
Coates' Canons Blog: Local Preferences in Public Contracting, Part 3

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In my last two posts ([here](#) and [here](#)), I've discussed the efforts of the City Council of Emerald City, North Carolina, to support its local businesses by adopting a local preference policy. Purchasing Officer Scarecrow has just finished reviewing the Council's goals for the policy: reducing local unemployment, supporting local businesses, increasing Emerald City's tax base, and reducing the City's carbon footprint. The Council has asked Scarecrow to give them time to consider his comments so they can determine if there are other goals that they would like to achieve through the local preference policy.

Meanwhile, City Attorney Tin Man is about to present his report to the Council on the legal issues presented by a local preference policy. Tin Man explains that he'll begin his report by discussing Emerald City's legal authority to implement a local preference policy. (This is number two on the list of "questions to consider" that I provided in my first post, but will provide a framework for the discussion of questions 1 and 3.) Let's listen in as Attorney Tin Man begins his report:

"As you know, local governments in North Carolina only have the powers given to them by the State Constitution and the General Assembly. This is not true for every state in the United States. In some states, called 'home rule' states, local governments have broad authority to act unless some statute restricts their authority. North Carolina is not a 'home rule' state, and that means North Carolina local governments can't do some things that local governments in some other states can do.

"The types of local preferences we've discussed—hiring preferences, purchasing preferences, and contract award preferences—all involve the City's power to enter into contracts. While the North Carolina General Statutes do give local governments the authority to enter into contracts, the statutes also require that local governments follow specific procedures for awarding certain types of contracts. If a local government enters into one of those contracts without following the specific procedures in the statute, the contract will be invalid. Practically speaking, this means the City couldn't force a general contractor to complete a construction project based on an invalid contract, or couldn't force a vendor to deliver equipment purchased through an invalid contract.

"So how does this impact our ability to institute local preferences? Well, [North Carolina General Statutes 143-129](#) and [143-131](#) require that local governments award formally and informally bid contracts to the lowest responsive, responsible bidder. Formal bidding applies to contracts for the purchase of apparatus, supplies, materials, and equipment costing \$90,000 or more and to construction or repair contracts costing \$500,000 or more. Informal bidding applies to contracts for the purchase of apparatus, supplies, materials, and equipment costing \$30,000 or more but less than \$90,000, and to construction or repair contracts costing \$30,000 or more but less than \$500,000. In other words, any purchase contracts or construction contracts costing \$30,000 or more must be awarded to the lowest responsive, responsible bidder."

"Wait a minute!" exclaims Councilman Lion. "I thought we had to use informal bidding on purchases costing \$5,000 or more."

"That's right," agrees Tin Man. "Here in Emerald City, our purchasing policy requires informal bidding on purchases and construction projects costing \$5,000 or more, and formal bidding on purchases and construction contracts costing \$50,000 or more, which means the City is required to award contracts for purchases and construction projects costing \$5,000 or more to the lowest responsive, responsible bidder. The Council may want to reconsider these bidding thresholds after hearing the rest of my report, although there are good reasons for keeping the thresholds where they are."

Tin Man continues. "When I say that these contracts must be awarded to the lowest responsive, responsible bidder, what

do I mean? Well, the 'lowest' part is easy. 'Responsive' means that the bid matches up with what we've asked for in our specifications—that the product we've asked for is what the bidder will provide, for example—and that any legal requirements have been met. For example, if a bid bond is required, and the bidder didn't provide one, then that bid is not responsive. The term 'responsible' addresses the bidder's ability—considering the bidder's skill, experience, financial resources, and track record—to perform the contract.

"This means that where a bidder lives or how a contract will affect the City's unemployment rate or tax base or carbon footprint simply doesn't figure in to the questions of whether a bid is responsive or whether a bidder is responsible. In other words, let's say we put out a bid for ruby slippers, and our friend Dorothy from Kansas was the lowest bidder with a bid of \$35,000, and an Emerald City company was the next lowest bidder with a bid of \$35,100, and they were both bidding ruby slippers that met our specifications, and they both had the skill, experience, financial resources, and track record to perform the contract. In that situation, we would have to award the contract to Dorothy, even though she's not from Emerald City."

"But that's only a difference of \$100!" protests Chairwoman Glinda. "Surely if the difference is that small it wouldn't matter if we awarded the contract to the Emerald City bidder."

