

# Local Government Purchasing and Contracting Update: Statutory Requirements and Local Policies

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By Eileen Youens

Nearly all local governments in North Carolina are subject to statutory requirements governing purchases and other contracts.<sup>1</sup> Over the past twenty-five years, the statutory procedures that apply to local government contracts in North Carolina have increased in number and complexity. At the same time, many North Carolina local governments have adopted policies and ordinances that add to the procedures and requirements imposed by the North Carolina General Statutes. The complexity of the statutory framework and these local variations has caused a great deal of confusion for local governments as well as companies seeking to do business with them.

The first half of this article provides an overview of the statutory requirements and procedures that currently apply to local government contracts in North Carolina.<sup>2</sup> Examples in the last half of this article demonstrate how to reconcile local government policies with these statutory requirements.

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1. There are four exceptions. Public housing authorities, hospital authorities, joint municipal power agencies, and soil and water conservation districts are exempt from all competitive bidding, bonding, and other general contracting requirements. N.C. GEN. STAT. (hereinafter G.S.) § 157-9 (public housing authorities), G.S. 131E-23(d) (hospital authorities), G.S. 159B-11(10) (joint municipal power agencies), G.S. 139-8(11) (soil and water conservation districts).

2. The School of Government offers several publications that provide additional detail regarding local government purchasing and contracting. See Frayda S. Bluestein, *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 2d ed. (Chapel Hill, N.C.: School of Government, The University of North Carolina at Chapel Hill, 2004, and 2007 Supp.); A. Fleming Bell, II, *Construction Contracts with North Carolina Local Governments*, 4th ed. (Chapel Hill, N.C.: School of Government, The University of North Carolina at Chapel Hill, 2007); David M. Lawrence, *Local Government Property Transactions in North Carolina*, 2d ed. (Chapel Hill, N.C.: School of Government, The University of North Carolina at Chapel Hill, 2000). Other related publications can be found at the School of Government's North Carolina Local Government Purchasing and Contracting website, <http://ncpurchasing.unc.edu>.

## Background

The North Carolina General Statutes (referred to in short as G.S.) require that local governments use competitive bidding for two types of contracts: (1) contracts for the purchase of apparatus, supplies, materials, and equipment ("purchase contracts") and (2) construction and repair contracts.<sup>3</sup> As described below, there are two levels of bidding: informal and formal. The level of bidding depends upon the dollar value of the contract.

It is important to remember that the purpose of the competitive bidding laws is *not* to find the lowest possible price. Rather, the purpose of these laws

is to prevent favoritism, corruption, fraud, and imposition in the awarding of public contracts by giving notice to prospective bidders and thus assuring competition which in turn guarantees *fair play* and *reasonable*

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3. G.S. 143-129, -131. There are several exceptions to the statutory bidding requirements. See G.S. 63-54(c) (airport construction when using federal funding), G.S. 115C-264 (purchases of food and supplies for school food services), G.S. 143-129(e)(1) (purchases from other governments within North Carolina), G.S. 143-129(e)(2) (purchases made and construction or repair work performed in cases of special emergency), G.S. 143-129(e)(3) (purchases from group purchasing programs), G.S. 143-129(e)(4) (change order work), G.S. 143-129(e)(5) (purchases of fuel, oil, or gas), G.S. 143-129(e)(6) (purchases from a sole source), G.S. 143-129(e)(7) (purchases of information technology through contracts established by the State Office of Information Technology), G.S. 143-129(e)(9) (purchases from contracts established by the state of North Carolina), G.S. 143-129(e)(9a) (purchases from contracts established by the federal government), G.S. 143-129(e)(10) (purchases of used equipment), G.S. 143-129(e)(12) (build-to-suit capital leases with a private developer entered into under G.S. 115C-532), G.S. 143-129(g) (purchases off of previously bid contracts, or "piggybacking"), G.S. 143-129(h) (certain purchases by transportation authorities), G.S. 143-129.5 (purchases from work centers for the blind or severely disabled), G.S. 143-135 (small construction or repair work performed by the unit's own forces). This article does not address these exceptions, which are discussed in detail in other School of Government publications. See Bluestein, *Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 27-39; Bell, *Construction Contracts with North Carolina Local Governments*, 27-39.

prices in contracts involving the expenditure of substantial amount of public money.<sup>4</sup>

Local governments are not required to obtain competitive bids for purchase contracts worth less than \$30,000, for construction or repair contracts worth less than \$30,000, or for contracts that are not purchase contracts or construction or repair contracts. In addition, certain types of local government contracts require the use of procurement methods other than competitive bidding. Local governments must use a qualifications-based procurement method to select firms to provide architectural, engineering, surveying, or construction-manager-at-risk services regardless of the cost of such services,<sup>5</sup> unless they choose to exempt themselves in writing from this selection process for particular projects.<sup>6</sup> Local governments wishing to enter into a guaranteed energy savings contract must use a specific request-for-proposal method set out in detail in the General Statutes.<sup>7</sup> Local governments *may* use a request-for-proposal process for purchases of information technology<sup>8</sup> and for the construction, design, and operation of solid waste management facilities and sludge management facilities.<sup>9</sup>

For contracts that do require competitive bidding, the statutes set out two different competitive bidding procedures: (1) informal bidding, for purchase contracts worth at least \$30,000 but less than \$90,000 and for construction and repair contracts worth at least \$30,000 but less than \$500,000, and (2) formal bidding, for purchase contracts worth \$90,000 or more and for construction and repair contracts worth \$500,000 or more. See table 1. In addition to these statutory dollar thresholds, many local government policies or ordinances require informal bidding procedures for purchase contracts or construction and repair contracts worth less than \$30,000 and require formal bidding procedures for purchase contracts worth less than \$90,000 or for construction or repair contracts worth less than \$500,000.

