



When Are Bids and Proposals Subject to Public Inspection?

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When soliciting bids or proposals for purchases and contracts, local governments receive pricing and other information from vendors and contractors. Local governments often receive requests from other bidders, the media, and private citizens to examine these bids and proposals. While bids and proposals received by local governments are considered public records under North Carolina law, some bids and proposals are subject to public inspection only after the local government opens them, and some are subject to public inspection only after the local government awards the contract.

This bulletin explains how the North Carolina public records laws apply to bids and proposals submitted to local governments in North Carolina.¹ It also addresses specific questions regarding the obligations of North Carolina local governments to disclose those bids and proposals.

Background

North Carolina General Statute 132-1 defines *public records* as

all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions, including every public office, public officer or official (State or local, elected or appointed), institution, board, commission,

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1. 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>.

bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

This broad definition addresses four aspects of the record: (1) the form of the record, (2) whether the record was “made or received” by the unit, (3) *how* the record was “made or received” by the unit, and (4) the nature of the entity with custody of the record. In order for a record to be a public record, therefore, it must be: (1) in one of the forms described by the statute, (2) made or received by the unit, (3) made or received by the unit for the reasons set out in the statute, and (4) made or received by an entity of the type listed in the statute.

Once the record is determined to be a public record, North Carolina law gives “any person” the right to examine and have a copy of the record.² Furthermore, the North Carolina Supreme Court has held that “in the absence of clear statutory exemption or exception, documents falling within the definition of ‘public records’ in the Public Records Law must be made available for public inspection.”³ In other words, all public records are subject to public inspection unless a statute specifically excludes or exempts the records from public inspection.

Application of the Public Records Laws to Specific Categories of Bids

Informal Bids

Informal bidding is required on purchases costing at least \$30,000 but less than \$90,000 and on construction and repair contracts costing at least \$30,000 but less than \$500,000.⁴ The informal bidding statute exempts informal bids (or the record of bids submitted)⁵ from public inspection “until the contract has been awarded.”⁶ In other words, bids received on purchase contracts valued at \$30,000 or more but less than \$90,000 and on construction or repair contracts valued at \$30,000 or more but less than \$500,000 are not subject to public inspection until after the contract is awarded.⁷

Formal Bids

The formal bidding statute, which applies to purchase contracts costing \$90,000 or more and to construction and repair contracts costing \$500,000 or more, does not contain a provision exempting formal bids from public inspection until the contract is awarded. Instead the statute requires that bidders submit sealed bids⁸ and prohibits unsealing a formal bid or disclosing the contents of a formal bid before the public bid opening.⁹

2. N.C. GEN. STAT. (hereinafter G.S.) § 132-6.

3. *News & Observer Publ’g Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992).

4. G.S. 143-131(a) (referring to the formal bidding thresholds found in G.S. 143-129(a)).

5. Local governments must keep a record of all informal bids submitted. G.S. 143-131(a).

6. G.S. 143-131.

7. *But see* the discussion at pages 6–8 for an explanation of how this exemption applies when formal bidding procedures are used for contracts in the informal bidding range.

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

9. Unsealing a formal bid or disclosing the contents of a formal bid before the public bid opening is a Class 1 misdemeanor. *Id.*

Although the formal bidding statute does not exempt unopened formal bids from public inspection, formal bids received by a local government are not public records until they are opened. As discussed above, an unopened formal bid would be a public record only if the bid meets all of the following four requirements: (1) the bid is in one of the forms listed in the statute, (2) the bid was made or received by the unit, (3) the bid was made or received by the unit for the reasons set out in the statute, and (4) the bid contents were made or received by an entity of the type listed in the statute. An unopened formal bid meets only three of these four requirements. The bid will be in one of the forms listed in G.S. 132-1 (“documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, artifacts, or other documentary material, regardless of physical form or characteristics”), satisfying the first of these four requirements. The bid will also be submitted to the unit “in connection with the transaction of public business” (i.e., public purchases or construction), meeting the third requirement. And, because local governments are included in the list of public entities found in G.S. 132-1, a formal bid submitted to a local government also meets the fourth requirement.

