



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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September 23, 2019

John Maddrey
NC Department of Administration
Sent via email only to: John.Maddrey@doa.nc.gov

Re: Objection to Rule 01 NCAC 05B .1520

Dear Mr. Maddrey:

At its meeting on September 19, 2019, the Rules Review Commission objected to the above-captioned Rule in accordance with G.S. 150B-21.10 for lack of statutory authority and ambiguity.

The Commission objected to this Rule for lack of statutory authority as none of the cited authority in the history note of this Rule provides the Department authority to promulgate rules regarding the “debarment” of a vendor as eligibility and ineligibility requirements for vendors are specifically set forth in Statute. Specifically, G.S. 143-59.1 and 143-59.2 address eligibility of vendors. G.S. 143-59.1 sets forth eligibility requirements for foreign vendors. G.S.143-59.2 indicates when vendors are prohibited from contracting with the State. Because none of the cited authority in the History Note of this Rule gives specific authority regarding debarment or eligibility requirements of vendors, the Commission determined that the agency does not have the authority to create additional grounds for debarment and ineligibility beyond the circumstances set forth in Statute.

Additionally, the Commission objected to this Rule for ambiguity. Specifically, Paragraph (a) of this Rule states that the “SPO may debar the vendor from receiving an award under a State Contract or conducting further business with the State for up to a one year term in accordance with this Rule.” However, while this Rule does provide circumstances upon which this determination may be applicable, this Rule does not provide factors that the SPO is to use in determining whether and for how long a Vendor will be debarred.

Further, it is unclear in Subparagraph (b)(1) what “deliberate failure without good cause” means and how it is to be determined.

Administration 919/431-3000 fax:919/431-3100	Rules Division 919/431-3000 fax: 919/431-3104	Judges and Assistants 919/431-3000 fax: 919/431-3100	Clerk’s Office 919/431-3000 fax: 919/431-3100	Rules Review Commission 919/431-3000 fax: 919/431-3104	Civil Rights Division 919/431-3036 fax: 919/431-3103
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Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please let me know.

Sincerely,



Amber C. May
Commission Counsel

cc: Shanon Gerger

RRC STAFF OPINION

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .1520

RECOMMENDED ACTION:

- Approve, but note staff’s comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff is recommending objection to this Rule for lack of statutory authority and ambiguity.

Staff believes that as written, the agency lacks statutory authority for Paragraphs (a), (b), and (c) of this Rule. This Rule applies to the debarment of vendors from State Contracts. It is Staff’s understanding that this “debarment” will make a vendor ineligible “from receiving an award under a State Contract or conducting future business with the State” for up to one year. Further, Paragraph (c) indicates that the “SPO may remove the Vendor from any distribution lists for up to one year.” Staff does not believe that the agency has the authority to promulgate rules regarding the “debarment” of a vendor as eligibility and ineligibility requirements for vendors are specifically set forth in Statute. Specifically, G.S. 143-59.1 and 143-59.2 address eligibility of vendors. G.S. 143-59.1 sets forth eligibility requirements for foreign vendors. G.S.143-59.2 indicates when vendors are prohibited from contracting with the State.

In addition to rulemaking authority pursuant to G.S. 143-49, 143-52, 143-53, and 143-60, the agency has provided as authority G.S. 143-746 and 147-64.6. G.S. 143-746 addresses audits by an internal auditor of a State agency. As applied to this Rule, Staff believes this would be the purchasing agency. G.S. 147-64.6(c)(21) addresses audits by the State Auditor’s office. Both 143-746 and 147-64.6 provide that if an audit “results in a finding that a private person or entity has received public funds as a result of fraud, misrepresentation, or other deceptive acts or practices while doing business” with the State, the auditor is required to send a written report of its findings to the SPO. The report “may include a recommendation that the private person or entity be debarred”; however,

there is no other authority cited that provides this agency authority regarding debarment and eligibility. Essentially there appears to be a gap between these Statutes and the authority of the agency to debar or determine eligibility of vendors. Even if these Statutes provide authority to the SPO regarding debarment, Staff believes that it would be limited to circumstances where an auditor makes this recommendation to the SPO following an audit. As written, this Rule goes well beyond these limited statutory circumstances.

Because none of the cited authority in the History Note of this Rule gives specific authority to the SPO regarding debarment or eligibility requirements of vendors, Staff does not believe that the agency has the authority to create additional grounds for debarment and ineligibility beyond the circumstances set forth in Statute.

Additionally, Staff is recommending objection to this Rule for ambiguity. Paragraph (a) of this Rule states that the “SPO may debar the vendor from receiving an award under a State Contract or conducting further business with the State for up to a one year term in accordance with this Rule.” However, while this Rule does provide circumstances upon which this determination may be applicable, this Rule does not provide factors that the SPO will use in determining whether and for how long a Vendor will be debarred.

Further, it is unclear in Subparagraph (b)(1) what “deliberate failure without good cause” means and how it will be determined.

§ 143-49. Powers and duties of Secretary.