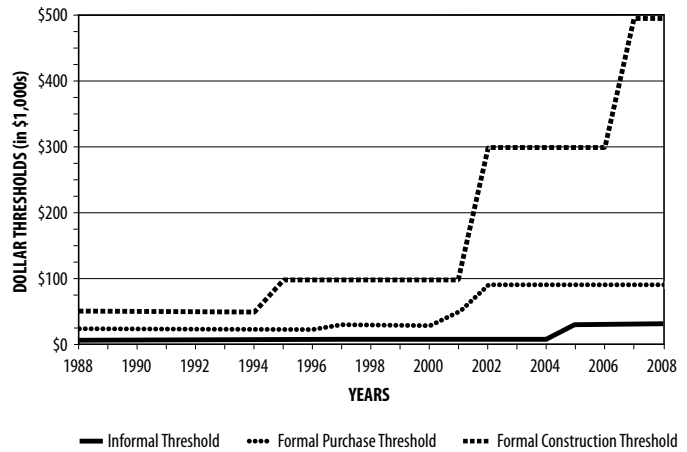
### History of Bidding Thresholds

Over the past twenty years, the informal bidding threshold has increased from \$2,500 to \$30,000, while the threshold for formal purchase contracts has increased from \$10,000 to \$90,000 and the threshold for formal construction and repair contracts has increased from \$30,000 to \$500,000. See figure 1. During this time many local governments have

**Table 1. North Carolina Local Government Contracts Subject to Competitive Bidding**

	Contracts for the purchase of apparatus, supplies, materials, or equipment	Construction and repair contracts
<b>Formal bidding (G.S. 143-129)</b>	\$90,000 or above	\$500,000 or above
<b>Informal bidding (G.S. 143-131)</b>	\$30,000 to less than \$90,000	\$30,000 to less than \$500,000
<b>Competitive bidding not required</b>	Less than \$30,000	Less than \$30,000

**Figure 1. Bidding Thresholds, 1988–2008**



retained earlier dollar thresholds rather than increasing their thresholds to those set by statute.

### Overview of Statutory Requirements and Procedures

#### FORMAL BIDDING PROCEDURES

As noted earlier, formal bidding is required for all construction and repair contracts worth \$500,000 or more and for purchase contracts worth \$90,000 or more, unless an exception applies. The requirements for formal bidding are as follows:

- The local government advertises in a newspaper of general circulation,<sup>10</sup> or electronically (e.g., on the local government’s website), or both. The advertisement must be published at least seven full days before the date of the bid opening.<sup>11</sup> A local government cannot advertise *solely* through electronic

4. Mullen v. Town of Louisburg, 225 N.C. 53, 58–59, 33 S.E.2d 484, 487 (1941) (emphasis added).

5. G.S. 143-64.31.  
 6. G.S. 143-64.32.  
 7. G.S. 143-64.17A.  
 8. G.S. 143-129.8.  
 9. G.S. 143-129.2.

10. G.S. 1-597 through 1-600 provide the requirements for publishing legal advertisements in newspapers.

11. G.S. 143-129(b). The advertisement must (1) provide the time and place where potential bidders may obtain plans and specifications of the project or purchase, (2) provide the time and place of the bid opening, and (3) state that the local government “reserves the right to reject any and all proposals.” G.S. 143-129(b).

means unless during a regular meeting of the board the governing board has approved the use of electronic advertisement only.<sup>12</sup>

- Bidders submit sealed bids.<sup>13</sup>
- A bid deposit or bid bond of at least 5 percent of the bid price must accompany all formal bids for construction and repair work.<sup>14</sup>
- Bids are opened in public.<sup>15</sup>
- The governing board awards the contract to the lowest responsive, responsible bidder or bidders, taking into consideration quality, performance, and the time specified in the proposals for the performance of the contract.<sup>16</sup> (The governing board may delegate its authority to award, reject, and readvertise formal bids for *purchase* contracts—but not construction or repair contracts—to “the manager, school superintendent, chief purchasing official, or other employee.”<sup>17</sup>)
- Negotiation with the lowest responsive, responsible bidder prior to the award is permitted only if that bidder’s price proposal exceeds the funds available for the project or purchase.<sup>18</sup>
- The successful bidder enters into the contract or else forfeits the bid deposit (if one was required).
- Performance and payment bonds are required for all *construction or repair* contracts in the formal range.<sup>19</sup>
- A minimum of three bids is required for all *construction or repair* contracts in the formal range.<sup>20</sup> Preferably two or more bids should be secured for purchase contracts in the formal range.<sup>21</sup>
- For *building construction and repair* contracts in the formal range, the local government and its contractors must make good faith efforts to solicit participation by historically underutilized businesses (HUBs).<sup>22</sup>

Although the formal bidding statute does not expressly address the issue of whether formal bids are subject to pub-

lic inspection, it does make the opening of a sealed bid prior to the time set for the bid opening a Class 1 misdemeanor.<sup>23</sup>

#### CONSTRUCTION AND REPAIR CONTRACTS COSTING \$300,000 OR MORE

In 2007 the General Assembly increased the formal bidding threshold for construction and repair contracts from \$300,000 to \$500,000 by amending G.S. 143-129.<sup>24</sup> However, the \$300,000 threshold was not increased in several other statutes in which it appears. As a result, construction and repair contracts costing from \$300,000 to less than \$500,000 must comply with certain requirements previously considered part of formal bidding, even though these contracts are now in the informal bidding range.<sup>25</sup> Specifically:

- G.S. 44A-26 requires performance and payment bonds for each contract over \$50,000 that is part of a construction or repair project costing over \$300,000.
- G.S. 143-128(a) requires the preparation of separate specifications in four categories [(1) heating, ventilation, and air conditioning; (2) plumbing and gas fittings; (3) electrical wiring and installation; and (4) general work] for all *building* construction and repair projects costing over \$300,000.
- G.S. 143-128(a1) requires that *building* construction and repair projects costing over \$300,000 use only the following construction methods: single-prime, separate-prime, dual-bidding, construction-management-at-risk, or alternative methods (when authorized by the State Building Commission or a local act).
- G.S. 143-128(a2) requires local governments to report annually to the secretary of the Department of Administration on the effectiveness and cost-benefit of each of the construction methods used by the public entity in *building* construction and repair projects costing over \$300,000.<sup>26</sup>
- G.S. 143-128.2 sets out specific requirements for good faith efforts made by local governments and bidders to

12. G.S. 143-129(b).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. G.S. 143-129(a).

18. G.S. 143-129(b).

19. G.S. 44A-26; G.S. 143-129(c).

20. G.S. 143-132.

21. The North Carolina General Statutes do not require a minimum number of bids for purchase contracts, regardless of the cost of the contract. However, the intent and purpose of the bidding laws—promoting competition to guarantee fairness and reasonable prices—require that more than one bid should be solicited when multiple sources are available. See Bluestein, *Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 80.