The second requirement, however—that the local government “receives” the bid—is not met in the case of an unopened formal bid. The bid must remain sealed until the public bid opening, and the local government cannot access the sealed bid before the bid opening without compromising the integrity of the bidding process or undermining the goals of that process: to promote and maintain fairness and competition.¹⁰ Furthermore, it is a Class 1 misdemeanor to unseal a formal bid or to disclose the contents of a formal bid before the bid opening.¹¹

Because a local government cannot “receive” a sealed formal bid until the bid is opened in public, sealed formal bids are not public records and thus are not subject to public inspection.¹² Once the bids are opened in public (as required by statute), the unit “receives” the bids, and the bids become subject to public inspection. An opened formal bid is not exempted or excepted from public inspection, except for any information in the bid meeting the definition in G.S. 66-152 for “trade secret” information.¹³

Bids Below the Informal Range

There is also no general statutory exemption or exception for bids submitted on purchases or construction or repair contracts costing less than \$30,000 (the informal bidding threshold).¹⁴ Accordingly, if a local government chooses to receive unsealed bids on contracts below the

10. See *Mullen v. Town of Louisburg*, 225 N.C. 53, 58–59, 33 S.E.2d 484, 487 (1941) (stating that the purpose of the bidding 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 prices”). Sealed bidding prevents any one bidder from gaining an unfair advantage over the other bidders by reviewing its competitors’ bids before submitting its own bid.

11. *Id.* (“[T]he opening of an envelope or package with knowledge that it contains a bid or the disclosure or exhibition of the contents of any bid by anyone without the permission of the bidder prior to the time set for opening in the invitation to bid shall constitute a Class 1 misdemeanor.”)

12. North Carolina courts presume that the General Assembly acts “in accordance with reason and common sense” in enacting legislation and also presume that the General Assembly does “not intend an unjust or absurd result.” *King v. Baldwin*, 276 N.C. 316, 325, 172 S.E.2d 12, 18 (1970). As discussed above, subjecting sealed bids to public inspection would be both absurd and unjust.

13. See pages 9–11 for a discussion of these requirements.

14. Trade secret information is not subject to public inspection, even if such information is part of a bid on a contract costing less than \$30,000. See pages 9–11.

informal range, those bids are subject to public inspection once received. If a local government chooses to receive sealed bids on contracts in this range, those bids are subject to public inspection once they are opened.¹⁵

Cost Estimates and Bidders' Lists

North Carolina law authorizes local governments to promulgate rules regarding the confidentiality of (1) the unit's cost estimates for public contracts, before bidding, and (2) the identity of contractors who have obtained proposals for a public contract for bidding purposes (commonly known as a "bidders' list").¹⁶ If the unit promulgates rules under this statute, and the rules require that cost estimates or bidders' lists be kept confidential, an employee or officer of the unit who discloses such information in violation of the rules is subject to disciplinary action.¹⁷

Other Procurement Methods

Qualifications-based selection of architectural, engineering, surveying, or construction-management-at-risk services. There is no exemption or exception to the public records laws for proposals received during a qualifications-based selection process, and the applicable statute does not require sealed proposals.¹⁸ If a local government chooses to require sealed proposals, those proposals would not become subject to public inspection until the sealed proposals were opened.¹⁹ If a local government chooses not to require sealed proposals, the proposals would become subject to public inspection when received by the local government.

