Coates' Canons Blog: Beyond Bathrooms – Special Session Legislation Impacts City and County Contracts

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UPDATE March 2017: Seethis post for a discussion of the impact of HB2's repeal on city and county contracting authority.

UPDATED April 2016: See Trey Allen'sblog post update for information on a recent 4th Circuit ruling that has bearing on HB2 (Title IX discrimination claim involving a transgender student's use of bathrooms in a Virginia public school).

During its special session held yesterday (March 23rd), the General Assembly enacted the Public Facilities Privacy & Security Act (S.L. 2016-3 / HB2). The recent media attention leading up to the special session focused on the effect of the City of Charlotte's non-discrimination ordinance on public restrooms. While the bill did address this issue, it also modified state laws governing wage and hour requirements and anti-discrimination in employment and access to public accommodations. In addition, state law now specifically preempts city and county ordinances relating to these issues. Perhaps not as newsworthy but nonetheless important to local governments, the legislation also places new limits on the contracting authority of cities and counties. My colleague, Trey Allen, has authored a blog post on the broader implications of this legislation; this post focuses specifically on the changes to local government contracting. Yesterday's legislation was signed by Governor McCrory last night. It went into effect immediately, so it is now the law.

Sections 2.2 and 2.3 of the bill amend the contracting statutes for cities and counties (G.S. 160A-20.1(a) for cities and G.S. 153A-449(a) for counties) in three ways. Specifically, the amendments:

1. Expand the current prohibition against cities and counties placing requirements on bidders that the city or county could not place on all private employers within its jurisdiction (for example, minimum wage or paid sick leave). The amendments to these statutes now prohibit cities and counties from imposing *any* regulations or controls on a contractor's employment practices, such as wage levels, hours of employment, benefits, and leave.
2. Add new language prohibiting cities and counties from imposing on bidders any mandates or prohibitions on to whom among the general public a contractor provides goods, services, or accommodations (in other words, anti-discrimination in commercial transactions or public accommodations).
3. Extend both of the above prohibitions to bidders *and* respondents to an RFQ under a qualifications-based selection solicitation (the latter commonly referred to as the Mini-Brooks Act, S. 143-64.31, which applies to contracts for architectural, engineering, or surveying services as well as the alternative construction delivery methods of construction management at-risk, design-build, design-build bridging, and public private partnerships).

In short, cities and counties cannot impose requirements in these two categories – employment practices and anti-discrimination measures – as a condition of bidding on a contract or responding to an RFQ. Despite these broad prohibitions, cities and counties still may impose conditions on bidders' and respondents' employment practices and anti-discrimination measures if those conditions are otherwise required or allowed by state law.

What does this mean for cities and counties? With regard to the newly expanded prohibition against imposing employment-related restrictions on bidders and respondents, cities and counties had little authority to regulate private employment even before the General Assembly enacted HB2, and the previous amendments to G.S. 153A-449 and G.S. 160A-20.1 that restricted their ability to impose employment related requirements on bidders that they could not otherwise impose on all businesses essentially eviscerated their ability to affect private employment through their bidding and

contracting practices. To the extent that employment-related conditions are required by state or federal law – such as complying with Davis-Bacon wage and hour requirements associated with federal grant funds or adhering to OSHA regulations on a construction job site – cities and counties still have the authority to require bidder compliance. On the other hand, if a local government wished to require that bidders pay their employees a living wage or provide paid sick leave, they could not do so before and cannot do so now.

With regard to the new prohibition against imposing anti-discrimination requirements on contractors in commercial transactions and public accommodations, the impact of this change is less clear and will likely depend on the degree to which cities and counties were imposing this category of requirements on bidders beyond what was already authorized under state law. Take this example: a city bids a contract for lawn services and requires as a condition of bidding that each bidder provide a statement that the bidder does not discriminate on the basis of race, religion, color, national origin, age, sex, or handicap. Since discrimination on this basis is prohibited under state law, a city could impose such a condition. However, if the city went farther than state law by requiring the bidder's anti-discrimination statement to include sexual orientation, transgender, or gender identity, its requirement would be unlawful inasmuch as state law doesn't prohibit discrimination on those grounds. Moreover, cities and counties no longer have the authority to adopt local anti-discrimination ordinances, regulations, or policies, so the city in our example above could not require bidders to comply with such a local measure as a condition of bidding.

Do the new contracting limitations apply to other units of local government? No. The new restrictions on bidding and contracting specifically apply *only* to cities and counties. These restrictions are not applicable to other units of local government or political subdivisions of the state, such as local school boards, water and sewer authorities, and ABC districts. However, section 1.3 of the legislation establishing single-sex multiple occupancy bathroom and changing facilities in all public agencies does apply to all units of government at the state and local level, and sections 1.1 and 1.2 establishing the same for public schools apply to local school boards. Trey discusses these sections of the legislation in his blog post.

What about contracts not subject to competitive bidding requirements? The new restrictions apply when bidding a contract or soliciting qualifications. Because the restrictions apply only when bidding or soliciting and not all contracts, contracts that do not require competitive bidding or qualifications-based selection under state law are not subject to the restrictions. However, since cities and counties no longer have the authority to adopt ordinances relating to private employment or anti-discrimination, attempting to further such issues through a non-competitive contracting process may not withstand legal challenge.

Do the new contracting limitations affect HUB requirements? No. State law currently requires good faith efforts to solicit and encourage historically underutilized business participation in building construction projects. The HUB statutes (G.S. 143-128.2, G.S. 143-128.3, and G.S. 143-128.4) were not affected by the new legislation, so these statutes remain intact and all local governments must still comply with them. However, to the extent a city or county has adopted a local ordinance or policy that extends HUB good faith efforts requirements for bidders to other categories of contracts beyond those specified under state law (building construction projects costing $300,000 or more), it is unclear whether such an ordinance or policy remains valid.

When does the legislation go into effect and what is the impact on existing contracts? The new laws went into effect when Governor McCrory signed the bill at 9:57 p.m. on March 23rd. The restrictions on contracting apply to all contracts entered into on or after this date. The legislation does not invalidate existing contracts, but the new restrictions apply to all future contracts, including those that may be going through the bidding or RFQ solicitation process right now. Cities and counties should examine any contracts currently out for bid or RFQs currently in the solicitation phase to ensure that none of the newly prohibited conditions on bidding or responding are part of the bidding or solicitation process. Cities and counties should also evaluate all of their standard bid specifications and contract templates to ensure that the prohibited conditions are not part of their bidding and solicitation process going forward.

Links

- canons.sog.unc.edu/the-general-assembly-preempts-local-antidiscrimination-measures/
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015E2&BillID=h2&submitButton=Go
- charmeck.org/city/charlotte/nondiscrimination/Pages/default.aspx

- www.wral.com/nc-lawmakers-bar-lgbt-protections-against-discrimination/15594951/
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-20.1
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-449
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-64.31
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-128.2.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-128.3.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-128.4.html