22. G.S. 143-128.2.

23. G.S. 143-129(b).

24. S.L. 2007-446.

25. These requirements are explained in detail in Bell, *Construction Contracts with North Carolina Local Governments*, 51–60.

26. The reports must contain whatever information the secretary requires, including: (1) the type of construction method used on the project; (2) the total dollar value of building projects by specific project with costs; (3) the bid costs and relevant post-bid costs; (4) a detailed listing of all contractors and subcontractors used on the project indicating whether any of the contractors or subcontractors were from out of state; and (5) if any contractor or subcontractor was an out-of-state contractor or subcontractor, the reasons the contractor or subcontractor was selected. G.S. 143-128(a2). The reporting forms are available on the website of the state’s Office for Historically Underutilized Businesses, [www.doa.state.nc.us/hub](http://www.doa.state.nc.us/hub).

encourage participation by HUBs in public building construction and repair projects costing \$300,000 or more.<sup>27</sup>

### INFORMAL BIDDING PROCEDURES

Informal bidding is required for all construction and repair contracts costing at least \$30,000 but less than \$500,000 and for purchase contracts costing at least \$30,000 but less than \$90,000, unless an exception applies. The requirements for informal bidding are as follows:

- At least one—but preferably two or more—informal bids must be secured before the contract is awarded.<sup>28</sup> The statute does not limit the forms (e.g., telephone quotes, faxes, e-mails) in which informal bids may be received.<sup>29</sup>
- The unit must keep a record of all bids submitted.<sup>30</sup>
- The contract must be awarded to the lowest responsible, responsive bidder, taking into consideration quality, performance, and the time specified in the bids for the performance of the contract.<sup>31</sup>
- For *building construction or repair* projects, the unit must solicit participation by HUBs and must document its efforts to recruit such participation.<sup>32</sup> For each building construction or repair contract in the informal bidding range, the unit must report to the Department of Administration's Office for Historically Underutilized Businesses the type of project, total dollar value of the project, the dollar value of minority business participation in the project, and the unit's efforts to recruit minority participation.<sup>33</sup>

The informal bidding statute does not require advertisement, notification, preparation of specifications, sealed bids, or a public bid opening. It does not require award by the governing board, nor does it require bid bonds or a

minimum number of bids. Finally, although the informal bidding statute does not require performance and payment bonds, such bonds are still required for all contracts worth more than \$50,000 that are part of a project worth more than \$300,000.<sup>34</sup>

### CONTRACTS COSTING LESS THAN \$30,000

There are no statutorily required bidding procedures for purchase contracts or construction or repair contracts valued at less than \$30,000. Accordingly, local governments may enter into contracts worth less than \$30,000 without bidding. However, a state statute specifically prohibits local governments from dividing contracts into smaller parts to evade the requirements of the bidding statutes.<sup>35</sup>

### QUALIFICATIONS-BASED SELECTION FOR ARCHITECTURAL, ENGINEERING, SURVEYING, AND CONSTRUCTION-MANAGEMENT-AT-RISK SERVICES

Local governments must use a qualifications-based selection process to procure architectural, engineering, surveying, and construction-management-at-risk services,<sup>36</sup> unless the local governments exempt themselves from the process in writing.<sup>37</sup> Rather than focusing on the cost of such services, the qualifications-based process is a three-step process that emphasizes the service providers' qualifications:

- First, the local government must "announce" its requirements for these services.<sup>38</sup> Because the statute also requires local governments to make good faith efforts to encourage minority participation,<sup>39</sup> a local government should employ the same methods it uses to encourage minority participation in informal and formal building construction and repair contracts when seeking proposals for architectural, engineering, surveying, and construction-management-at-risk services.
- Second, the local government must evaluate the proposals it receives to determine which firms are "qualified to provide such services on the basis of demonstrated competence and qualification for the type of professional services required *without regard to fee.*"<sup>40</sup>
- Third, the local government must negotiate a contract for those services at a "fair and reasonable

27. G.S. 143-131(b), the informal bidding statute, sets out less detailed requirements for minority participation and the use of good faith efforts in building construction projects costing between \$30,000 and \$500,000. Because the coverage of these two statutes overlap for building projects costing \$300,000 to less than \$500,000, the more stringent requirements of G.S. 143-128.2 should be used for building projects that fall in this range.

28. See note 21.

29. G.S. 143-131(a).

30. *Id.*

31. *Id.*

32. G.S. 143-131(b). Note that, as explained in note 27, there is an overlap in the requirements in G.S. 143-131(b) and G.S. 143-128.2 for building construction and repair contracts costing between \$300,000 and \$500,000.

33. G.S. 143-131(b). The reporting forms are available on the website of the state's Office for Historically Underutilized Businesses, [www.doa.state.nc.us/hub](http://www.doa.state.nc.us/hub).

34. G.S. 44A-26.

35. G.S. 143-133.

36. G.S. 143-64.31.

37. G.S. 143-64.32.

38. G.S. 143-64.31(a). The statute does not define or explain what is meant by "announce." Local governments usually notify qualified firms by mail or e-mail. Local governments may also advertise in the newspaper or online, but advertisement is not required.

