A Review of Some Legal Aspects of Construction for Governmental Units in North Carolina

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The purpose of this article is to provide general information to librarians on some of the legal issues involved in contracting for construction of libraries in North Carolina. We will focus exclusively on North Carolina statutory obligations. Related areas not covered in this article, but which the reader may wish to pursue, include federal regulations and guidelines and contractual issues between owners, architects, and contractors. In regard to the latter, a perusal of the major contractual documents developed by the American Institute of Architects should prove particularly helpful to anyone embarking upon a building project.

It is emphasized that our intent is to identify and illuminate the most frequently encountered issues in construction. This article is not intended to present definitive legal opinions, nor is it intended to be used as the basis for policy decisions. Librarians confronting such issues are advised to consult with the appropriate legal authority.

The majority of libraries in North Carolina are departments or subdivisions of local governmental units and are therefore subject to the state's rules governing the process of construction and purchasing by local governments. These rules are found in the *General Statutes of North Carolina*. Essentially, the intent of the statutes is to demonstrate that when a local governmental unit enters into a construction or purchase contract, that it is done openly, in a competitive environment with no appearance of collusion between the unit and the contractor. A further intent is to ensure that the financial interest of the public is protected and that the contract is satisfactorily completed.

As in many areas of statutory law, the rules regarding construction contracts contain much gray area. Some of this area has been illuminated by case law. It should also be noted that modifications that apply exclusively to specific governmental units in North Carolina have been enacted over the years. While it is beyond the scope of this article to cover case law and local legislation, a survey of both are necessary to provide definitive answers to specific questions.

Formal Bidding Procedure

The General Statutes (G.S.) recognize two forms of bidding. These two forms apply to both construction/repair contracts and purchase contracts. They are commonly referred to as the formal bidding procedure and the informal bidding procedure.

Generally bid openings are orchestrated to satisfy all legal requirements and to demonstrate that all bidders are treated fairly and to avoid any appearance to the contrary.

The formal bidding procedure is generally described in G.S. 143-129. It is required for all construction or repair projects with estimated expenditures of $50,000 or more and for the purchase or lease-purchase of supplies or equipment requiring an estimated expenditure of $20,000 or more.

Under formal bidding procedures, plans and specifications for the project must be prepared and made available to potential bidders. Information about such projects are usually available through industry information services, such as the AGC, Inc. (Association of General Contractors) and F.W. Dodge McGraw-Hill Information Services Company, as well as through the offices of the architects and/or engineers involved in the projects.

An advertisement inviting bids must be published at least one week before the time specified for the opening of bids. It must be placed in a newspaper having general circulation in the local area and must state the time and place where the plans and specifications are available and the time and place for the opening of the proposals. It also must reserve the right of the governing body or board to reject any or all bids that are received. Usually the bidding period will last for a period of three to four weeks.

All bids must be accompanied by a five percent bid deposit. Bids that are not accompanied by a satisfactory bid deposit may not be considered or accepted. The purpose of the bid deposit is to discourage irresponsible or frivolous bids. If a bidder is unable or unwilling to execute a contract after an award has been made, that contractor's bid deposit may be retained and claimed by the governmental unit.

There are four acceptable forms of bid deposit: cash, a cashier's check, a certified check on a bank or trust company ensured by FDIC, or a bid bond executed by a surety licensed by the state of North Carolina to execute such bonds. (A surety is a third party, usually an insurance company, that is willing to accept financial responsibility for the bidder.) A bond is a promise by the surety to pay the value of the bond in the event that the bidder fails to live up to his obligations. It should be standard procedure for bid bonds to be closely examined by legal council prior to award. Similarly, it is recommended that sureties be checked by the Department of Insurance to verify that they are licensed. It is prudent to hold the deposit of the three lowest bidders until a contract is executed. However, practices as to the number of deposits held and when deposits are returned varies from place to place.

The bids must be opened in public at the time and place specified in the advertisement. Although sealed bids are gener-

ally required for formal bids, the statutes do not require that this be so. However, if the advertisement specifies sealed bids, no bids may be opened without the permission of the bidder prior to the time set for the opening.

Generally bid openings are orchestrated to satisfy all legal requirements and to demonstrate that all bidders are treated fairly and to avoid any appearance to the contrary. To meet the objectives, certain formalities are followed such as announcing the time at which all bids must be delivered to the representative of the governmental unit, reading all bids aloud, and recording the results of the bid opening.

