action is not a felony if disclosure is made to the probate judge at least 15 days prior to the execution of the contract.<sup>121</sup> Although criminal charges might be avoided, such sales may be voided. The selling of services to the county is not included in the crime defined in this section of the code.<sup>122</sup> These

statutory provisions make it clear that any county official who sells to his or her county could have the contract invalidated and even face criminal charges.

County officials must avoid all situations in which their personal interests affect their public actions or come into conflict with them. When such situations occur, they should disqualify themselves from acting on such matters. It is of no consequence that there is only a potential conflict of interest, that there is no dishonesty or loss of public funds, or that the official is not influenced by the situation. For more information on ethics, see Chapter 6.

## SALE OF COUNTY PROPERTY

Georgia law specifies different requirements for selling real property generally than for selling real property used for roads.

### Sale of Real Property

Real property (other than roads) sold by the county must be awarded to the highest responsible bidder, either by sealed bids or at auction. The county commissioners cannot contract with an individual to purchase county-owned land—even if it is no longer needed by the county and the proposed buyer is willing to pay fair market value or higher.<sup>123</sup>

Notice of the sale must be published once in the legal organ or in a newspaper of general circulation in the county not less than 15 days or more than 60 days before the date of the auction or the last day for the receipt of proposals.<sup>124</sup> The notice must include a legal description of the property, conditions of the sale, and the date, time, and place of the bid opening or auction.<sup>125</sup> The commissioners may award the sale to the highest bidder or may reject all bidders.

The general requirements for sale of real property (other than roads) do not apply to certain types of sales of county property:

- *Tax deeds.* The sheriff or tax commissioner may sell property held by a county under a tax deed without using this procedure.<sup>126</sup>
- *Exchanges.* A county may exchange a parcel of real property so long as the other property is of equal or greater value than the property held by the county as determined by an appraisal.<sup>127</sup> However, within the six weeks before the closing of the exchange, the county must publish a notice of the proposed exchange in the legal organ once per week for four weeks.<sup>128</sup>

- *Unusable parcels.* Counties may sell small or odd-shaped parcels that cannot reasonably be used under applicable land-use controls to abutting property owners without going to auction or sealed bids, as long as all abutting property owners are given an opportunity to purchase the property.<sup>129</sup>
- *Property to schools.* Counties may sell, lease, or transfer real property to the local board of education or other public education institution for use as a public school or other educational purpose. This transfer may take place without advertisement, bidding, auction, notice, publication, or referendum, provided that the county governing authority holds a public hearing in the area where the affected property is located and at least one subsequent meeting to discuss comments expressed at the public hearing.<sup>130</sup>
- *Recreational set-asides to homeowners' associations.* If the county requires developers to set aside a certain amount of property in each new subdivision for recreational purposes, the county may negotiate a sale of those recreational set-asides to the homeowners' association so long as the recreational set-asides were conveyed to the county at no cost to the county.<sup>131</sup> However, the county must publish a notice of the sale in the legal organ once per week for four weeks.<sup>132</sup>
- *Property to the state.* The county may sell or grant property to the state or any state authority if it determines that the establishment of a state facility would be of benefit to the county by providing activities in an area in need of redevelopment, by enhancing employment activities, or by benefiting the county in other ways.<sup>133</sup>
- *Land to be developed as a lake.* If the county abandoned plans to develop or create a lake on at least 1,000 acres, it may sell the property back to the original owner for at least the price paid by the county or in the case of remnants of the original acquisition, at market value.<sup>134</sup> If the original owner does not purchase the property within 60 days' notice and if the county still desires to dispose of the property, it must do so using the regular requirements for selling real property explained earlier in this chapter.<sup>135</sup>

## Personal Property

Other public property (i.e., not real property) such as equipment and vehicles that becomes unserviceable may be disposed of by an order of the governing authority.<sup>136</sup>

## Sale of County Roads

A county may, in the public interest, abandon any public road or dispose of or lease property acquired for public road purposes if certain procedures are followed.<sup>137</sup> When property is no longer needed for road purposes,<sup>138</sup> the county must first contact the owner of the property who sold it to the county or his or her successors in title who own the abutting property.<sup>139</sup> The original owner or his or her successors may purchase the property at any price agreed upon so long as it is not less than the amount paid by the county.<sup>140</sup> If only remnants or portions of the property exist, they may be acquired at market value.<sup>141</sup> If the original owner or his or her successors do not exercise their option to purchase the property, it may be sold through one of three methods:

1. *Sealed bid.* The county may sell the former right-of-way property to the highest sealed bidder after advertising for bids.<sup>142</sup> The first advertisement must be at least two weeks before the bid opening, and the second advertisement must be at least one week after the first advertisement.<sup>143</sup> The advertisement must include a description of the property, the time and place to submit and open bids, the right to reject any and all bids, the conditions of the sale, and any other information that the county believes would be advisable in the public interest.<sup>144</sup>
2. *Real estate broker.* The county may list the former road property for sale through a licensed real estate broker who has a business located within the county.<sup>145</sup> If there are no real estate brokers in the county, then the county may use a broker located outside the county.<sup>146</sup> The county must publish the names of the real estate brokers listing property once per week for two weeks in the legal organ.<sup>147</sup> The property must be listed for a minimum of three months and may not be sold for less than fair market value.<sup>148</sup> The county governing authority must approve the sale at a regular meeting after providing opportunity for public comment.<sup>149</sup>
3. *Public auction.* The county may sell the property no longer needed for road purposes at public auction by a licensed auctioneer, provided that it not be sold for less than fair market value.<sup>150</sup> The county must publish in the legal organ once per week for the two weeks immediately preceding the auction a notice that includes a description of the property, the time and place to submit and open bids, a statement of the right to reject any and all bids, the

conditions of the sale, and any other information that the county believes would be advisable in the public interest.<sup>151</sup>

As can be seen from this chapter, it is essential that county officials and staff be aware of the restrictions imposed by state law on the ability of counties to enter into contracts as well as the varying requirements established for different types of county purchases or sales.

## NOTES

1. *Stephenson v. Board of Commissioners of Cobb County*, 261 Ga. 399 (1991).
2. *Board of Commissioners of Spalding County v. Stewart*, 284 Ga. 573 (2008) (sheriff had authority to enter into contract for inmate medical care); OFFICIAL CODE OF GEORGIA ANNOTATED (O.C.G.A.) §15-16-13(a) (sheriff is authorized to contract with cities to provide law enforcement services subject to the written consent of the board of commissioners); O.C.G.A. §42-4-9 (the “keeper of a county jail” may house federal prisoners in the jail with the consent of the board of commissioners); O.C.G.A. §15-6-96 (clerk of superior court may enter into a contract to distribute, sell, or market records or computer-generated data from the office; a monthly report of any such contracts as well as the revenues received must be submitted to the board of commissioners); O.C.G.A. §15-6-61(a)(18) (clerk of superior court may participate in agreements necessary to file and transmit civil case filing and disposition forms to the Superior Court Clerks’ Cooperative Authority); O.C.G.A. §48-5-359.1(a) (county’s contract with any city located within the county to prepare the tax digest, assess, and collect taxes for the city must also be approved by tax commissioner); *ibid.* (tax commissioner may contract to receive additional compensation from the city for collection of city taxes); O.C.G.A. §48-5-147 (in counties where the tax commissioner receives tax payments for both the county and city or receives mailed tax payments for the county, the tax commissioner may enter into a contract for a lock box system with a bank to receive, process, and deposit mailed tax returns and payments); O.C.G.A. §42-8-100(g)(1) (authorizes the probate judge or the chief magistrate judge to enter into a contract with a private probation company to provide probation supervision so long as the contract is approved by the board of commissioners); O.C.G.A. §§15-10-150, 15-10-151 (the board of commissioners and city council of a city located within the county may enter into an agreement, which must be approved by the chief magistrate judge, for the magistrate court to provide municipal court services to the city).
3. See title 13 of O.C.G.A.; O.C.G.A. §36-10-91.
4. O.C.G.A. §36-10-1. See *Board of Commissioners of Spalding County v. Stewart*, 284 Ga. 573 (2008) (contract by sheriff did not have to be on the minutes); *Smith v. Murrath Enterprises, Inc.*, 243 Ga. App. 856 (2000); *Cherokee County v. Hause*, 229 Ga. App. 578 (1997); *Smith v. Gwinnett County*, 182 Ga. App. 875 (1987); *Commercial Credit Corp. v. Mason*, 151 Ga. App. 443 (1979); *Lasky v. Fulton County*, 145 Ga. App. 120 (1978); *DeKalb County v. Scruggs*, 147 Ga. App. 711 (1978); *Hatcher v. Hancock County Commissioners of Roads and Revenues*, 239 Ga. 229 (1977). See also *Murray County v. Pickering*, 42 Ga. App. 739 (1931); *Graham v. Beacham*, 189 Ga. 304 (1939); *City of Atlanta v. North by Northwest Civic Association*, 262 Ga. 531 (1992).

