

October 8, 2014

To: **North Carolina Public School Superintendents and other interested parties**

From: Norma R. Houston, *Lecturer in Public Law and Government*
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Director, Center for Public Technology*

Re: USETPA Group Purchasing Program

The UNC School of Government has been asked to render an opinion about the validity and legality of the use of the US Educational Technology Purchasing Alliance (“USETPA”) as a competitive bidding group purchasing program under North Carolina General Statute 143-129(e)(3). The following opinion is not a recommendation for or endorsement of the products or services offered through USETPA.

Under North Carolina law, when a local government¹ subject to Article 8, Chapter 143 of the North Carolina General Statutes decides to purchase apparatus, supplies, materials, or equipment involving the expenditure of \$30,000 or more, that local government must follow certain statutory bidding procedures, unless an exception applies. G.S. 143-129 contains several exceptions to these bidding requirements. One of these exceptions, found in G.S. 143-129(e)(3), allows local governments to purchase apparatus, supplies, materials, or equipment through a “competitive bidding group purchasing program” instead of following the bidding requirements in Article 8. G.S. 143-129(e)(3) defines “competitive bidding group purchasing program” as “a formally organized program that offers competitively obtained purchasing services at discount prices to two or more public agencies.” **In our opinion, USETPA qualifies as a competitive bidding group purchasing program under G.S. 143-129(e)(3).**

Accordingly, local governments subject to Article 8, Chapter 143 of the North Carolina General Statutes have the legal authority to purchase apparatus, supplies, materials, or equipment directly from vendors under contract through USETPA under the competitive bidding group purchasing program exception in G.S. 143-129(e)(3), unless such purchases are inconsistent with local policies or procedures.

¹ LEAs are units of local government and as such, follow the procurement laws under G.S. Chapter 143, Article 8, established for such units.

We have arrived at this opinion after reviewing the following items to ensure legal compliance with G.S. 143-129(e)(3):

1. the establishment and organization of USETPA; and
2. the Request for Proposals (RFP) and procurement process to be used by USETPA in awarding contracts.

Discussed below are our specific findings as they relate to the eligibility of USETPA to offer products and services under the North Carolina group purchasing program exception to Article 8 competitive bidding requirements.

Formally Organized Program

In order to qualify as a group purchasing program under G.S. 143-129(e)(3), the entity offering products and services must be “formally organized.” While the statute does not define this term, it suggests some level of organization beyond an ad hoc group that decides to enter into contracts jointly. According to its website (www.usetpa.org), USETPA is incorporated as a 501(c)(3) organization with an Executive Director (Mr. Landon Scism), a Board of Advisors, a physical office address, office phone number, and an email address. **This level of organization is, in our opinion, sufficient to meet the statutory requirement of formality.**

Competitively Obtained Purchasing Services

Under the group purchasing exception, the items and services offered must be “competitively obtained,” meaning the organization’s contracts were procured through a competitive process. While this process does not have to mirror in every respect the competitive bidding requirements of G.S. 143-129 for purchase contracts in the formal bidding range, it must ensure a reasonable opportunity for interested vendors to submit bids with fair evaluation of those bids leading to a contract award. According to the standard terms and conditions of the USETPA’s RFP, contracts awarded by USETPA will be procured through a process that involves broad electronic advertising for bid solicitation, sealed bid submission by a stated bid deadline, objective and transparent evaluation criteria, and a clearly articulated standard of award that includes responsiveness, responsible, and best value discounted prices. **In our opinion, this process meets the statutory requirement that the contracts be obtained competitively. (See USETPA RFP, Sections I-1.5, I-1.17, II-1.1, II-1.5, and 3.1-3.4).**

Discount Prices

A third element of the group purchasing program exception is that the prices offered by vendors must be at a discount price. Typically such discounts take the form of a price less than list price, although this is not specifically required under the group purchasing program exception. According to the USETPA RFP, vendors awarded contracts by USETPA must offer discounted prices to USETPA members (See USETPA RFP, Sections 1.4, 1.12,

1.16, 1.17, 1.18, 3.3, and U). In our opinion, this requirement in the RFP satisfies the statutory requirement that prices be offered at a discount.

Two or More Public Agencies

The final requirement under the group purchasing program exception is that the items offered through the program are available to at least two public agencies (this requirement does not exclude the opportunity for private entities to purchase items from the program). According to its website, USETPA offers membership to all public k-12 schools, public libraries, and Head Start programs in North Carolina. Membership is free, and there is no minimum purchase obligation. Because of its open enrollment for a wide array of public entities, USETPA meets the requirement that products offered through this program are available to at least two public agencies.

For these reasons, it is our opinion that local governments in North Carolina may purchase information technology goods and services directly (i.e., without having to comply with the competitive bidding requirements of Article 8) from vendors through the USETPA under the group purchasing program exception of G.S. 143-129(e)(3).