The Secretary of Administration has the power and authority, and it is the Secretary's duty, subject to the provisions of this Article:

- (1) To canvass sources of supply, including sources of goods with recycled content, and to purchase or to contract for the purchase, lease and lease-purchase of all goods required by the State government, or any of its departments, institutions or agencies under competitive bidding or other suitable means authorized by the Secretary including, without limitation, negotiations, reverse auctions, a best value procurement method such as that defined in G.S. 143-135.9(a)(1), and the solicitation, offer, and acceptance of electronic bids. For purposes of this Article, the term "goods" includes, without limitation, all commodities, supplies, materials, equipment, and other tangible personal property.
- (2) To establish and enforce specifications which shall apply to all goods and services to be purchased or leased for the use of the State government or any of its departments, institutions or agencies.
- (3) To purchase or to contract for, by sealed, competitive bidding or other suitable means authorized by the Secretary including, without limitation, negotiations, reverse auctions, a best value procurement method such as that defined in G.S. 143-135.9(a)(1), and the solicitation, offer, and acceptance of electronic bids, all services of the State government, or any of its departments, institutions, or agencies; or to authorize any department, institution or agency to purchase or contract for such services.
- (3a) To notify the Attorney General of pending contracts for contractual services exceeding a cost of five million dollars (\$5,000,000) and that are not otherwise excepted by this subdivision. Upon notification, the Attorney General shall assign a representative from within the office of the Attorney General, the Contract Management Section of the Division of Purchase and Contract, Department of Administration, or other qualified counsel to assist in negotiation for the award of the contract. It is the duty of the representative to assist and advise in obtaining the most favorable contract for the State, to evaluate all proposals available from prospective contractors for that purpose, to interpret proposed contract terms and to advise the Secretary or his representatives of the liabilities of the State and validity of the contract to be awarded. An attorney from within the office of the Attorney General shall review all contracts and drafts of contracts, and the office shall retain copies for a period of three years following the termination of the contracts. The term "contractual services" as used in this subsection and G.S. 143-52.2 means work performed by an independent contractor requiring specialized knowledge, experience, expertise or similar capabilities wherein the service rendered does not consist primarily of acquisition by this State of equipment or materials and the rental of equipment, materials and supplies. This subdivision does not apply to contracts entered into or to be entered into as a result of a competitive bidding process. In order to be valid, any contract for services reviewed pursuant to this subdivision must include the signature and title of the attorney designated from within the office of the Attorney General to review the contract. If the contract commences without the required signature, the State has the right to terminate the contract, and the other party or parties to the contract shall only be entitled to the value of all services provided to the State prior to the termination. The Secretary is not required to

notify the Attorney General for the appointment of a representative for any contracts for contractual services to be entered into by the constituent institutions of The University of North Carolina pursuant to G.S. 114-8.3(b), or for contracts to be entered into by the Department of Treasurer pursuant to G.S. 114-8.3(b1), unless requested to do so by the General Counsel of The University of North Carolina or the General Counsel of the Department of State Treasurer, respectively.

- (4) To have general supervision of all storerooms and stores operated by the State government, or any of its departments, institutions or agencies and to have supervision of inventories of all tangible personal property belonging to the State government, or any of its departments, institutions or agencies. The duties imposed by this subdivision shall not relieve any department, institution or agency of the State government from accountability for equipment, materials, supplies and tangible personal property under its control.
- (5) To make provision for or to contract for all State printing, including all printing, binding, paper stock, recycled paper stock, supplies, and supplies with recycled content, or materials in connection with the same.
- (6) To make available to nonprofit corporations operating charitable hospitals, to local nonprofit community sheltered workshops or centers that meet standards established by the Division of Vocational Rehabilitation of the Department of Health and Human Services, to private nonprofit agencies licensed or approved by the Department of Health and Human Services as child placing agencies, residential child-care facilities, private nonprofit rural, community, and migrant health centers designated by the Office of Rural Health and Resource Development, to private higher education institutions that are described as nonprofit postsecondary educational institutions in G.S. 116-280 and to counties, cities, towns, local school administrative units, governmental entities and other subdivisions of the State and public agencies thereof in the expenditure of public funds, the services of the Department of Administration in the purchase of goods and services under such rules, regulations and procedures as the Secretary of Administration may adopt. In adopting rules and regulations any or all provisions of this Article may be made applicable to such purchases and contracts made through the Department of Administration, and in addition the rules and regulations shall contain a requirement that payment for all such purchases be made in accordance with the terms of the contract.
- (7) To evaluate the nonprofit qualifications and capabilities of qualified work centers to manufacture commodities or perform services.
- (8) To establish and maintain a procurement card program for use by State agencies, community colleges, and nonexempted constituent institutions of The University of North Carolina. The Secretary of Administration may adopt temporary rules for the implementation and operation of the program in accordance with the payment policies of the State Controller, after consultation with the Department of Information Technology. These rules would include the establishment of appropriate order limits that leverage the cost savings and efficiencies of the procurement card program in conjunction with the fullest possible use of the North Carolina E-Procurement Service. Prior to implementing the program, the Secretary shall consult with the State Controller, the UNC System Office, the Community Colleges System Office, the State Auditor, the Department of Public Instruction, a representative

chosen by the local school administrative units, and the Department of Information Technology. The Secretary may periodically adjust the order limit authorized in this section after consulting with the State Controller, the UNC System Office, the Community Colleges System Office, the Department of Public Instruction, and the Department of Information Technology.