5. *Madden v. Bellew*, 260 Ga. 530 (1990); compare with *Twiggs County v. Oconee Electric Membership Corporation*, 245 Ga. App. 231 (2000) (county could not claim that its actions were illegal and *ultra vires* because there was no written contract two years after making payments).
6. O.C.G.A. §36-10-1. See *Board of Commissioners of Spalding County v. Stewart*, 284 Ga. 573 (2008) (contract by sheriff did not have to be on the minutes); *Smith v. Murrath Enterprises, Inc.*, 243 Ga. App. 856 (2000); *Cherokee County v. Hause*, 229 Ga. App. 578 (1997); *Smith v. Gwinnett County*, 182 Ga. App. 875 (1987); *Commercial Credit Corp. v. Mason*, 151 Ga. App. 443 (1979); *Lasky v. Fulton County*, 145 Ga. App. 120 (1978); *DeKalb County v. Scruggs*, 147 Ga. App. 711 (1978); *Hatcher v. Hancock County Commissioners of Roads and Revenues*, 239 Ga. 229 (1977). See also *Murray County v. Pickering*, 42 Ga. App. 739 (1931); *Graham v. Beacham*, 189 Ga. 304 (1939); *City of Atlanta v. North by Northwest Civic Association*, 262 Ga. 531 (1992).
7. *Lester Witte and Company v. Rabun County*, 245 Ga. 382 (1980). See *John D. Stephens, Inc. v. Gwinnett County*, 175 Ga. App. 379 (1985).
8. *Hatcher v. Hancock County Commissioners of Roads and Revenues*, 239 Ga. 229 (1977); *Malcom v. Fulton County*, 209 Ga. 392 (1952). There is no time limit as to when a county contract must be entered into the minutes. See also *Burke v. Wheeler County*, 54 Ga. App. 81 (1936) and *Wagener v. Forsyth County*, 135 Ga. 162 (1910). In both cases, the contract was entered into the minutes after completion of the work.
9. *Harden v. Clarke County Board of Education*, 279 Ga. App. 513 (2006); *PMS Construction Company, Inc. v. DeKalb County*, 243 Ga. 870 (1979); *DeKalb County v. Scruggs*, 147 Ga. App. 711 (1978); *Neely v. Richmond County*, 161 Ga. App. 71 (1982); *Cherokee County v. Hause*, 229 Ga. App. 578 (1997); *Barge and Company, Inc. v. City of Atlanta*, 161 Ga. App. 675 (1982).
10. *PMS Construction Company, Inc. v. DeKalb County*, 243 Ga. 870 (1979); *DeKalb County v. PMS Construction Company, Inc.*, 151 Ga. App. 63 (1979); *Barge and Company, Inc. v. City of Atlanta*, 161 Ga. App. 675 (1982).
11. See O.C.G.A. §36-30-3(a); *Madden v. Bellew*, 260 Ga. 530 (1990); *Ledbetter Bros. v. Floyd County*, 237 Ga. 22 (1976); *Brennan v. Chatham County Commissioners*, 209 Ga. App. 177 (1993); *International Brotherhood of Police Officers Local #471 v. Chatham County*, 232 Ga. App. 507 (1998).
12. See *Jonesboro Area Athletic Association, Inc. v. Dickson*, 227 Ga. 513 (1971).
13. See *City of Atlanta v. Brinderson Corp.*, 799 F.2d 1541 (11th Cir. 1986) (prohibition does not apply to construction contracts that typically extend beyond the term of the officer entering into the contract on behalf of the local government).
14. O.C.G.A. §36-60-13(a).
15. O.C.G.A. §36-60-13(a)(1).
16. O.C.G.A. §36-60-13(a)(3).
17. O.C.G.A. §36-60-13(a)(4).
18. O.C.G.A. §36-60-15.
19. GA. CONST. art. IX, §5, ¶1; O.C.G.A. §36-60-13(e).
20. O.C.G.A. §36-60-13(f).
21. O.C.G.A. §36-60-13(g).
22. O.C.G.A. §36-60-13(h)(1)(A).