The results of the bid opening must be recorded in the minutes of the local governing body or board. That body or board is required to make the award. Typically the recording of the bid opening is done by the presentation of a bid tabulation to the body or board. The tabulation is accepted and incorporated in the minutes.

G.S. 143-132 requires that three competitive bids be received for a formal bidding process. For this reason, it is generally a good practice to avoid opening any bids until it has been verified that at least three bids have been received. If less than three bids are received, the project must be readvertised. A governmental unit is free to award a contract if fewer than three bids have been received after the second advertisement.

The statutes grant an exception to the requirements of the formal bid process "...in cases of special emergency involving the health and safety of the people or their property,..." (G.S. 143-129) This is generally assumed to apply to an immediate, as opposed to an expected situation. An example would be structural damage to a public building jeopardizing the people and property in the building.

Informal Bid Process

The informal bid process (G.S. 143-131) must be used on construction/repair projects with estimated expenditures between $5,000 and $50,000 and for the purchase or lease-purchase of equipment or supplies with estimated expenditures of $5,000 to $20,000. There are no requirements for written plans and specifications, advertising, bid deposits, a public opening, an award by the governing board, or a minimum number of bids. A record of informal bids shall be kept by the person or board that receives the bids and shall be subject to public inspection at any time.

As with formal bidding, contracts shall be awarded to the lowest responsible bidder, taking into consideration quality, performance, and the time specified in the bids for the performance of the contract. It should be noted that the governmental unit always has the option of adopting formal bid procedures regardless of the project budget, and that the statutory obligations are considered to be minimum requirements that may be exceeded.

Performance Bonds and Laborers' and Materialmen's Bonds

Under G.S. 143-129, performance bonds and laborers' and materialsmen's bonds are required for the full contract amount for all construction projects over $15,000 when a project involves two or more contracts whose sums exceed $50,000. In cases when a project involves only a single contract, the performance and laborers' and materialsmen's bonds are not required unless the contract exceeds $50,000. In the case of purchase contracts, a governing body may waive the bond requirement (see also G.S. 44A-3).

The purpose of the bonds is to ensure that contracts involving public funds are satisfactorily performed and completed and that all claims from subcontractors and materials suppliers are resolved. As in the case of a bid deposit, a surety promises to stand behind the contract and make good on any deficiencies or valid claims against the contractor. Although the statutes set thresholds over which bonds are required, a governmental unit may require such bonds on contracts that do not exceed the thresholds. The statutes also allow cash, certified checks, or government securities as alternatives to bonds. Regardless of the form, the bond or any of the alternatives must be valued at the full amount of the contract if a bond is required.

Single vs. Multiple Prime Contracts

Prior to the summer of 1989, G.S. 143-128 required that all construction projects over a set dollar amount be divided into a minimum of four separate sets of specifications and that each set be bid and contracted for separately. The four divisions are as follows:

1. Heating, ventilation, and air conditioning
2. Plumbing
3. Electrical work
4. General construction and any other work not included in the previous three.

This system of construction is generally referred to as the "multiple prime contract system." The 1989 General Assembly amended that chapter to give governmental units the option of bidding and contracting for construction using the "single prime contract" approach. A single prime contract is one in which a single contractor is responsible for coordinating all phases of the work.

Under the amended law, a governmental unit may bid the project both as multiple prime contracts and as a single prime contract, and the award is made to which ever method results in the lowest combined bid. This requirement applies to any project involving $100,000 or more. The amendment provides that various divisions of state government will monitor the use of single prime vs. multiple prime contracts and compile empirical evidence of the comparative costs of each approach. It further requires that the evidence be summarized and presented to the 1995 session of the General Assembly, at which time it would presumably be modified or continued.

The issue of single prime vs. multiple prime contracts is one that has been hotly debated by construction professionals for many years. Architects and general contractors generally argue that the single prime contract is the preferable method of ensuring that a project is completed satisfactorily. Their arguments contend that in a multiple prime contract project, there are four or more contractors on the job without adequate contractual relationships between them to effectively coordinate their work. Furthermore, in the event that problems or delays occur on a multiple prime contract project, the governmental unit finds itself in a game of finger pointing that makes resolution extremely difficult.

Construction professionals engaged in the major subcontracting trades have argued vigorously in favor of continuation of the multiple prime contract approach. They argue that by requiring separate contracts for HVAC, plumbing, and electrical work, the governmental unit is assured more competitive pricing which means direct savings to the public. Furthermore, they argue that if specifications are well written, coordination between the prior contractors is assured.