Guaranteed energy savings contracts. The statutes governing guaranteed energy savings contracts do not expressly address public records or public inspections; however, the statutes require sealed proposals, which are opened in public.²⁰ Accordingly, proposals received for guaranteed energy savings contracts are not subject to public inspection until they are opened.²¹

Requests for proposals (RFPs) on solid waste management facilities and sludge management facilities. There is no exemption or exception to the public records laws for proposals received in response to an RFP for solid waste management facilities or sludge management facilities, and the applicable statute does not require sealed proposals.²² Accordingly, if a local government chooses to require sealed proposals, those proposals would not become subject to public inspection until they were opened.²³ On the other hand, if a local government chooses not to require sealed proposals, the proposals would become subject to public inspection when received by the local government.

Requests for proposals (RFPs) on information technology. The statute governing information technology RFPs provides that proposals received in response to such RFPs "shall not be subject to

15. Sealed bids or proposals are not public records until opened. See pages 2–3.

16. G.S. 133-33.

17. *Id.*

18. G.S. 143-64.31.

19. Sealed bids or proposals are not public records until opened. See pages 2–3.

20. G.S. 143-64.17A.

21. See pages 2–3.

22. G.S. 143-129.2.

23. See pages 2–3.

public inspection until a contract is awarded.”²⁴ Accordingly, even if such proposals are not sealed when received by the local government, they are not subject to public inspection until the contract is awarded. The local government probably may choose to make the proposals available for public inspection before the contract is awarded.²⁵

Locally Established Bidding Thresholds

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 require the use of some or all formal bidding procedures for contracts below the \$90,000 statutory threshold for purchase contracts or below the \$500,000 statutory threshold for construction and repair contracts. Local policies may also require competitive bidding for services, although the state statutes do not.²⁶

When a local government uses the statutory thresholds, the unit’s obligations under the public records statutes are relatively clear. When a local government uses bidding thresholds below the statutory thresholds (or when the local government requires bidding when the statutes do not), there is considerable confusion about when bids or proposals are subject to public inspection. The remainder of this bulletin will focus on specific questions that local governments may have when responding to public records requests for bids and proposals.

Answers to Specific Questions regarding Bids and the Public Records Laws

This section will answer questions that arise from the application of the North Carolina public records laws to statutory bidding thresholds and to locally established thresholds. It will address the following questions:

- What does “subject to public inspection” mean?
- May local governments subject informal bids to public inspection before the contract is awarded?
- When do formal bids become subject to public inspection?
- When do bids for contracts that fall below the informal bid range become subject to public inspection?
- When should local governments withhold confidential information or trade secrets from public inspection?
- What are a local government’s obligations under the public records laws when it uses an informal process for bids below the informal range or a formal process for bids in the informal range?

24. G.S. 143-129.8(d).

25. If the local government chooses to open the RFPs publicly, then the proposals become public records at that time and probably may not be withheld from public inspection after they are opened.

26. The North Carolina General Statutes do not require local governments to use competitive bidding for service contracts. G.S. 143-64.31 does require that local governments use a qualifications-based selection process (not a competitive bidding process) for architectural, engineering, surveying, and construction-management-at-risk services, although local governments may exempt themselves from this process in writing under G.S. 143-64.32.

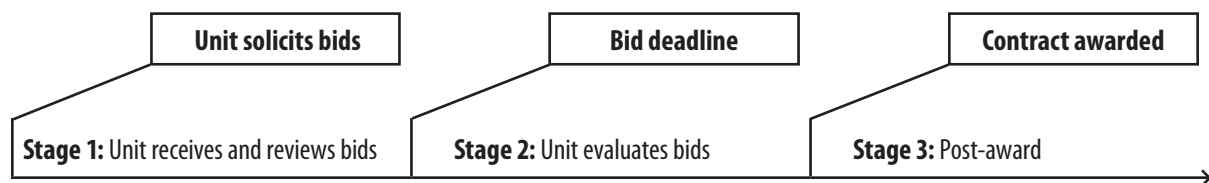
What Does “Subject to Public Inspection” Mean?

Making bids subject to public inspection means that the public can examine and copy the bids. For purposes of the public records laws, the identity and intentions of persons seeking to examine public records are irrelevant. Reading bid prices aloud in public is not the same as making the bids available for public inspection. If bid prices are recorded on a log or record (in lieu of or in addition to receiving bids separately), then that record is subject to public inspection under the same rules that apply to the bid documents themselves.