- (9) To include a standard clause in all contracts awarded by the State and departments, agencies, and institutions of the State, providing that the State Auditor and internal auditors of the affected department, agency, or institution may audit the records of the contractor during and after the term of the contract to verify accounts and data affecting fees or performance.
- (10) To monitor and enforce the terms and conditions of statewide term contracts. The Secretary of Administration shall not delegate the power and authority granted under this subdivision to any other department, agency, or institution of the State.
- (11) To develop rules, regulations, and procedures specifying the manner in which departments, agencies, and institutions of the State shall monitor and enforce agency term and non-term contracts.
- (12) To consult with the Attorney General or the Attorney General's designee in developing rules, regulations, and procedures providing for the orderly and efficient submission of proposed contracts to the Attorney General for review as provided in G.S. 114-8.3 and G.S. 143-52.2.
- (13) Repealed by Session Laws 2013-234, s. 2, effective October 1, 2013, and applicable to contracts entered into on or after that date.
- (14) To work in conjunction with the Office of State Human Resources to create a Contracting Specialist career path to provide for the designation of one or more employees within each department, agency, or institution of the State to serve as the Contracting Specialist for the department, agency, or institution. Employees on the Contracting Specialist career path shall receive training and guidance as to the provisions of this Article.
- (15) To work in conjunction with the Office of State Human Resources, the Division of Purchase and Contract, and the University of North Carolina School of Government to develop a rigorous contract management training and certification program for State employees. Certification in the contract management training program is mandatory for all State employees who are responsible for awarding contracts or monitoring contract compliance. The program shall be administered by the Office of State Human Resources.
- (16) To work in conjunction with the University of North Carolina School of Government to study and recommend improvements to State procurement laws, including the feasibility of adopting the provisions of the American Bar Association Model Procurement Code. The recommendations shall be reported by the Secretary to the Joint Legislative Commission on Governmental Operations and the Program Evaluation Division by June 30, 2014.
- (17) To establish procedures to permit State government, or any of its departments, institutions, or agencies, to join with any federal, State, or local government agency, entity, or subdivision, or any nonprofit organization in cooperative purchasing plans, projects, arrangements, or agreements if the interest of the State would be served thereby. (1931, c. 261, s. 2; 1951, c. 3, s. 1; c. 1127, s. 1; 1957, c. 269, s. 3; 1961, c. 310; 1971, c. 587, s. 1; 1975, c. 580; c. 879, s. 46; 1977, c. 733; 1979, c. 759, s. 1; 1983, c. 717, ss. 60, 62; 1985 (Reg. Sess.,

1986), c. 955, ss. 79-82; 1989, c. 408; 1991, c. 358, s. 1; 1993, c. 256, s. 1; 1995, c. 265, ss. 1, 5; 1996, 2nd Ex. Sess., c. 18, s. 24.17; 1997-443, s. 11A.118(a); 1999-20, s. 1; 2000-67, s. 10.9(a); 2001-424, s. 15.6(a); 2001-424, s. 15.6(d); 2001-513, s. 28(b); 2003-147, s. 8; 2004-203, s. 72(b); 2005-213, s. 2; 2006-203, s. 82; 2010-194, s. 21; 2011-145, s. 9.18(h); 2011-326, s. 15(w); 2011-338, s. 1; 2013-234, s. 2; 2013-382, s. 9.1(c); 2015-241, s. 7A.4(p); 2017-102, s. 42.1; 2018-5, s. 31.1(a); 2018-12, s. 16.)

§ 143-52. Competitive bidding procedure; consolidation of estimates by Secretary; bids; awarding of contracts; cost plus percentage of cost contracts strictly prohibited.

(a) The Secretary of Administration shall compile and consolidate all estimates of goods and services needed and required by State departments, institutions and agencies to determine the total requirements of any given commodity. Where the total requirements will involve an expenditure in excess of the expenditure benchmark established under the provisions of G.S. 143-53.1 and where the competitive bidding procedure is employed as hereinafter provided, sealed bids shall be solicited by advertisement in a newspaper widely distributed in this State or through electronic means, or both, as determined by the Secretary to be most advantageous, at least once and at least 10 days prior to the date designated for opening. Except as otherwise provided under this Article, contracts for the purchase of goods and services shall be based on competitive bids and suitable means authorized by the Secretary as provided in G.S. 143-49. The acceptance of bid(s) most advantageous to the State shall be determined upon consideration of the following criteria: prices offered; best value, as the term is defined in G.S. 143-135.9(a)(1); the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record. Competitive bids on contracts shall be received in accordance with rules and regulations to be adopted by the Secretary of Administration, which rules and regulations shall prescribe for the manner, time and place for proper advertisement for such bids, the time and place when bids will be received, the articles for which such bids are to be submitted and the specifications prescribed for the articles, the number of the articles desired or the duration of the proposed contract, and the amount, if any, of bonds or certified checks to accompany the bids. Bids shall be publicly opened. Any and all bids received may be rejected. Each and every bid conforming to the terms of the invitation, together with the name of the bidder, shall be tabulated and that tabulation shall become public record in accordance with the rules adopted by the Secretary. All contract information shall be made a matter of public record after the award of contract. Provided, that trade secrets, test data and similar proprietary information may remain confidential. A bond for the faithful performance of any contract may be required of the successful bidder at bidder's expense and in the discretion of the Secretary of Administration. When the dollar value of a contract for the purchase, lease, or lease/purchase of goods exceeds the benchmark established by G.S. 143-53.1, the contract shall be reviewed by the State Purchasing Officer pursuant to G.S. 143-52.1 prior to the contract being awarded. After contracts have been awarded, the Secretary of Administration shall certify to the departments, institutions and agencies of the State government the sources of supply and the contract price of the goods so contracted for.