39. *Id.*

40. *Id.* (emphasis added).

fee,” working first with the “best qualified firm” and negotiating with the next best qualified firm only if the negotiations with the best qualified firm are unsuccessful.<sup>41</sup>

As mentioned above, G.S. 143-64.32 permits local governments to exempt “particular projects” from this qualifications-based process. The statute requires that the exemption be “in writing” and, if the estimated professional fee for the service is \$30,000 or more, that the writing must state the reasons for the exemption.<sup>42</sup> (If the estimated fee is less than \$30,000, no justification is required.) The required writing usually takes the form of a board resolution.

## REQUESTS FOR PROPOSALS

### *Guaranteed Energy Savings Contracts*

Local governments must use a request for proposal (RFP) process, rather than a competitive bidding process, for the solicitation of “guaranteed energy savings contracts.”<sup>43</sup> A *guaranteed energy savings contract* is “a contract for the evaluation, recommendation, or implementation of energy conservation measures” in which payments are made over time and energy savings are guaranteed to exceed costs.<sup>44</sup> The procedure for procuring guaranteed energy savings contracts is as follows:

- The local government must publish notice of its RFP at least fifteen days before the bid opening in at least one newspaper of general circulation in the local government’s geographic area.<sup>45</sup>
- The local government and any proposers must follow the requirements in G.S. 143-128.2 regarding the use of good faith efforts to encourage minority participation.<sup>46</sup>
- The proposals must be sealed and contain cost estimates and estimates of energy savings.<sup>47</sup> The local government must receive two proposals from “qualified providers” to award a guaranteed energy savings contract, although the unit may award the contract if, after publishing a second notice, only one proposal from a “qualified provider” has been received.<sup>48</sup> A *qualified provider* is defined as “a person

or business experienced in the design, implementation, and installation of energy conservation measures.”<sup>49</sup>

- As with formal bidding, the proposals are opened at a public bid opening.<sup>50</sup> The contents of each proposal must be announced and recorded in the governing body’s minutes.<sup>51</sup>
- Proposals must be evaluated by a licensed architect or engineer based on (1) the cost estimates and energy savings estimates included in the proposals and (2) the evaluation criteria stated in the RFP.<sup>52</sup> The local government must award the contract to the qualified provider that “best meet[s] the needs of the governmental unit,” considering the following criteria: (1) prices offered; (2) proposed costs of construction, financing, maintenance, and training; (3) quality of the products proposed; (4) amount of energy savings; (5) general reputation and performance capabilities of the qualified provider; (6) substantial conformity with the specifications and other conditions set forth in the RFP; (7) time specified in the proposals for the performance of the contract; and (8) any other factors the governmental unit deems necessary.<sup>53</sup>

### *Solid Waste Management Facilities and Sludge Management Facilities*

Local governments have the option to use an RFP process as an alternative to competitive bidding for contracts for the construction, design, and operation of solid waste management facilities and sludge management facilities.<sup>54</sup> A *solid waste management facility* is the “land, personnel and equipment used in the management of solid waste.”<sup>55</sup> A *sludge management facility* is “a facility that processes sludge that has been generated by a municipal wastewater treatment plant for final end use or disposal.” It “does not include any component of a wastewater treatment process or facility that generates sludge.”<sup>56</sup> The RFP alternative is available only for the sludge management facility or the solid waste management facility itself. The applicable competitive bidding methods must be used for “any facility or structure that is ancillary to a solid waste or sludge

41. *Id.*

42. G.S. 143-64.32.

43. G.S. 143-64.17A.

44. G.S. 143-64.17(3).

45. G.S. 143-64.17A(a). Although electronic advertisement would seem to save energy over newspaper advertisement, the statutes do not permit the use of advertisement for guaranteed energy savings contracts solely by electronic means. *Id.*

46. G.S. 143-129.4.

47. G.S. 143-64.17A(b).

48. G.S. 143-64.17A(a).

49. G.S. 143-64.17(5).

50. G.S. 143-64.17A(c).

51. *Id.* It is probably sufficient to incorporate a summary of the proposals in the minutes and retain the proposals as a separate record.

52. *Id.*

53. G.S. 143-64.17A(d). If the unit determines that “other factors” are necessary, these additional factors must be made a matter of record and listed in the RFP (along with the other statutory criteria). *Id.*

54. G.S. 143-129.2.

55. G.S. 130A-290(39); G.S. 143-129.2(a).

56. G.S. 143-129.2(a).

management facility and that does not involve storage and processing of solid waste or sludge or the separation, extraction, and recovery of useful or marketable forms of energy and materials from solid waste at a solid waste management facility.”<sup>57</sup> The “ancillary facilities” that must be competitively bid include “roads, water and sewer lines to the facility limits, transfer stations, scale houses, administration buildings, and residue and bypass disposal sites.”<sup>58</sup>

The procedure for procuring a contract for sludge management facilities or solid waste management facilities through the use of an RFP is as follows:

- The statutes do not require an “announcement” or “notice” of the local government’s RFP, so the local government may decide what manner and method of advertisement is appropriate.
- The RFP must require that each proposal include: (1) information regarding the proposer’s experience and qualifications to perform the work, the proposer’s ability to secure financing, and the proposer’s plans for staffing and carrying out the project; (2) specific details regarding the costs that will be charged to the local government under the proposal; and (3) “any other information as the unit of local government may determine to have a material bearing on its ability to evaluate any proposal.”<sup>59</sup>
- The statute does not specify the form or manner in which the proposals should be submitted and does not require that the proposals be opened in public, so the local government may decide these matters for itself.
- The statute lists the following criteria that may be considered in evaluating the proposals: (1) a technical analysis of facility design, (2) operational experience of the technology to be utilized in the proposed facility, (3) system reliability and availability, (4) energy production balance and efficiency, (5) environmental impact and protection, (6) recovery of materials, (7) required staffing level during operation, (8) projection of anticipated revenues from the sale of energy and materials recovered by the facility, and (9) net cost to the unit of local government for operation and maintenance of the facility for the duration of time established in the RFP.<sup>60</sup> In addition, the local government may use “any other factors and information that [it] determined to have a material bearing on its ability to evaluate any proposal” as long as those factors are listed in the RFP.<sup>61</sup>