May Local Governments Subject Informal Bids to Public Inspection before the Contract Is Awarded?

Breaking the informal bid process into three stages may help answer this question. In Stage 1 of the typical informal bid process, the local government receives bids in response to its solicitation, and, in Stage 2, the local government evaluates the bids. Stage 3 begins once the contract is awarded. See Figure 1. The informal bidding statute does not specify how local governments may receive informal bids; there are several ways that these bids may be submitted, including via e-mail, phone, fax, or mail.²⁷

Figure 1. Timeline for Typical Informal Bid Process

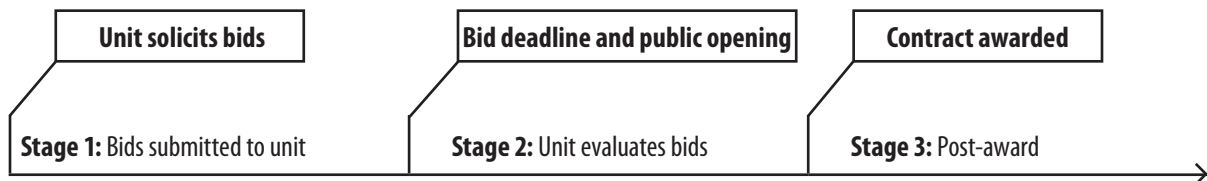


During Stage 1 of the typical informal bid process, the unit is aware of the contents of each bid as the bid is received, because the bids are not sealed. In fact, bids are often received via phone, fax, or e-mail. Potential bidders may want to know what prices are being offered by their competitors, and they may ask the purchasing staff to tell them who else has bid on the contract and what prices have been bid. While it may seem to be to the unit’s advantage to share this information with bidders who request it—after all, the unit may get a lower price by telling potential bidders what price they need to beat to become the lowest bidder—the concern here is with fairness, one of the basic principles of the competitive bidding process. Sharing bid prices and information with just a few but not all of the bidders or potential bidders is simply unfair. In Stage 2 the issue of fairness is no longer a concern because bidders cannot change their bids once the bid deadline has passed.

If a local government unit chooses to require sealed bids and a public bid opening for contracts in the informal range, the unit does not actually “receive” the bids themselves until the bid opening. See Figure 2. The bids are then opened in public before the contract is awarded.

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

Figure 2. Timeline for Informal Bid Process with Sealed Bids and Public Bid Opening



The informal bidding statute, G.S. 143-131, states that the record of informal bids “shall not be subject to public inspection until the contract has been awarded.” Using the stages described above, this language appears to protect the bids from public inspection during Stage 1 (while the local government is receiving informal bids) and Stage 2 (while the local government is evaluating the bids). This leads to three clarifying questions:

1. Is a local government prohibited from permitting public inspection of informal bids before the contract is awarded? A local government unit probably should not permit inspection of bids during Stage 1 (while the bidders are submitting bids to the local government). If bids were made available to the public (including potential bidders) during Stage 1, the fairness of the bidding process may be compromised. Accordingly, bids probably should not be disclosed during this stage.

However, the fairness concerns disappear once the bidding deadline has passed (see Figure 1) or once the bids are opened (see Figure 2), because the bidders cannot change their bids at that point. In fact, making the bids public may be desirable to permit the governing board to consider the bids during a public meeting.²⁸ (The General Statutes do not require governing board approval of informal bids,²⁹ but local policies may require such approval for some or all contracts in the informal range.)