(b) Expired.

(c) Neither the Department of Administration nor any department, agency, or institution of the State may award a cost plus percentage of cost contract for any purpose, except as provided in G.S. 18C-150. (1931, c. 261, s. 5; 1933, c. 441, s. 1; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, ss. 2, 3; 1983, c. 717, s. 61; 1985 (Reg. Sess., 1986), c. 955, ss. 83-86; 1989 (Reg. Sess., 1990), c. 936, s. 3(a); 1997-412, s. 2; 1999-434, s. 12; 2006-203, s. 83; 2009-475, s. 1; 2010-194, s. 22; 2011-338, s. 3; 2013-234, s. 8.)

§ 143-53. Rules.

- (a) The Secretary of Administration may adopt rules governing the following:
- (1) Prescribing the routine and procedures to be followed in canvassing bids and awarding contracts, and for reviewing decisions made pursuant thereto, and the decision of the reviewing body shall be the final administrative review. The Division of Purchase and Contract shall review and decide a protest on a contract valued at twenty-five thousand dollars (\$25,000) or more. The Secretary shall adopt rules or criteria governing the review of and decision on a protest on a contract of less than twenty-five thousand dollars (\$25,000) by the agency that awarded the contract.
 - (2) **(See Editor's note)** Prescribing the routine, including consistent contract language, for securing bids on items that do not exceed the bid value benchmark established under the provisions of G.S. 143-53.1, 115D-58.14, or 116-31.10. The bid value benchmark for securing offers for each State department, institution, and agency established under the provisions of G.S. 143-53.1 shall be determined by the Director of the Division of Purchase and Contract following the Director's consultation with the State Budget Officer and the State Auditor. The Director for the Division of Purchase and Contract may set or lower the benchmark, or raise the benchmark upon written request by the agency, after consideration of their overall capabilities, including staff resources, purchasing compliance reviews, and audit reports of the individual agency. The routine prescribed by the Secretary shall include contract award protest procedures and consistent requirements for advertising of solicitations for securing offers issued by State departments, institutions, universities (including the special responsibility constituent institutions of The University of North Carolina), agencies, community colleges, and the public school administrative units.
 - (3) Repealed by Session Laws 2011-338, s. 4, effective July 1, 2011.
 - (4) Prescribing items and quantities, and conditions and procedures, governing the acquisition of goods and services which may be delegated to departments, institutions and agencies, notwithstanding any other provisions of this Article.
 - (5) Prescribing conditions under which purchases and contracts for the purchase, installment or lease-purchase, rental or lease of goods and services may be entered into by means other than competitive bidding, including, but not limited to, negotiation, reverse auctions, and acceptance of electronic bids. Notwithstanding the provisions of subsections (a) and (b) of this section, any waiver of competition for the purchase, rental, or lease of goods and services is subject to prior review by the Secretary, if the expenditure exceeds ten thousand dollars (\$10,000). The Division may levy a fee, not to exceed one dollar (\$1.00), for review of each waiver application.
 - (6) Prescribing conditions under which partial, progressive and multiple awards may be made.
 - (7) Prescribing conditions and procedures governing the purchase of used goods.
 - (8) Providing conditions under which bids may be rejected in whole or in part.
 - (9) Prescribing conditions under which information submitted by bidders or suppliers may be considered proprietary or confidential.

- (10) Prescribing procedures for making purchases under programs involving participation by two or more levels or agencies of government, or otherwise with funds other than State-appropriated.
- (11) Prescribing procedures to encourage the purchase of North Carolina farm products, and products of North Carolina manufacturing enterprises.
- (12) Repealed by Session Laws 1987, c. 827, s. 216.

(b) In adopting the rules authorized by subsection (a) of this section, the Secretary shall include special provisions for the purchase of goods and services, which provisions are necessary to meet the documented training, work, or independent living needs of persons with disabilities according to the requirements of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act, as amended. The Secretary may consult with other agencies having expertise in meeting the needs of individuals with disabilities in developing these provisions. These special provisions shall establish purchasing procedures that:

- (1) Provide for the involvement of the individual in the choice of particular goods, service providers, and in the methods used to provide the goods and services;
- (2) Provide the flexibility necessary to meet those varying needs of individuals that are related to their disabilities;
- (3) Allow for purchase outside of certified sources of supply and competitive bidding when a single source can provide multiple pieces of equipment, including adaptive equipment, that are more compatible with each other than they would be if they were purchased from multiple vendors;
- (4) Permit priority consideration for vendors who have the expertise to provide appropriate and necessary training for the users of the equipment and who will guarantee prompt service, ongoing support, and maintenance of this equipment;
- (5) Permit agencies to give priority consideration to suppliers offering the earliest possible delivery date of goods or services especially when a time factor is crucial to the individual's ability to secure a job, meet the probationary training periods of employment, continue to meet job requirements, or avoid residential placement in an institutional setting; and
- (6) Allow consideration of the convenience of the provider's location for the individual with the disability.