23. O.C.G.A. §36-60-13(h)(1)(B).
24. O.C.G.A. §36-60-13(h)(2).
25. O.C.G.A. §36-60-13(b)(1).
26. O.C.G.A. §36-60-13(d).
27. O.C.G.A. §36-60-21(c).
28. O.C.G.A. §36-60-15.1.
29. O.C.G.A. §36-91-1 et seq.
30. GA. CONST. art. IX, §3, ¶1.
31. *Ibid.*
32. *Ibid.*
33. GA. CONST. art. IX, §2, ¶3; O.C.G.A. §§32-4-60, 36-13-4.
34. GA. CONST. art. IX, §2, ¶3(b)(1).
35. O.C.G.A. §36-60-2.
36. O.C.G.A. §45-18-5.
37. O.C.G.A. §52-2-9(15).
38. GA. CONST. art. IX, §4, ¶4.
39. O.C.G.A. §36-73-1 et seq.
40. O.C.G.A. §36-87-2.
41. O.C.G.A. §36-91-1 et seq.; *A Guidebook to Local Government Construction Projects* (Atlanta: ACCG, 2010).
42. O.C.G.A. §36-91-2(10).
43. See O.C.G.A. §36-91-20(c).
44. O.C.G.A. §36-91-22.
45. See O.C.G.A. §§32-4-60 et seq., 36-91-22(f).
46. O.C.G.A. §36-91-22(a); *Griffin Bros., Inc. v. Town of Alto*, 280 Ga. App. 176 (2006).
47. O.C.G.A. §36-91-22(a).
48. O.C.G.A. §36-91-22(g).
49. See O.C.G.A. §36-91-20(c).
50. O.C.G.A. §36-91-22(e); *Jacks v. City of Atlanta*, 284 Ga. App. 200 (2007), *cert. denied*, 2007 Ga. LEXIS 500 (Ga. 2007) (park project not considered an emergency subject to the exception).
51. O.C.G.A. §36-91-22(b).
52. O.C.G.A. §36-91-22(d).
53. O.C.G.A. §36-91-20(b).
54. O.C.G.A. §36-91-20(b)(1).
55. O.C.G.A. §36-91-20(b)(3).
56. O.C.G.A. §36-91-20(b)(2).
57. *Dyer v. Erwin*, 106 Ga. 845 (1899).
58. *Bird v. Franklin*, 151 Ga. 4 (1921).
59. *Ibid.*
60. *Pilcher v. English*, 133 Ga. 496 (1909).

61. Manley Building Co. v. Newton, 114 Ga. 245 (1901); Glynn County v. Teal, 256 Ga. 174 (1986).
62. O.C.G.A. §36-91-20(f).
63. See also Ruby-Collins, Inc. v. Cobb County, 237 Ga. App. 517 (1999).
64. See O.C.G.A. §§36-91-2(3), 36-91-2(4), 36-91-20(c), 36-91-21(b), 36-91-21(c).
65. O.C.G.A. §36-91-50(b).
66. O.C.G.A. §36-91-21(b)(4).
67. See O.C.G.A. §36-91-21(c)(2).
68. See O.C.G.A. §36-91-50(c).
69. O.C.G.A. §§36-91-50(a), 36-91-70, 36-91-90.
70. McArthur Elec., Inc. v. Cobb County School District, 281 Ga. 773 (2007).
71. O.C.G.A. §36-91-91; see Sims Crane Service, Inc. v. Reliance Insurance Company, 514 F.Supp 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982).
72. O.C.G.A. §36-91-21(e).
73. Bird v. Franklin, 151 Ga. 4 (1921).
74. O.C.G.A. §§36-91-21(a), 36-91-21(g).
75. O.C.G.A. §36-91-21(f).
76. O.C.G.A. §36-91-21(a).
77. O.C.G.A. §32-4-63(1).
78. O.C.G.A. §32-4-63(2).
79. O.C.G.A. §32-4-63(3).
80. O.C.G.A. §32-4-63(5).
81. O.C.G.A. §32-4-63(6).
82. O.C.G.A. §32-4-65(a).
83. *Ibid.*
84. O.C.G.A. §§32-4-65(b), 32-4-69(3).
85. O.C.G.A. §32-4-68.
86. *Ibid.*
87. O.C.G.A. §32-4-61.
88. O.C.G.A. §32-4-72.
89. O.C.G.A. §32-4-67(a).
90. O.C.G.A. §32-4-72.
91. O.C.G.A. §32-4-67(b).
92. *Ibid.*
93. *Ibid.*
94. O.C.G.A. §32-4-69(1).
95. O.C.G.A. §32-4-69(2).
96. O.C.G.A. §32-4-71(a).
97. O.C.G.A. §32-4-70.
98. O.C.G.A. §32-4-71(b).
99. O.C.G.A. §32-4-69(3).