If a local government requires sealed bids and a public bid opening for bids in the informal range, those bids probably will be subject to public inspection once they are opened in public. Otherwise, the local government would have to arbitrarily choose a time after which the publicly opened bids would no longer be subject to public inspection. In other words, a local government

28. See David M. Lawrence, *Public Records Law for North Carolina Local Governments: 1997–2003 Supplement* (Chapel Hill, N.C.: School of Government, The University of North Carolina at Chapel Hill, 2004), 80 (“If a local government submits informal bids to its governing board for award, purchasing officials might want to make the bids public at that time, before the actual awarding of the contract. Because the statute does not prohibit such a release but simply does not require it, it is entirely appropriate for purchasing officials to make the bids public when they are considered by the board.”); Bluestein, *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 79–80 (Question 134) (“The statute specifically provides that bids received under the informal procedure are not subject to public inspection until after the contract has been awarded. Furthermore, nothing in the statute requires a public official to provide this information verbally. To do so would seem both inconsistent with the statutory directive to maintain confidentiality until after award and detrimental to a fair, competitive process. The statute does not appear, however, to prohibit the unit from disclosing the bids after they have all been received and prior to the award of the contract, and this may be desirable for evaluation and approval after all bids have been received.”).

29. G.S. 143-131.

that opens informal bids in public has probably waived its ability to rely on the informal bid exemption from the public records laws.

The unit *must* permit inspection of bids once the contract is awarded.

2. Must a local government permit public inspection of informal bids before the contract is awarded? Although the local government may choose to permit public inspection of informal bids during Stage 2, it is not *required* to permit public inspection of informal bids that are not opened in public until the contract is awarded (Stage 3). However, as discussed in Question 1, if a local government requires sealed bids and a public bid opening for contracts in the informal range, it probably must permit public inspection of those bids once they are opened, even before the contract is awarded.

3. Must a local government permit public inspection of informal bids if the unit decides not to award the contract? If the unit has requested and received sealed bids on a contract in the informal range but decides before opening the bids not to award the contract, the unit probably may return the unopened bids to the bidders. In this case, the bids themselves never became public records.³⁰

If the local government has requested and received unsealed bids, or if the local government decides *after* opening sealed bids not to award the contract, the unit may be required to permit public inspection of the bids (or the record of the bids) once it decides not to award the contract. When the bidding process is terminated, its integrity is no longer an issue and the bids probably must be made available to the public.³¹ However, one could argue that the wording of the public records exception in G.S. 143-131 (“such record shall not be subject to public inspection until the contract has been awarded”) creates a condition—the award of the contract—that must be met before the records can become subject to public inspection. Under this interpretation of G.S. 143-131(b), if the contract is not awarded, the unit may continue to withhold the bids (or the record of the bids) from public inspection.

When Do Formal Bids Become Subject to Public Inspection?

Formal bids (bids on purchase contracts costing \$90,000 or more and bids on construction and repair contracts costing \$500,000 or more) are subject to public inspection once they are opened. There is no exception or exemption from the public records law for formal bids, except for trade secrets (discussed below). And, as discussed above, if a local government requires sealed bids and a public bid opening for contracts in the informal range, it probably must permit public inspection of the bids once they are opened in public, even before the contract is awarded.

If the local government decides before opening bids not to award the contract, the unit probably may return the unopened bids to the bidders. In this case, the bids were never “received” by the local government and the bids have not become public records. If the local government decides

30. See pages 2–3.

31. Although the General Statutes do not address this specific issue, one statute allows the inspection of public records in an analogous situation. G.S. 143-318.10(e) allows a public body to withhold from public inspection the minutes of a closed session of the body only for “so long as public inspection would frustrate the purpose of a closed session.” Once disclosure of the minutes will not frustrate the purpose of the closed session, the public body may no longer withhold the minutes from public inspection. Similarly, once the reason for withholding bids from public inspection no longer exists (i.e., once the bidding process is terminated), the bids probably must be made available to the public.

after opening the bids not to award the contract, the unit must permit public inspection of the bids, which become public records when opened.

When Do Bids for Contracts That Fall below the Informal Bid Range Become Subject to Public Inspection?