In developing these purchasing provisions, the Secretary shall also consider the following criteria: (i) cost-effectiveness, (ii) quality, (iii) the provider's general reputation and performance capabilities, (iv) substantial conformity with specifications and other conditions set forth for these purchases, (v) the suitability of the goods or services for the intended use, (vi) the personal or other related services needed, (vii) transportation charges, and (viii) any other factors the Secretary considers pertinent to the purchases in question.

(c) The purpose of rules promulgated hereunder shall be to promote sound purchasing management.

(d) Notwithstanding the provisions of this section or any rule adopted pursuant to this Article, The University of North Carolina may solicit bids for service contracts with a term of 10 years or less, including extensions and renewals, without the prior approval of the State Purchasing Officer.

(e) Expired. (1931, c. 261, s. 5; 1933, c. 441, s. 1; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, s. 4; 1983, c. 717, ss. 63-64.1; 1985 (Reg. Sess., 1986), c. 955, ss. 87, 88; 1987, c. 827, s. 216; 1989 (Reg. Sess., 1990), c. 936, s. 3(b); 1995, c. 256, s. 1;

1997-412, s. 3; 1998-217, s. 15; 1999-400, ss. 1, 2; 2002-107, s. 2; 2003-147, s. 9; 2004-203, s. 72(b); 2005-125, s. 1; 2006-203, s. 84; 2009-475, s. 2; 2011-338, s. 4; 2013-289, s. 7.)

§ 143-59.1. Contracts with certain foreign vendors.

(a) **Ineligible Vendors.** – The Secretary of Administration, State Chief Information Officer, and other entities to which this Article applies shall not contract for goods or services with either of the following:

- (1) A vendor if the vendor or an affiliate of the vendor if the Secretary of Revenue has determined that the vendor or affiliate of the vendor meets one or more of the conditions of G.S. 105-164.8(b) but refuses to collect the use tax levied under Article 5 of Chapter 105 of the General Statutes on its sales delivered to North Carolina. The Secretary of Revenue shall provide the Secretary of Administration periodically with a list of vendors to which this section applies.
- (2) A vendor if the vendor or an affiliate of the vendor incorporates or reincorporates in a tax haven country after December 31, 2001, but the United States is the principal market for the public trading of the stock of the corporation incorporated in the tax haven country.

(b) **Vendor Certification.** – The Secretary of Administration shall require each vendor submitting a bid or contract to certify that the vendor is not an ineligible vendor as set forth in subsection (a) of this section. Any person who submits a certification required by this subsection known to be false shall be guilty of a Class I felony.

(c) **Definitions.** – The following definitions apply in this section:

- (1) **Affiliate.** – As defined in G.S. 105-163.010.
- (2) **Tax haven country.** – Means each of the following: Barbados, Bermuda, British Virgin Islands, Cayman Islands, Commonwealth of the Bahamas, Gibraltar, Isle of Man, the Principality of Monaco, and the Republic of the Seychelles. (1999-341, s. 7; 2002-189, s. 6; 2003-413, s. 28; 2012-79, s. 2.14; 2015-241, s. 7A.4(r).)

§ 143-59.2. Certain vendors prohibited from contracting with State.

(a) **Ineligible Vendors.** – A vendor is not entitled to enter into a contract for goods or services with any department, institution, or agency of the State government subject to the provisions of this Article if any officer or director of the vendor, or any owner if the vendor is an unincorporated business entity, within 10 years immediately prior to the date of the bid solicitation, has been convicted of any violation of Chapter 78A of the General Statutes or the Securities Act of 1933 or the Securities Exchange Act of 1934.

(b) **Vendor Certification.** – The Secretary of Administration shall require each vendor submitting a bid or contract to certify that none of its officers, directors, or owners of an unincorporated business entity has been convicted of any violation referenced in subsection (a) of this section within 10 years immediately prior to the date of the bid solicitation. Any person who submits a certification required by this subsection known to be false shall be guilty of a Class I felony.

(c) **Void Contracts.** – A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare, and (ii) the continuation is approved by the Secretary of Administration. Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (2002-189, s. 5.)

§ 143-60. Rules covering certain purposes.

The Secretary of Administration may adopt, modify, or abrogate rules covering the following purposes, in addition to those authorized elsewhere in this Article:

- (1) Requiring reports by State departments, institutions, or agencies of stocks of supplies and materials and equipment on hand and prescribing the form of such reports.
- (2) Prescribing the manner in which supplies, materials and equipment shall be delivered, stored and distributed.
- (3) Prescribing the manner of inspecting deliveries of supplies, materials and equipment and making chemical and/or physical tests of samples submitted with bids and samples of deliveries to determine whether deliveries have been made in compliance with specifications. However, the provisions of this subdivision shall not apply to the constituent institutions of The University of North Carolina. The President of The University of North Carolina shall issue regulations or guidelines for the conducting of quality inspections by constituent institutions to ensure that deliveries have been made in compliance with specifications.
- (4) Prescribing the manner in which purchases shall be made in emergencies.
- (5) Providing for such other matters as may be necessary to give effect to foregoing rules and provisions of this Article.
- (6) Prescribing the manner in which passenger vehicles shall be purchased.

