UNC SCHOOL OF GOVERNMENT

2014 Legislative Summary: Public Purchasing and Contracting

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The North Carolina General Assembly adjourned the 2013-14 legislative session *sine die* (from the Latin "without day") on August 20, 2014. Unless recalled to Raleigh for a special session, the General Assembly will not meet again until January 14, 2015, when a new session convenes following the November 2014 general elections. Enacted legislation affecting public purchasing and contracting is summarized below.

I. Public Bills

Prequalification Requirements

S.L. 2014-42 (H1043) amends G.S. 143-135.8 by establishing specific procedural requirements for when and how local governments may prequalify construction contractors to bid on construction and repair contracts. These new requirements also apply to the prequalification of first-tier subcontractors by a construction manager at risk under G.S. 143-128.1(c). The focus of these new requirements is to ensure that a prequalification process is conducted transparently using criteria that relate to the specific project being bid and which are applied objectively and fairly to all bidders. The new requirements also give bidders an opportunity to learn why they were denied prequalification and to appeal that denial. The changes go into effect on October 1, 2014, and apply to all contracts *awarded* on or after that date.

Prequalification is defined under the new G.S. 143-135.8(f)(2) as "[a] process of evaluating and determining whether potential bidders have the skill, judgment, integrity, sufficient financial resources, and ability necessary to the faithful performance of a contract for construction or repair work." This definition is consistent with the North Carolina Court of Appeals' interpretation of who is a responsible bidder under the lowest responsive, responsible bidder standard of award applicable to purchase and construction or repair contracts in the informal and formal bidding ranges.[1]

Under the new version of G.S. 143-135.8, use of prequalification is limited to construction or repair projects (regardless of cost) that are bid under the single-prime, separate-prime (multi-prime), or dual bidding methods. Prequalification is specifically *prohibited* on all contracts subject to the Mini-Brooks Act (G.S. 143-64.31), meaning prequalification *cannot* be used when contracting for architectural, engineering, or surveying services as well as alternative construction delivery methods (construction management at risk, design-build, design-build bridging, and public-private partnerships).

If a local government intends to prequalify bidders, it must first adopt an

[1] *Kinsey Contracting Co., Inc. v. City of Fayetteville,* 106 N.C. App. 383, 385, 416 S.E.2d 607, 609 (1992).

objective prequalification policy applicable to all construction or repair work. It must also adopt the assessment tool and criteria to be used in prequalifying bidders for that specific project. The assessment tool must include the scoring values and minimum required score for prequalification on that project.

For further discussion of the new prequalification requirements, see "New Construction Contractor Prequalification Requirements," Coates' Canons blog post (7/29/2014)

Mini-Brooks Act Changes

Included in the legislation establishing new prequalification requirements discussed immediately above (S.L. 2014-42 (H1043)) are changes to the Mini-Brooks Act which establishes the qualifications-based selection method for hiring architects, engineers, and surveyors, and contracting for alternative construction delivery methods (G.S. 143-64.31). Expanding the existing prohibition against soliciting costs other than unit price in response to a RFQ, the legislation now also prohibits soliciting, submitting, or considering work product or designs as part of the selection process. This prohibition prevents local governments from asking respondents to prepare work product on the project for which they are competing as part of the solicitation process. However, examples of *prior completed work* may be solicited, submitted, and considered when determining the competence and qualifications of respondents, and the new statutory language encourages discussion of concepts or approaches to the project and impact on project schedules. The legislation also clarifies that no costs or fees, other than unit price information, may be solicited, submitted, or considered as part of the selection process. This change is effective October 1, 2014, and applies to all contracts *awarded* on or after that date.