- The local government may award the contract to the person or entity whose proposal is “more responsive” to the RFP and may negotiate a contract with that proposer.<sup>62</sup>

### *Information Technology Goods and Services*

Local governments also have the *option* to use an RFP process for the procurement of information technology goods and services, defined as “electronic data processing goods and services, telecommunications goods and services, security goods and services, microprocessors, software, information processing, office systems, any services related to the foregoing, and consulting or other services for design or redesign of information technology supporting business processes.”<sup>63</sup> The RFP process outlined in G.S. 143-129.8 for information technology goods or services differs slightly from the RFP processes outlined in G.S. 143-64.17A for guaranteed energy savings contracts and in G.S. 143-129.2 for solid waste management and sludge management facilities. The RFP process for information technology goods and services is as follows:

- Notice of the RFP must be advertised in the same manner as notices for formal bids: in a newspaper of general circulation,<sup>64</sup> electronically (e.g., on the local government’s website), or both, published at least seven full days before the date of the bid opening.<sup>65</sup> A local government cannot advertise *solely* through electronic means unless, during a regular meeting of the board, the governing board has approved the use of electronic advertisement only.<sup>66</sup>
- The local government determines what factors it will use to evaluate the proposals and must clearly identify those factors in its RFP.<sup>67</sup>
- As one alternative, the local government may develop its evaluation criteria and standard of award using the “best value” procurement method set out in G.S. 143-135.9.<sup>68</sup> Under best value procurement, the local government will award the contract based on a determination of which proposal “offers the best trade-off between price and performance, where

62. G.S. 143-129.2(e).

63. G.S. 143-129.8(a); G.S. 147-33.81(2).

64. G.S. 1-597 through 1-600 provide the requirements for publishing legal advertisements in newspapers.

65. G.S. 143-129.8(b)(1); G.S. 143-129(b). The advertisement must: (1) provide the time and place where potential bidders may obtain plans and specifications of the project or purchase, (2) provide the time and place of the bid opening, and (3) state that the local government “reserves the right to reject any and all proposals.” G.S. 143-129(b).

66. G.S. 143-129(b); G.S. 143-129.8(b)(1).

67. G.S. 143-129.8(b)(2).

68. *Id.*

57. G.S. 143-129.2(f).

58. *Id.*

59. G.S. 143-129.2(c).

60. G.S. 143-129.2(d).

61. *Id.*

quality is considered an integral performance factor.”<sup>69</sup> The factors that may be considered under best value procurement include “total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor’s proposal; the vendor’s past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance.”<sup>70</sup> If a local government chooses to use the best value criteria, the RFP must still clearly identify the criteria that will be used.

- After receiving proposals, the local government may negotiate with any proposer to obtain a contract that “best meets the needs” of the local government.<sup>71</sup> However, these negotiations cannot alter the contract beyond the scope of the RFP in a way that (1) deprives the other proposers (or potential proposers) from a fair opportunity to compete for the contract or (2) would result in an award to a different company if the alterations had been included in the RFP.<sup>72</sup>

#### OTHER CONTRACTS

There are no statutorily required procedures for contracts that do not involve purchases; construction; repair; architectural, engineering, surveying, or construction-management-at-risk services; or guaranteed energy savings. (Examples of contracts not covered by statutory procurement procedures include contracts for janitorial services, accounting services, and contracts to purchase land.) For these types of contracts, local governments may use any procedures, including competitive bidding, that make sense on a local level.

#### Locally Established Bidding Policies

As noted earlier, many local governments use bidding thresholds that are lower than the statutory bidding thresholds. These thresholds are set by local policies, resolutions, or ordinances that require the use of some or all informal bidding procedures for contracts below the \$30,000 statutory threshold or that require the use of some or all formal bidding procedures for purchase contracts below the \$90,000 statutory threshold or for construction and repair contracts below the \$500,000 statutory threshold. Many local policies also require the use of competitive bidding

procedures even when competitive bidding is not required under the General Statutes.

#### STATUTORY REQUIREMENTS AND LOCAL BIDDING POLICIES: GUIDING PRINCIPLES

When a local government uses bidding thresholds for formal and informal bids that are below the statutory thresholds, the local government should be aware that some bidding requirements are tied directly to the dollar amounts found in the General Statutes—not to whether the local government calls the process “formal” or “informal.” For example, if a local government uses a “formal” process for bids that fall in the informal statutory bidding range, certain parts of the informal bidding statute will automatically apply, but the requirements in the formal bidding statute will not automatically apply (because the bid is below the statutory formal bidding threshold). Similarly, if a local government uses an “informal” process for bids below the informal statutory bidding range, the requirements in the informal bidding statute will not automatically apply (because the bid is below the statutory informal bidding threshold).

To avoid the confusion that may result from this interplay between statutory bidding requirements and local bidding practices, local governments must establish consistent, clear, and specific local policies. To impose formal bidding requirements on contracts that fall below the statutory formal bidding range, a local government must specify in its local policies and bid documents which formal requirements apply to those contracts and at what dollar amounts those requirements apply. Similarly, to impose informal bidding requirements on contracts that fall below the statutory informal bidding range, a local government must specify in its local policies and bid documents which informal requirements apply to those contracts and at what dollar amounts those requirements apply. If a local government requires competitive bidding on contracts not covered under the statutory bidding procedures (such as most service contracts), it must specify in its local policies and bid documents which bidding requirements apply to those contracts and at what dollar amounts those requirements apply.