Further, the Secretary of Administration may prescribe appropriate procedures necessary to enable the State, its institutions and agencies, to obtain materials surplus or otherwise available from federal, State or local governments or their disposal agencies. (1931, c. 261, s. 11; 1945, c. 145; 1957, c. 269, s. 3; 1961, c. 772; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 268, s. 2; 1983, c. 717, ss. 67, 68; 1985 (Reg. Sess., 1986), c. 955, ss. 89, 90; 1987, c. 282, s. 27; c. 827, s. 217; 2006-203, s. 85; 2011-145, s. 9.6G(a).)

§ 143-746. Internal auditing required.

- (a) Requirements. – A State agency shall establish a program of internal auditing that:
- (1) Promotes an effective system of internal controls that safeguards public funds and assets and minimizes incidences of fraud, waste, and abuse.
 - (2) Determines if programs and business operations are administered in compliance with federal and state laws, regulations, and other requirements.
 - (3) Reviews the effectiveness and efficiency of agency and program operations and service delivery.
 - (4) Periodically audits the agency's major systems and controls, including:
 - a. Accounting systems and controls.
 - b. Administrative systems and controls.
 - c. Information technology systems and controls.
- (b) Internal Audit Standards. – Internal audits shall comply with current Standards for the Professional Practice of Internal Auditing issued by the Institute for Internal Auditors or, if appropriate, Government Auditing Standards issued by the Comptroller General of the United States.
- (c) Appointment and Qualifications of Internal Auditors. – Any State employee who performs the internal audit function shall meet the minimum qualifications for internal auditors established by the Office of State Human Resources, in consultation with the Council of Internal Auditing.
- (d) Director of Internal Auditing. – The agency head shall appoint a Director of Internal Auditing who shall report to, as designated by the agency head, (i) the agency head, (ii) the chief deputy or chief administrative assistant, or (iii) the agency governing board, or subcommittee thereof, if such a governing board exists. The Director of Internal Auditing shall be organizationally situated to avoid impairments to independence as defined in the auditing standards referenced in subsection (b) of this section.
- (e) Insufficient Personnel. – If a State agency has insufficient personnel to comply with this section, the Office of State Budget and Management shall provide technical assistance.
- (f) Reporting Fraudulent Activity. – If an internal audit conducted pursuant to this section results in a finding that a private person or entity has received public funds as a result of fraud, misrepresentation, or other deceptive acts or practices while doing business with the State agency, the internal auditor shall submit a detailed written report of the finding, and any additional necessary supporting documentation, to the State Purchasing Officer. A report submitted under this subsection may include a recommendation that the private person or entity be debarred from doing business with the State or a political subdivision thereof. (2007-424, s. 1; 2013-382, s. 9.1(c); 2013-406, s. 1; 2015-241, s. 25.1(a); 2015-268, s. 7.4.)

§ 147-64.6. Duties and responsibilities.

(a) It is the policy of the General Assembly to provide for the auditing of State agencies by the impartial, independent State Auditor.

(b) The duties of the Auditor are independently to examine into and make findings of fact on whether State agencies:

- (1) Have established adequate operating and administrative procedures and practices; systems of accounting, reporting and auditing; and other necessary elements of legislative or management control.
- (2) Are providing financial and other reports which disclose fairly, consistently, fully, and promptly all information needed to show the nature and scope of programs and activities and have established bases for evaluating the results of such programs and operations.
- (3) Are promptly collecting, depositing, and properly accounting for all revenues and receipts arising from their activities.
- (4) Are conducting programs and activities and expending funds made available in a faithful, efficient, and economical manner in compliance with and in furtherance of applicable laws and regulations of the State, and, if applicable, federal law and regulation.
- (5) Are determining that the authorized activities or programs effectively serve the intent and purpose of the General Assembly and, if applicable, federal law and regulation.

(c) The Auditor shall be responsible for the following acts and activities:

- (1) Audits made or caused to be made by the Auditor shall be conducted in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants, the United States General Accounting Office, or other professionally recognized accounting standards-setting bodies.
- (2) Financial and compliance audits may be made at the discretion of the Auditor without advance notice to the organization being audited. Audits of economy and efficiency and program results shall be discussed in advance with the prospective auditee unless an unannounced visit is essential to the audit.
- (3) The Auditor, on the Auditor's own initiative and as often as the Auditor deems necessary, or as requested by the Governor or the General Assembly, shall, to the extent deemed practicable and consistent with the Auditor's overall responsibility as contained in this act, make or cause to be made audits of all or any part of the activities of the State agencies. Each agency or department receiving a financial statement audit by the Auditor under this subdivision shall prepare a financial statement and supplementary information in the format required by the Auditor. Financial statements and supplementary information prepared as required by this subdivision shall be completed and submitted to the Auditor not later than 60 days after the deadline for the agency's or department's Comprehensive Annual Financial Report submission as established by the State Controller.
- (4) The Auditor, at the Auditor's own discretion, may, in selecting audit areas and in evaluating current audit activity, consider and utilize, in whole or in part, the relevant audit coverage and applicable reports of the audit staffs of the various State agencies, independent contractors, and federal agencies. The Auditor shall coordinate, to the extent deemed practicable, the auditing conducted within the State to meet the needs of all governmental bodies.