If a local government receives unsealed bids on projects below the informal bidding threshold (\$30,000), those bids are public records—and are subject to public inspection—at the moment the local government receives them. This is true even if the local government considers these bids “informal” bids. The provision protecting informal bids from public inspection applies *only* to bids within the dollar thresholds in the informal bidding statute. In other words, the public records exception in G.S. 143-131(a) applies only to contracts costing between \$30,000 and \$90,000 (for purchase contracts) and to contracts costing between \$30,000 and \$500,000 (for construction and repair contracts), *regardless of the dollar threshold the local government uses for informal bidding*. For example, if a local government uses an informal bid process for contracts worth \$10,000 to \$50,000, any informal bids it receives on a contract costing at least \$10,000 but less than \$30,000 are public records—and subject to public inspection—from the time the bids are received.

However, as discussed above at pages 3–4, if the local government requires *sealed* bids on contracts that fall below the statutory informal bidding threshold (\$30,000), those bids are probably subject to public inspection only once they are opened—that is, once the bid itself is “received” by the local government.

If the local government has requested and received sealed bids on a contract below the informal range but decides before opening the bids not to award the contract, the unit probably may return the unopened bids to the bidders. In this case the bid contents were never “received” by the local government and the bids have not become public records.

If the local government has requested and received sealed bids on a contract below the informal range and decides *after* opening the bids not to award the contract, the unit must permit public inspection of the bids (or the record of the bids) once it decides not to award the contract.

When Should Local Governments Withhold Confidential Information or Trade Secrets from Public Inspection?

Trade secret information received in any bidding or proposal process—formal, informal, or otherwise—is not subject to public inspection as long as the information meets all of the following requirements:

- The information is “business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that (a) derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”³²

32. G.S. 66-152(3).

- The information is the property of “an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity.”³³
- The information is disclosed or furnished to the local government in connection with the owner’s performance of a public contract; in connection with a bid, application, proposal, or industrial development project; or in compliance with laws, regulations, rules, or ordinances of the United States, the state, or political subdivisions of the state.
- The information is designated or indicated as “confidential” or a “trade secret” *at the time of its initial disclosure to the local government*.³⁴

Local governments may face civil liability for disclosing information that meets all four of these requirements. The North Carolina Trade Secrets Act gives the owner of a trade secret the right to bring a civil action for misappropriation of the owner’s trade secrets.³⁵ Misappropriation of a trade secret includes disclosure,³⁶ and the act provides that the owner of the trade secret may recover actual damages as well as punitive damages for misappropriation.³⁷ As a result, a local government asked to disclose public records that may contain trade secrets is placed in a very difficult position: should the local government refuse to disclose the information and face penalties for refusing to disclose public records, or should it disclose the information and risk a lawsuit and civil damages? The local government is usually not in the best position to determine whether certain information is a “trade secret” as defined by G.S. 66-152(3); that determination is more easily made by the company claiming trade secret protection.³⁸

There are three options for placing the burden of this determination—and the risk of penalties or damages—on the entity best able to determine whether the information merits trade secret protection: the company claiming trade secret protection. First, a local government faced with a public records request for information that may contain trade secrets could require the company claiming trade secret protection to provide the local government a written explanation of the company’s basis for claiming trade secret protection under G.S. 66-152 and G.S. 132-1.2. If the local govern-

33. G.S. 66-152(2).

34. G.S. 66-152(2), (3); G.S. 132-1.2. In *North Carolina Elec. Membership Corp. v. North Carolina Dep’t of Econ. and Cmty. Dev.*, 108 N.C. App. 711, 425 S.E.2d 440 (1993), the North Carolina Court of Appeals interpreted this requirement very broadly in finding that the North Carolina Electric Membership Corporation (NCEMC) established a likelihood of success on the merits of its claim that certain documents sought by Duke Power Company (Duke), a competitor of NCEMC, were not subject to disclosure. The documents in question were submitted to the North Carolina Department of Economic and Community Development (NCDECD) before the enactment of G.S. 132-1.2, but the opinion does not explain what, if any, actions the plaintiff took to “indicate” that the documents contained trade secrets when the documents were submitted. Instead, the court found that “the facts and circumstances surrounding this case,” including the fact that NCDECD asked NCEMC to respond to Duke’s public records request, “support a conclusion that the documents were ‘indicated’ to contain trade secrets at the time of their initial submission.” 108 N.C. App. at 720–21, 425 S.E.2d at 446. It is unclear if the Court of Appeals or the North Carolina Supreme Court would interpret this confidentiality requirement as broadly after the enactment of G.S. 132-1.2.