#### STATUTORY REQUIREMENTS AND LOCAL BIDDING POLICIES: EXAMPLES

##### *Example A*

*A local government uses a formal bidding process for contracts for the purchase of apparatus, supplies, materials, and equipment worth \$30,000 or more. The statutory threshold for formal bids is \$90,000.<sup>73</sup>*

Bids on purchase contracts worth at least \$30,000 but less than \$90,000 fall within the informal bidding range, even though the local government considers these bids formal.

69. G.S. 143-135.9(a)(1).

70. *Id.*

71. G.S. 143-129.8(c).

72. *Id.*

73. G.S. 143-129(a).

Thus for purchase contracts costing between \$30,000 (the local government's formal threshold) and \$90,000 (the statutory formal bidding threshold), the bids will be governed by any requirements in the informal bidding statute. Specifically, the local government must

- record all bids received<sup>74</sup> and
- award the contract to the lowest responsible, responsive bidder.<sup>75</sup>

The local government may choose to supplement the informal bidding procedures or requirements with additional procedures or requirements as long as those additional procedures or requirements do not conflict with the limitations in the informal bidding statute. However, the local government should specify in its bid documents and its policies and procedures what additional procedures or requirements apply. The local government should not simply call the process a "formal" bidding process expecting that all of the formal bidding requirements will automatically apply. Even though the unit uses what it calls a "formal" process, the formal bidding requirements—such as advertisement, sealed bids, and a public bid opening—do not automatically apply unless the local policy specifically requires them.

#### **Example B**

*A local government uses an informal bidding process for contracts for the purchase of apparatus, supplies, materials, and equipment valued at between \$5,000 and \$90,000. The statutory threshold for informal bids is \$30,000.<sup>76</sup>*

Bids on purchase contracts worth from \$5,000 to \$30,000 fall below the informal bidding threshold, even though the local government considers these bids informal. That is, the bids are outside both the informal and formal bidding ranges, and the local government is not bound by any statutory limitations on these bids. The local government may instead use any procedures deemed appropriate at the local level.

#### **Example C**

*A local government uses a formal bidding process for construction and repair contracts worth \$300,000 or more. The statutory threshold for formal bids is \$500,000,<sup>77</sup> although certain requirements for building construction and repair contracts apply to contracts worth \$300,000 or more.<sup>78</sup>*

Bids on construction contracts worth at least \$300,000 but less than \$500,000 fall within the informal bidding range, even though the local government considers these bids formal. Thus for construction or repair contracts between \$300,000 (the local government's formal threshold) and \$500,000 (the statutory formal bidding threshold), the local government is bound by any limitations in the informal bidding statute. Specifically, the local government must

- record all bids received<sup>79</sup> and
- award to the lowest responsible, responsive bidder.<sup>80</sup>

In addition, performance and payment bonds are required for each contract over \$50,000 that is part of a construction or repair project costing over \$300,000.<sup>81</sup> For each building construction or repair contract costing between the local government's formal threshold (\$300,000) and the statutory formal bidding threshold (\$500,000), the local government must also do all of the following:

- Solicit, document, and report on HUB participation.<sup>82</sup>
- Use good faith efforts to reach minority participation goals.<sup>83</sup>
- Use separate specifications for HVAC, plumbing/gas, electrical, and general work.<sup>84</sup>
- Use any of the separate-prime, single-prime, dual-bidding, or construction-manager-at-risk construction methods (and report on the effectiveness and cost-benefit of each method used to the secretary of the Department of Administration).<sup>85</sup>
- Provide a dispute resolution process.<sup>86</sup>

The local government may choose to supplement its informal bidding procedures or requirements with additional procedures or requirements as long as those additional procedures or requirements do not conflict with the requirements in the informal bidding statute. However, the local government should specify any additional applicable procedures and requirements in its bid documents and policies and procedures and not simply call the process a "formal" bidding process expecting that all of the formal bidding requirements will automatically apply.

74. G.S. 143-131(a).

75. *Id.* This requirement also applies to bids in the statutory formal bidding range. G.S. 143-129(b).

76. G.S. 143-131(a).

77. G.S. 143-129(a).

78. See the section above entitled "Construction and Repair Contracts Costing \$300,000 or More."

79. G.S. 143-131(a).

80. *Id.* This requirement applies also to bids in the statutory formal bidding range. G.S. 143-129(b).

81. G.S. 44A-26.

82. G.S. 143-131(b).

83. G.S. 143-128.2.

84. G.S. 143-128(a).

85. G.S. 143-128(a1), (a2).

86. G.S. 143-128(f1).



**Example D**

*A local government uses an informal bidding process for construction and repair contracts worth at least \$10,000 but less than \$300,000. The statutory threshold for informal bids is \$30,000.<sup>87</sup>*

Bids on construction contracts worth from \$10,000 up to \$30,000 are below the informal bidding threshold. That is, these bids are not subject to the statutory rules governing informal bidding, even though the local government considers these bids informal. Furthermore, if the project does not involve building construction or repair, the local government is not bound by any statutory bidding requirements for construction projects involving public buildings, so it can use any procedures deemed appropriate at the local level. For building construction and repair contracts costing between \$10,000 and \$30,000, however, the local government must provide a dispute resolution process as required by G.S. 143-128(f1).

Tables 2–4 can provide some guidance to local governments that need to draft or revise their local purchasing and

contracting policies or ordinances. These tables outline the statutory requirements that apply to (1) purchase contracts, (2) construction and repair contracts (not involving buildings), and (3) building construction and repair contracts. The tables also identify which statutory requirements may be modified by local policies.

**Conclusion**

The statutes that apply to North Carolina local government contracts have become increasingly complex. This statutory scheme applies to all local governments in North Carolina, regardless of jurisdiction size, location, population density, per capita income, or geography. As local governments attempt to tailor this one-size-fits-all scheme to the realities facing them, they often choose to modify the application of these statutes through local policies. To avoid confusion—and the delays and legal challenges that can result from such confusion—North Carolina local governments must clarify their local procedures and policies and explain them to vendors and contractors seeking to do business with these local units. ■

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87. G.S. 143-131(a).