- (5) The Auditor is authorized to contract with federal audit agencies, or any governmental agency, on a cost reimbursable basis, for the Auditor to perform audits of federal grants and programs administered by the State Departments and institutions in accordance with agreements negotiated between the Auditor and the contracting federal audit agencies or any governmental agency. In instances where the grantee State agency shall subgrant these federal funds to local governments, regional councils of government and other local groups or private or semiprivate institutions or agencies, the Auditor shall have the authority to examine the books and records of these subgrantees to the extent necessary to determine eligibility and proper use in accordance with State and federal laws and regulations.

The Auditor shall charge and collect from the contracting federal audit agencies, or any governmental agencies, the actual cost of all the audits of the grants and programs contracted by him to do. Amounts collected under these arrangements shall be deposited in the State Treasury and be budgeted in the Department of State Auditor and shall be available to hire sufficient personnel to perform these contracted audits and to pay for related travel, supplies and other necessary expenses.
- (6) The Auditor is authorized and directed in the Auditor's reports of audits or reports of special investigations to make any comments, suggestions, or recommendations the Auditor deems appropriate concerning any aspect of such agency's activities and operations.
- (7) The Auditor may charge and collect from each examining and licensing board the actual cost of each audit of such board. Costs collected under this subdivision shall be based on the actual expense incurred by the Auditor's office in making such audit and the affected agency shall be entitled to an itemized statement of such costs. Amounts collected under this subdivision shall be deposited into the general fund as nontax revenue.
- (8) The Auditor shall examine as often as may be deemed necessary the accounts kept by the Treasurer, and if the Auditor discovers any irregularity or deficiency therein, unless the same be rectified or explained to his satisfaction, report the same forthwith in writing to the General Assembly, with copy of such report to the Governor and Attorney General. In addition to regular audits, the Auditor shall check the treasury records at the time a Treasurer assumes office (not to succeed himself or herself), and therein charge the Treasurer with the balance in the treasury, and shall check the Treasurer's records at the time the Treasurer leaves office to determine that the accounts are in order.
- (9) The Auditor may examine the accounts and records of any bank or financial institution relating to transactions with the State Treasurer, or with any State agency, or the Auditor may require banks doing business with the State to furnish the Auditor information relating to transactions with the State or State agencies.
- (10) The Auditor may, as often as the Auditor deems advisable, conduct a detailed review of the bookkeeping and accounting systems in use in the various State agencies which are supported partially or entirely from State funds. Such examinations will be for the purpose of evaluating the adequacy of systems in use by these agencies and institutions. In instances where the Auditor determines that existing systems are outmoded, inefficient, or otherwise inadequate, the Auditor shall recommend changes to the State Controller. The

- State Controller shall prescribe and supervise the installation of such changes, as provided in G.S. 143B-426.39(2).
- (11) The Auditor shall, through appropriate tests, satisfy himself or herself concerning the propriety of the data presented in the Comprehensive Annual Financial Report and shall express the appropriate auditor's opinion in accordance with generally accepted auditing standards.
 - (12) The Auditor shall provide a report to the Governor and Attorney General, and other appropriate officials, of such facts as are in the Auditor's possession which pertain to the apparent violation of penal statutes or apparent instances of malfeasance, misfeasance, or nonfeasance by an officer or employee.
 - (13) At the conclusion of an audit, the Auditor or the Auditor's designated representative shall discuss the audit with the official whose office is subject to audit and submit necessary underlying facts developed for all findings and recommendations which may be included in the audit report. On audits of economy and efficiency and program results, the auditee's written response shall be included in the final report if received within 30 days from receipt of the draft report.
 - (14) The Auditor shall notify the General Assembly, the Governor, the Chief Executive Officer of each agency audited, and other persons as the Auditor deems appropriate that an audit report has been published, its subject and title, and the locations, including State libraries, at which the report is available. The Auditor shall then distribute copies of the report only to those who request a report. The copies shall be in written or electronic form, as requested. He shall also file a copy of the audit report in the Auditor's office, which will be a permanent public record. In addition, the Auditor may publish on his or her Web site any reports from audits of State agencies not directly conducted by the Auditor. Nothing in this subsection shall be construed as authorizing or permitting the publication of information whose disclosure is otherwise prohibited by law.
 - (15) It is not the intent of the audit function, nor shall it be so construed, to infringe upon or deprive the General Assembly and the executive or judicial branches of State government of any rights, powers, or duties vested in or imposed upon them by statute or the Constitution.
 - (16) The Auditor shall be responsible for receiving reports of allegations of the improper governmental activities as provided in G.S. 147-64.6B. The Auditor shall adopt policies and procedures necessary to provide for the investigation or referral of these allegations.
 - (17) Repealed by Session Laws 2009-136, s. 2, effective June 19, 2009.
 - (18) Repealed by Session Laws 2010-31, s. 6.15(b), effective July 1, 2010.
 - (19) Whenever the Auditor believes that information received or collected by the Auditor may be evidence of a violation of any of the provisions of Subchapter II of Chapter 163A of the General Statutes, or Article 14 of Chapter 120 of the General Statutes, the Auditor shall report that information to the Bipartisan State Board of Elections and Ethics Enforcement and the Secretary of State as appropriate. The Auditor shall be bound by interpretations issued by the Bipartisan State Board of Elections and Ethics Enforcement as to whether or not any information reported by the Auditor under this subdivision involves or may involve a violation of Subchapter II of Chapter 163A of the General Statutes, or Article 14 of Chapter 120 of the General Statutes. Nothing in this

subdivision shall be construed to limit the Auditor's authority under subdivision (1) of this subsection.