Chapter 143-132 was amended at the same time to clarify the minimum number of bids required for award if a governmental unit elects to bid a project as a single prime contract. It provides that, for the purposes of counting bids toward the three bid minimum, a single prime contract bid shall constitute a bid in each of the four subdivisions.

Minority Participation Plan

The same revision to G.S. 143-128 by the 1989 General Assembly that resulted in the single prime contract alternative mandates that all local governmental units adopt minority business participation plans for contracts involving $100,000 or more. The purpose of this section is to encourage the use of minority businesses in public contracts.

In order to avoid the problems associ-

ated with quota or set-aside programs that have been ruled unconstitutional, the encouragement takes the form of a verifiable percentage goal for minority business participation. The statute requires that after notice and public hearing, each governmental unit establish a minority business participation plan with a verifiable goal. The plan must include written guidelines "to ensure a good faith effort in the recruitment and selection of minority businesses." The statute defines "minority business" and "minority person." It states explicitly that it is not intended to require contractors or governmental units to award contracts on the basis of anything other than the lowest responsible bid.

Award Procedures

Contracts requiring the use of the formal bid procedure must be awarded by the governing board of the governmental unit. There is no such requirement for contracts below the formal bid threshold of $50,000. It is required that the award be made to "the lowest responsible bidder or bidders, taking into consideration quality, performance, and the time specified in the proposals for the performance of the contract." Interpretation of this section is difficult, but it clearly is intended to give the governmental unit the flexibility to determine the reliability and responsibility of a bidder and to consider those factors when an award is made.

As frequently happens in both public and private construction, the low bid may exceed the available funds for the project. If that is the case, the governmental unit has several options:

1. it may reject all bids and rebid the project;
2. it may modify the bid documents and rebid the project; or
3. it may negotiate with the lowest responsible bidder to make the necessary changes to bring the contract price within the available funds. If those negotiations are successful, a contract may be awarded to the lowest responsible bidder.

There is no allowance for negotiating with anyone other than the lowest responsible bidder either selectively or competitively.

Design Services

G.S. 143-64.31 establishes that when governmental units procure architectural, engineering and surveying services, the selection of firms should be made on the basis of "demonstrated competence and qualification for the type of professional services required without regard to fee...." The purpose of this article is to prevent governmental units from bidding out design services and awarding contracts to the low bidders. The proper procedure is to first select firms based on qualifications and then to negotiate contracts. "If a contract cannot be negotiated with the most qualified firm, negotiations with that firm shall be terminated and initiated with the best qualified firms."

G.S.143-64.32 provides for exceptions to the above procedures when the estimated professional fee will be less than $30,000 or the governmental unit in its "sole discretion" exempts itself and states its reasons and circumstances.

Generally, an architect or engineer is required for all new construction when the cost is more than $45,000 or repair projects, including major structural changes, when the cost is more than $45,000. Repair projects that do not involve major structural changes and cost more than $100,000 require an architect or engineer. These requirements and other rules regarding design services are in G.S. 133-1.1.

Recommended Reading

We have touched on some of the more important aspects of the state law regarding construction contracts involving local governments. Those of you who may be involved in a library construction project or major repair project are encouraged to become more familiar with North Carolina law as it relates to construction. We would recommend reading "An Outline of Statutory Provisions Controlling Purchasing by Local Governments in North Carolina" (1990) by Warren Jake Wicker and "Construction Contracts with North Carolina Local Governments" (1991) by A. Fleming Bell,II. Both are published by the Institute of Government (UNC at Chapel Hill). These two publications are excellent road maps through the treacherous territory of North Carolina law. Using them hand-in-hand with the General Statutes will provide the reader with a thorough overview of the many legal aspects related to public construction projects in North Carolina.

References

A. Fleming Bell, II. *Construction Contracts with North Carolina Local Governments* (Chapel Hill, NC: Institute of Government, 1991).

General Statutes of North Carolina (Charlottesville, VA: The Michie Company, 1990).

Warren Jake Wicker. *An Outline of Statutory Provisions Controlling Purchasing by Local Governments in North Carolina* (Chapel Hill, NC: Institute of Government, 1990).

Signage: A Poem

I never heard of signage before. In fact,
I thought signage was what you fed the hogs!

I never heard of signage before. In fact,
I thought signage was a kind of headache
producing swelling of the nasal cavity
and post-nasal drip!

— Sharon W. Gore
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