35. G.S. 66-153.

36. G.S. 66-152(1).

37. G.S. 66-154.

38. For a discussion of what types of records may be considered trade secrets, see David M. Lawrence, *Public Records Law for North Carolina Local Governments* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997), 131–40, and *Public Records Law for North Carolina Local Governments: 1997–2003 Supplement*, 33–34.

ment is satisfied with the explanation, it may then provide the explanation to the entity seeking disclosure. Second, the local government may require each company that submits a proposal or bid in response to a bid solicitation to indemnify the local government for costs arising out of a public records request for documents the company claims contain protected trade secrets.³⁹ Finally, as a third alternative, the local government may wait to be sued by the entity seeking the records⁴⁰ and then file a third-party action against—or join as a defendant—the company claiming trade secret protection. This option guarantees a final determination of what information, if any, merits trade secret protection and allows the interested parties (the party seeking disclosure and the party claiming trade secret protection) to litigate the matter without requiring the local government to do more than follow the resulting order. The drawback to this third option is the potential cost—in time if not money—to the local government. However, by using an indemnification provision, the court costs and legal fees may be passed on to the company claiming trade secret protection.

What Are a Local Government's Obligations under the Public Records Laws When It Uses an Informal Process for Bids below the Informal Range or a Formal Process for Bids in the Informal Range?

The public records exemption in the informal bidding statute applies only to bids received on contracts in the *statutory* informal bidding range (purchases costing at least \$30,000 but no more than \$90,000 and construction and repair contracts costing at least \$30,000 but no more than \$500,000). In other words, if a local government uses an informal bidding process on contracts that cost less than \$30,000, the unit cannot rely on the language in G.S. 143-131(a) that permits local governments to withhold these bids from public inspection until the contract is awarded. The bids, if unsealed, will be subject to public inspection once the local government receives them.

At the same time, if a local government requires a formal bid process—or, at least, requires sealed bids and a public bid opening—for contracts in the informal bidding range, the unit will probably be deemed as waiving the exemption in G.S. 143-131(a) once it opens the bids in public. That is, the unit probably may not withhold the bids from public inspection once these bids are opened. However, the unit may withhold the bids from public inspection before the bids are opened.

Conclusion

Local governments must know their obligations under the public records laws and understand how those obligations apply to the bidding process. These obligations are relatively clear for local governments that use the statutory dollar thresholds and procedures for formal and informal bids

39. Cynthia L. White, assistant city attorney for the City of Charlotte, suggested this approach as one that the City of Charlotte has used successfully for several years. E-mail from Cynthia L. White, Assistant City Attorney, City of Charlotte, to the Local Government Law Listserv, lglaw@listserv.unc.edu (Aug. 6, 2008, 7:36 p.m. EST).

40. The local government may not bring a declaratory judgment action on its own to seek a judicial determination of whether the information sought should be disclosed. The North Carolina Court of Appeals has held that a public entity may not bring a declaratory judgment action against a person or company seeking public records to determine whether certain records must be disclosed. See *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 463, 596 S.E.2d 431, 434 (2004).

but can be confusing to local governments that use bidding thresholds or procedures that differ from those in the statutes. A better understanding of the interaction between bidding procedures and the public records laws will enable North Carolina local governments to protect the integrity of the competitive bidding process while complying with these laws.

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