(20) Whenever the Auditor believes that information received or collected by the Auditor may be evidence of criminal misconduct, the Auditor shall report that information to either the State Bureau of Investigation or the District Attorney for the county where the alleged misconduct occurred. Nothing in this subdivision shall be construed to limit the Auditor's authority under subdivision (1) of this subsection.

(21) **If an audit undertaken by the Auditor results in a finding that a private person or entity has received public funds as a result of fraud, misrepresentation, or other deceptive acts or practices while doing business with the State or a political subdivision thereof, the Auditor shall submit a detailed written report of the finding, and any additional necessary supporting documentation, to the State Purchasing Officer or the appropriate political subdivision official, as applicable. A report submitted under this subsection may include a recommendation that the private person or entity be debarred from doing business with the State or a political subdivision thereof.**

(d) Reports and Work Papers. – The Auditor shall maintain for 10 years a complete file of all audit reports and reports of other examinations, investigations, surveys, and reviews issued under the Auditor's authority. Audit work papers and other evidence and related supportive material directly pertaining to the work of the Auditor's office shall be retained according to an agreement between the Auditor and State Archives. To promote intergovernmental cooperation and avoid unnecessary duplication of audit effort, and notwithstanding the provisions of G.S. 126-24, pertinent work papers and other supportive material related to issued audit reports may be, at the discretion of the Auditor and unless otherwise prohibited by law, made available for inspection by duly authorized representatives of the State and federal government who desire access to and inspection of such records in connection with some matter officially before them, including criminal investigations.

Except as provided in this section, or upon an order issued in Wake County Superior Court upon 10 days' notice and hearing finding that access is necessary to a proper administration of justice, audit work papers and related supportive material shall be kept confidential, including any interpretations, advisory opinions, or other information or materials furnished to or by the Bipartisan State Board of Elections and Ethics Enforcement under this section. (1983, c. 913, s. 2; 1985 (Reg. Sess., 1986), c. 1024, ss. 24, 25; 1987, c. 738, s. 62; 1989, c. 236, s. 2; 1999-188, s. 2; 2001-142, s. 2; 2001-424, ss. 9.1(a), 15.2(c); 2002-126, s. 27.2(b); 2002-159, s. 48; 2004-129, s. 46; 2008-215, ss. 1(a), 2, 3; 2009-136, s. 2; 2010-31, s. 6.15(b); 2010-194, s. 27; 2014-100, ss. 25.2, 25.3; 2015-241, s. 25.1(b); 2015-268, s. 7.4; 2017-6, s. 3; 2018-5, s. 27.1.)

1 01 NCAC 05B .1520 is readopted as published in 33:23 NCR 2248-2249 as follows:

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3 **01 NCAC 05B .1520 DEFAULT PROCEEDINGS; DEBARMENT**

4 ~~(a) The agency which issued the solicitation document resulting in the contract may find a contractor in default of~~
5 ~~contract for failing to perform in accordance with the contract requirements, terms and conditions. If a contractor is~~
6 ~~found in default of contract, the agency which issued the solicitation document resulting in the contract may take~~
7 ~~action, immediate if necessary, to purchase the needed commodities, printing or services on the open market and~~
8 ~~charge any additional cost for the commodities, printing or services and expense for doing so to the defaulting~~
9 ~~contractor. If an agency finds a contractor in default, such action and the circumstances shall be reported by the agency~~
10 ~~to the Division of Purchase and Contract in writing. This does not limit any other remedies that may be available to~~
11 ~~the State or agency.~~

12 (a) In addition to any civil or criminal remedies available to the State, the SPO may debar the Vendor from receiving
13 an award under a State Contract or conducting future business with the State for up to a one year term in accordance
14 with this Rule.

15 (b) Cause for initial or successive debarment may include:

- 16 (1) deliberate failure without good cause to perform a Contract in accordance with the terms and
17 conditions of the Contract;
18 (2) substantiated or uncured complaints;
19 (3) the Vendor or any officer, director, owner, project manager, Procurement manager or chief financial
20 officer is convicted under a State or Federal statute of embezzlement, theft, forgery, bribery,
21 falsification or destruction of records, receiving stolen property, or any other offense indicating a
22 lack of business integrity which currently, seriously, and directly affects responsibility as a State
23 Vendor;
24 (4) the Vendor or any officer, director, or owner is debarred from bidding or contracting with the federal
25 government;
26 (5) conviction under State or Federal antitrust statutes arising out of the submission of bids or proposals;
27 and
28 (6) violation of the State Government Ethics Act or the Lobbying laws.

29 ~~(c)(b) Upon finding cause to debar a Vendor, the SPO The Division may remove the contractor Vendor from any~~
30 ~~mailing distribution lists which may be utilized for up to a one year term, and debar the contractor from doing business~~
31 ~~with the agency, or any agency, for a period of time at the discretion of the Division.~~

32 (d) The SPO shall notify a Vendor of any debarment and appeal rights, in writing, which may include an Electronic
33 form.

34
35 *History Note: Authority G.S. 143-49; 143-52; 143-53; 143-60; 143-64.b(c)(21); 143-746;*
36 *Eff. February 1, 1996;*
37 *Amended Eff. April 1, 1999.*

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Eff. October 1, 2019