Alternative Construction Delivery Methods Use Analysis

The prequalification legislation discussed immediately above (S.L. 2014-42 (H1043)) also made changes to the analysis local governments must conduct prior to using an alternative construction delivery method – construction management at risk (G.S. 143-128.1), design-build (G.S. 143-128.1A), and design-build bridging (G.S. 143-128.1B). Previously, the local government was required to compare the "costs and benefits" of using one of these alternative construction delivery methods in lieu of a traditional bidding method (single-prime, separate-prime, or dual bidding). Now, instead of comparing the "costs and benefits," the local government must compare the "advantages and disadvantages" of using an alternative method over a traditional one. This change clarifies confusion about the phrase "costs and benefits," which has been misinterpreted to require a detailed financial cost-benefit analysis. As a result, local governments may properly consider both financial and non-financial considerations when comparing the use of an alternative method to that of a traditional method. This change is effective October 1, 2014, and applies to all contracts *awarded* on or after that date.

E-Verify Contracting Prohibition Changes for Cities and Counties

Section 13 of S.L. 2014-119, H369 scales back the E-Verify contracting prohibition for cities and counties. Effective October 1, 2014, the E-Verify contracting prohibition will apply *only* to purchase and construction or repair contracts in the formal bidding range, as is the case for all other units of local government (the legislation does not affect other units of local government). Cities and counties will no longer need to verify the E-Verify compliance of contractors and their subcontractors on contracts other than those for purchases or construction and repair in the formal bidding ranges. The change applies to all contracts *entered into* on or after October 1, 2014.

An updated version of E-Verify Contracting Prohibition FAQ's is available on the School of Government's Local Government Purchasing and Contracting webpage (www.ncpurchasing.unc.edu) under the "Legislative Updates" link.

Long-Term Leases for Renewable Energy Facilities

Section 34 of the Regulatory Reform Act of 2014 (S.L. 2014-120, S734) amends G.S. 160A-272(c) to extend the authorization for long-term leases of government property for the siting and operation of renewable energy facilities. Previously, this authority was granted only to a limited number of cities and counties for leases of up to 20 years. Now, all local governments may enter into a lease of up to 25 years for the siting and operation of renewable energy facilities on government-owned property without having to treat the lease as a disposal of that property which triggers competitive property disposal requirements (as is the case with all other leases of government property for terms greater than ten years). A lease entered into under this provision requires governing board approval. This legislation is effective immediately.

A renewable energy facility is defined as facility (other than a hydroelectric power facility) with a generation capacity of more than 10 megawatts that generates either electric power or useful, measurable combined heat and power derived from a renewable energy resource, or is a solar thermal energy facility (G.S. 62-133.8(a)(7)). Leases for renewable energy facilities that do not meet this definition must be treated as any other lease of government-owned property.

This change is effective September 18, 2014.

Small Business Contractor Act Repealed

Section 1.(a) of the Regulatory Reform Act of 2014 (S.L. 2014-120, S734) repealed the Small Business Contractor Act (Part 20 of Article 10 of Chapter 143B). Enacted in 2007, the Small Business Contractor Act established a program within the Department of Commerce to provide loan and bonding assistance to financially responsible small North Carolina contractors. The repeal of this program is effective September 18, 2014.

Engineering Licensure Technical Changes

Section 11 of the Regulatory Reform Act of 2014 (S.L. 2014-120, S734) makes technical and clarifying changes to G.S. 89C-25 and 89C-19. While the changes may appear to be substantive, they are, in fact, purely technical. For example, the legislation adds references to the Chapters of the General Statutes governing the professional activities listed in the statute (engineering,

land surveying, and contracting) to clarify, and thus make it easier to both comply with and enforce, those activities covered under the statute (for example, clarifying that "contracting or any other legally recognized profession or trade" means contracting as defined under the cited Articles of Chapter 87).

II. Local Bills

City of Greenville real property conveyance

The City of Greenville received authorization to sell by private negotiation and sale certain tracts of real property within residential zoning districts to adjacent property owners (S.L. 2014-37).

Moore County Board of Education real property conveyance

The Moore County Board of Education received authorization to convey real property to the Town of Taylorsville (S.L. 2014-70).

Mint Hill, Concord, and Kannapolis Public-Private Reimbursement Agreements

The Town of Mint Hill and the Cities of Concord and Kannapolis received authorization to enter into reimbursement agreements with private developers for the design and construction of municipal infrastructure that is included on each municipality's Capital Improvement Plan or Municipal Infrastructure Development Plan and which serves the developer or property owner.