**Table 2. Bidding Laws and Local Policies: Purchase Contracts**

("G.S." stands for the North Carolina General Statutes. Refer to the statutes for explanations, details, and exceptions.)

<b>Contract amount:</b>	<b>\$0 →</b>	<b>\$30,000 →</b>	<b>\$90,000 →</b>
<b>Advertisement</b> (G.S. 143-129)	<b>G.S.</b> —no ads required <b>Local policies</b> —may require specific method/timing of ads		<b>G.S.</b> —newspaper or electronic ads for full 7 days before bid opening (advertising by electronic means only requires board approval) <b>Local policies</b> —may require extra time/locations for ads
<b>Minimum number of bids</b> (G.S. 143-132)	<b>G.S.</b> —no minimum <b>Local policies</b> —may require a minimum		
<b>Form of bids</b> (G.S. 143-129, 143-131)	<b>G.S.</b> —no specific form required (e-mail, phone, fax, mail all acceptable) <b>Local policies</b> —may require a specific form		<b>G.S.</b> —bids must be sealed <b>Local policies</b> —must comply with G.S.
<b>Record of bids</b> (G.S. 143-131)	<b>G.S.</b> —not required <b>Local policies</b> —may require a record	<b>G.S.</b> —must keep a record of all bids received <b>Local policies</b> —must comply with G.S.	<b>G.S.</b> —because bids are public, no separate record is required <b>Local policies</b> —must comply with G.S.
<b>Bid opening</b> (G.S. 143-129, 143-129.9, 143-131)	<b>G.S.</b> —public bid opening not required <b>Local policies</b> —may require public bid opening		<b>G.S.</b> —public bid opening required, but may use reverse auction or electronic bidding instead <b>Local policies</b> —must comply with G.S.
<b>Bid bonds</b> (G.S. 143-129)	<b>G.S.</b> —bonds not required <b>Local policies</b> —may require bonds		
<b>Performance/payment bonds</b> (G.S. 44A-26, 143-129)	<b>G.S.</b> —bonds not required <b>Local policies</b> —may require bonds		
<b>Historically underutilized business (HUB) participation goals</b> (G.S. 143-128.2, 143-131)	<b>G.S.</b> —not required <b>Local policies</b> —may require good faith efforts/goals—check with local government attorney		
<b>Board approval</b> (G.S. 143-129, 143-131)	<b>G.S.</b> —not required <b>Local policies</b> —may require board approval		
<b>Standard of award</b> (G.S. 143-129, 143-131)	<b>G.S.</b> —no standard given <b>Local policies</b> —may require a specific standard	<b>G.S.</b> —award to lowest responsive, responsible bidder <b>Local policies</b> —must comply with G.S.	
<b>Public records</b> (G.S. 132-1, 132-6, 143-131)	<b>G.S.</b> —bids become public record when received <b>Local policies</b> —must comply with G.S.	<b>G.S.</b> —record of bids not subject to public inspection until contract award <b>Local policies</b> —may permit public inspection before award	<b>G.S.</b> —bids become public record once opened <b>Local policies</b> —must comply with G.S.

**Table 3. Bidding Laws and Local Policies: Construction and Repair Contracts (Not Involving Buildings)**

("G.S." stands for the North Carolina General Statutes. Refer to the statutes for explanations, details, and exceptions.)

<b>Contract amount:</b>	<b>\$0 →</b>	<b>\$30,000 →</b>	<b>\$500,000 →</b>
<b>Advertisement</b> (G.S. 143-129)	G.S.—no ads required <b>Local policies</b> —may require specific method/timing of ads		G.S.—newspaper or electronic ads for full 7 days before bid opening (advertising by electronic means only requires board approval) <b>Local policies</b> —may require extra time/locations for ads
<b>Minimum number of bids</b> (G.S. 143-132)	G.S.—no minimum <b>Local policies</b> —may require a minimum		G.S.—minimum of 3 bids is required <b>Local policies</b> —may require more than 3 bids
<b>Form of bids</b> (G.S. 143-129, 143-131)	G.S.—no specific form required (e-mail, phone, fax, mail all acceptable) <b>Local policies</b> —may require a specific form		G.S.—bids must be sealed <b>Local policies</b> —must comply with G.S.
<b>Record of bids</b> (G.S. 143-129, 143-131)	G.S.—not required <b>Local policies</b> —may require a record	G.S.—must keep a record of all bids received <b>Local policies</b> —must comply with G.S.	G.S.—because bids are public, no separate record is required <b>Local policies</b> —must comply with G.S.
<b>Bid opening</b> (G.S. 143-129, 143-131)	G.S.—public bid opening not required <b>Local policies</b> —may require public bid opening		G.S.—public bid opening required <b>Local policies</b> —must comply with G.S.
<b>Bid bonds/deposit</b> (G.S. 143-129)	G.S.—bid bonds not required <b>Local policies</b> —may require bid bonds		G.S.—bid bond/deposit (5% of bid amount) is required <b>Local policies</b> —may require more than 5%
<b>Performance/payment bonds</b> (G.S. 44A-26, 143-129)	G.S.—performance and payment bonds are not required <b>Local policies</b> —may require bonds	G.S.—performance and payment bonds are required (100% of bid amount) for contracts costing more than \$300,000 <b>Local policies</b> —must comply with G.S.	G.S.—performance and payment bonds are required (100% of bid amount) for contracts costing more than \$50,000 that are part of a project costing more than \$300,000 <b>Local policies</b> —must comply with G.S.
<b>Historically underutilized business (HUB) participation goals</b> (G.S. 143-128.2, 143-131)	G.S.—not required <b>Local policies</b> —may require good faith efforts/goals—check with local government attorney		
<b>Separate specifications</b> (G.S. 143-128)	G.S.—separate specifications not required <b>Local policies</b> —may require separate specifications		
<b>Licensed contractor</b> (G.S. 87-1, 87-1.1, 143-139.1)	G.S.—must use a licensed general contractor if the contract is part of a project worth more than \$30,000 <b>Local policies</b> —must comply with G.S.		
<b>Construction methods</b> (G.S. 143-128)	G.S.—no specific methods must be used <b>Local policies</b> —may require specific methods		
<b>Board approval</b> (G.S. 143-129, 143-131)	G.S.—not required <b>Local policies</b> —may require board approval		G.S.—board approval required; cannot be delegated <b>Local policies</b> —must comply with G.S.
<b>Standard of award</b> (G.S. 143-129, 143-131)	G.S.—no standard given <b>Local policies</b> —may require a specific standard	G.S.—award to lowest responsive, responsible bidder <b>Local policies</b> —must comply with G.S.	
<b>Dispute resolution</b> (G.S. 143-128(f1))	G.S.—dispute resolution process not required <b>Local policies</b> —may require a dispute resolution process		
<b>Public records</b> (G.S. 132-1, 132-6, 143-131)	G.S.—bids become public record when received <b>Local policies</b> —must comply with G.S.	G.S.—record of bids not subject to public inspection until contract award <b>Local policies</b> —may permit public inspection before award	G.S.—bids become public record once opened <b>Local policies</b> —must comply with G.S.