Tin Man shakes his head, "Actually, it would matter. The statutes don't say we can award to the lowest responsive, responsible bidder unless the next lowest is local and their bid is only a little bit more. It says we must award to the lowest responsive, responsible bidder, period."

The Council erupts in protests until Chairwoman Glinda manages to bring them to order by pounding her sparkling wand on the table. "Quiet down, quiet down! Please continue, Tin Man."

"Purchasing Officer Scarecrow will explain the reasoning behind this when he resumes his report. There *are* good policy reasons for these statutes, but I'll leave it to him to explain them. I'd like to get back to the issue at hand: the authority we have to institute a local preference policy.

"The bottom line is this: for contracts that must be informally or formally bid, any policy that would require the consideration of factors other than the bid price, the bid's responsiveness, or the bidder's responsibility would be outside of our authority. We simply cannot institute local preferences for these types of contracts. But if you think about it, there are lots of contracts we enter into that do not have to be formally or informally bid. Even under our purchasing policy, we're not required to bid purchases of apparatus, supplies, materials, or equipment costing less than \$5,000, and we're not required to bid construction contracts costing less than \$5,000. And then there's an entire category of contracts that doesn't have to be bid at all—service contracts."

"What kinds of service contracts do we enter into?" asks Councilman Lion.

Chairwoman Glinda answers quickly, "I think he's talking about contracts like accounting contracts, janitorial contracts, consultant contracts, and engineering contracts, right?"

"Almost right," says Tin Man. "The General Statutes don't say anything about how we're supposed to award most service contracts; they leave that up to our discretion. So it's up to us to decide how to award contracts for accounting services, janitorial services, and consulting services, to use your examples, Chairwoman. But [G.S. 143-64.31](#) requires us to use a qualifications-based selection process for four specific types of services—architectural, engineering, surveying, and construction management at risk services. In other words, to hire an engineer to do engineering work, we have to evaluate engineering firms based on their qualifications—not on price. However, that statute *does* require us to consider whether a bidder is local when we're evaluating bidders. It says that we must give a preference to North Carolina bidders—not Emerald City bidders—over a bidder from another state, but only to the extent that the non-North Carolina bidder would be given a preference by their home state. This is called a reciprocal preference. Of course, preferences in other states usually relate to price, and since we can't consider price in awarding these types of contracts, it's not clear to me how we'd apply this reciprocal preference."

"But you've told us before that we don't have to use that qualifications-based process," interrupts Councilman Lion.

"That's true," says Tin Man. "[G.S. 143-64.32](#) allows local governments to [exempt themselves from the qualifications-based process](#)

. If we do exempt ourselves, I suppose we could use the reciprocal preference, although we wouldn't have to. And it would only make sense to apply that preference if we decided to consider price instead of awarding the contract outright to a specific firm.

"So, we're required to use qualifications-based selection to award contracts for design services (unless we exempt ourselves)," concludes Tin Man. "But, as I just said, the General Statutes don't say anything about how we're supposed to award other types of service contracts."

"So you're saying we *can* use local preferences for service contracts." Councilman Lion says hopefully.

"And for purchases and construction contracts costing less than \$5,000—or less than \$30,000, if we used the thresholds in the statute," adds Chairwoman Glinda.

"Or what if the General Assembly changes the bidding law to give us the authority to institute local preferences?" asks Councilman Lion, his tail waving in excitement.

"Not so fast," replies Tin Man. "There's the Constitution to consider."

"The Constitution?" asks Chairwoman Glinda. "What does the Constitution have to do with local preferences?"

We'll hear the Tin Man's response to this question in my next post. In the meantime, here are some additional reference materials on the topics covered in this blog:

- [A Legal Guide to Purchasing and Contracting for North Carolina Local Governments](#), by Frayda Bluestein – a comprehensive reference book on local government procurement in North Carolina;
- ["Local Government Purchasing and Contracting Update: Statutory Requirements and Local Policies,"](#) by me – a shorter (free) overview of the bidding laws; and
- ["Understanding the Responsiveness Requirement in Competitive Bidding,"](#) by Frayda Bluestein – a discussion of the concepts of responsiveness and responsibility (also free).

Links

- canons.sog.unc.edu/?p=3202
- canons.sog.unc.edu/?p=3304
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-131.html
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