100. O.C.G.A. §§32-4-73, 36-91-21(e).
101. O.C.G.A. §36-60-21.
102. O.C.G.A. §32-9-11(b).
103. *Ibid.*
104. O.C.G.A. §32-9-11.
105. An index of current local legislation for a particular county may be found in Volume 42 of O.C.G.A. The actual text may be found in Georgia Laws, which is published after each session of the General Assembly.
106. For examples of counties with this requirement, see Ga. Laws 1988, 4877; 1984, 5318; 1983, 4757; 1980, 3809.
107. For examples of counties with this requirement, see Ga. Laws 1988, 4633; 1983, 4757.
108. For examples of counties with these requirements, see Ga. Laws 1992, 7064; 1988, 4877; 1988, 4633.
109. For examples of counties with this requirement, see Ga. Laws 1986, 5668; 1982, 5166.
110. For examples of counties with this requirement, see Ga. Laws 1986, 5668.
111. O.C.G.A. §§36-84-1(b), 50-5-61.
112. O.C.G.A. §36-84-1(c).
113. O.C.G.A. §50-5-81.
114. O.C.G.A. §50-16-81. Counties may enter into certain purchasing agreements with other governments without public advertising for bids, posting notices of expenditures, inviting or receiving competitive bids, or requiring delivery of procedures before payment. This statute does not affect contracting or purchasing requirements set out in general or special laws concerning other types of purchases.
115. O.C.G.A. §§50-5-100-50-5-103, 50-5-143.
116. O.C.G.A. §42-10-4(12).
117. GA. CONST. art. IX, §3, ¶1.
118. O.C.G.A. §36-1-14(a); *Dalton Rock Product Company v. Fannin County*, 136 Ga. App. 649 (1975).
119. O.C.G.A. §36-1-14(b).
120. O.C.G.A. §16-10-6.
121. *Ibid.*
122. *Ibid.*; *Defoor v. State*, 233 Ga. 190 (1974).
123. O.C.G.A. §36-9-3(a)(1).
124. *Ibid.*
125. *Ibid.*
126. O.C.G.A. §36-9-3(a)(2)(A).
127. O.C.G.A. §36-9-3(a)(2)(D).
128. *Ibid.*
129. O.C.G.A. §36-9-3(h).
130. O.C.G.A. §36-9-3(c).

131. O.C.G.A. §36-9-3(e).
132. *Ibid.*
133. O.C.G.A. §36-9-3(f).
134. O.C.G.A. §36-9-3(g).
135. O.C.G.A. §36-9-3(g)(5).
136. O.C.G.A. §36-9-2.
137. O.C.G.A tit. 32, ch. 7; *McIntosh County v. Fisher*, 242 Ga. 66 (1978).
138. O.C.G.A. §32-7-3.
139. O.C.G.A. §32-7-4(a)(1).
140. O.C.G.A. §32-7-4(a)(2).
141. *Ibid.*
142. O.C.G.A. §32-7-4(b)(1)(A).
143. O.C.G.A. §32-7-4(b)(1)(B).
144. *Ibid.*
145. O.C.G.A. §32-7-4(b)(2)(A).
146. *Ibid.*
147. O.C.G.A. §32-7-4(b)(2)(B).
148. O.C.G.A. §32-7-4(b)(2)(A).
149. *Ibid.*
150. O.C.G.A. §32-7-4(b)(3)(A).
151. O.C.G.A. §32-7-4(b)(3)(B).