**Table 4. Bidding Laws and Local Policies: Building Construction and Repair Contracts**

(“G.S.” stands for the North Carolina General Statutes. Refer to the statutes for explanations, details, and exceptions.)

<b>Contract amount:</b>	<b>\$0 →</b>	<b>\$30,000 →</b>	<b>\$300,000 →</b>	<b>\$500,000 →</b>
<b>Advertisement</b> (G.S. 143-129)	G.S.—no ads required <b>Local policies</b> —may require specific method/timing of ads			G.S.—newspaper or electronic ads for full 7 days before bid opening (advertising by electronic means only requires board approval) <b>Local policies</b> —may require extra time/locations for ads
<b>Minimum number of bids</b> (G.S. 143-132)	G.S.—no minimum <b>Local policies</b> —may require a minimum			G.S.—minimum of 3 bids is required <b>Local policies</b> —may require more than 3 bids
<b>Form of bids</b> (G.S. 143-129, 143-131)	G.S.—no specific form required (e-mail, phone, fax, mail all acceptable) <b>Local policies</b> —may require a specific form			G.S.—bids must be sealed <b>Local policies</b> —must comply with G.S.
<b>Record of bids</b> (G.S. 143-129, 143-131)	G.S.—not required <b>Local policies</b> —may require a record	G.S.—must keep a record of all bids received <b>Local policies</b> —must comply with G.S.		G.S.—because bids are public, no separate record is required <b>Local policies</b> —must comply with G.S.
<b>Bid opening</b> (G.S. 143-129, 143-131)	G.S.—public bid opening not required <b>Local policies</b> —may require a public bid opening			G.S.—public bid opening required <b>Local policies</b> —must comply with G.S.
<b>Bid bonds/deposit</b> (G.S. 143-129)	G.S.—bid bonds not required <b>Local policies</b> —may require bid bonds			G.S.—bid bond/deposit (5% of bid amount) required <b>Local policies</b> —may require more than 5%
<b>Performance/payment bonds</b> (G.S. 44A-26, 143-129)	G.S.—performance and payment bonds are not required <b>Local policies</b> —may require bonds	G.S.—performance and payment bonds are required (100% of bid amount) for contracts costing more than \$50,000 that are part of a project costing more than \$300,000 <b>Local policies</b> —must comply with G.S.		
<b>Historically underutilized business (HUB) participation goals</b> (G.S. 143-128.2, 143-131)	G.S.—not required unless part of state-funded project worth \$100,000 or more <b>Local policies</b> —may require good faith efforts/goals for other projects	G.S.—document good faith efforts; report to HUB Office <b>Local policies</b> —must comply with G.S.	G.S.—good faith efforts to reach goals; bidders must submit affidavits so local government can verify bidders’ good faith efforts; report to HUB Office <b>Local policies</b> —must comply with G.S.	
<b>Separate specifications</b> (G.S. 143-128)	G.S.—separate specifications not required <b>Local policies</b> —may require separate specifications		G.S.—separate specifications required for plumbing, electrical, HVAC, and general work <b>Local policies</b> —may require additional specifications	
<b>Licensed contractor</b> (G.S. 87-1, 87-1.1, 143-139.1)	G.S.—must use a licensed general contractor if the contract is part of a project worth more than \$30,000 <b>Local policies</b> —must comply with G.S.			
<b>Construction methods</b> (G.S. 143-128)	G.S.—no specific methods must be used <b>Local policies</b> —may require specific methods		G.S.—must use single-prime, separate-prime, dual-bidding, or construction-management-at-risk method; alternate methods may be used only if approved by the State Building Commission or authorized by local act <b>Local policies</b> —must comply with G.S.	
<b>Board approval</b> (G.S. 143-129, 143-131)	G.S.—not required <b>Local policies</b> —may require board approval			G.S.—board approval required; cannot be delegated <b>Local policies</b> —must comply with G.S.
<b>Standard of award</b> (G.S. 143-129, 143-131)	G.S.—no standard given <b>Local policies</b> —may require a specific standard	G.S.—award to lowest responsive, responsible bidder <b>Local policies</b> —must comply with G.S.		
<b>Dispute resolution</b> (G.S. 143-128(f1))	G.S.—must adopt own dispute resolution process (including mediation) or process adopted by the State Building Commission; available to all parties, with a amount-in-controversy not less than \$15,000 <b>Local policies</b> —must comply with G.S. (which permits adoption of unit’s own dispute resolution process)			
<b>Public records</b> (G.S. 132-1, 132-6, 143-131)	G.S.—bids become public record when received <b>Local policies</b> —must comply with G.S.	G.S.—record of bids not subject to public inspection until contract award <b>Local policies</b> —may permit public inspection before award		G.S.—bids become public record once opened <b>Local policies</b> —must comply with G.S.