
Coates' Canons Blog: Buying Without Bidding: Limits on Three Common Exceptions to the Bidding Laws

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Your county needs to buy 5 new law enforcement vehicles costing \$30,000 each, and the sheriff tells you that he prefers a specific make and model with certain options. The sheriff also tells you that he knows that a neighboring county recently bought 10 law enforcement vehicles of the same make and model, with the same options. You contact the dealership that sold the vehicles to the other county, and learn that the dealership sold 2008 models to the other county, but is now out of the 2008 models and only has 2009 models. Can you use the piggybacking exception to purchase these vehicles?

There are three exceptions to bidding that allow a local government to purchase apparatus, supplies, materials, or equipment from a vendor who has sold the same items to another public entity, as long as that vendor is willing to offer them to the local government at the same or better prices, terms, or conditions as were given the other public entity. The exceptions are:

- the state contract exception (G.S. 143-129(e)(9)),
- the federal contract exception (G.S. 143-129(e)(9a)), and
- the piggybacking exception (G.S. 143-129(g)).

I am frequently asked about whether use of these exceptions is appropriate when the item the local government wishes to purchase is slightly different than the item purchased by the other public entity. And one of the most common versions of this question is whether a local government can use one of these exceptions to buy vehicles that are a different model year than the vehicle purchased by the other public entity.

In considering these questions, it's helpful to think about why these exceptions exist. North Carolina law requires bidding for purchases of apparatus, supplies, materials, and equipment costing \$30,000 or more. Why is bidding required? The North Carolina Supreme Court has said that the purpose of bidding "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 in contracts involving the expenditure of substantial amount of public money." *Mullen v. Town of Louisburg*, 225 N.C. 53, 58-59, 33 S.E.2d 484, 487 (1941). However, anyone who has been involved with public bidding knows that bidding can sometimes be inefficient and impractical.

By enacting exceptions to the bidding laws, the General Assembly has offered alternatives to bidding that still preserve the purpose of bidding. With the state contract exception, the federal contract exception, and the piggybacking exception, the General Assembly achieved this goal by allowing local governments in North Carolina to take advantage of a bidding process that was undertaken by another public entity.

Accordingly, when purchasing under these exceptions, a key question is whether the item you want to purchase is similar enough to the item purchased under the contract awarded by the public agency that actually conducted the bid process. Stated another way, would bidding out the item you want to buy result in a different outcome from the bid process conducted by the other agency for the item that agency purchased?

This is an easy question to answer when the item the local government seeks to purchase is identical to the item originally bid. It's also an easy question to answer when the item the local government seeks to purchase is drastically different from the item originally bid. The hard cases, of course, fall in the gray area in between these two extremes. Adding or

subtracting relatively small options on a purchase is probably OK. Purchasing a different model year of a vehicle is probably not OK.

I've heard the argument that a newer (or better) model should be considered a "better . . . term or condition" of the type that these exceptions would allow. In my opinion, the "terms and conditions" in these statutory exceptions (which allow use of the exception if the vendor is willing to offer the item at the "same or better prices, terms, or conditions" as were offered under the original contract) refer to the terms and conditions of the contract itself (e.g. more favorable delivery options, better payment terms), not the characteristics of the item purchased. Otherwise, a local government could use these exceptions to purchase an item that is drastically different from the item originally bid—as long as the item purchased by the local government is "better" than the item originally bid. This is clearly not what the General Assembly intended.

There is no hard rule to follow here, so if you're not sure, it's always safer to bid rather than use the exception. Remember, if you use an exception inappropriately, the resulting contract will be void. See, e.g., *Hawkins v. Town of Dallas*, 229 N.C. 561, 564, 50 S.E.2d 561, 563 (1948) ("a contract not made in conformity to the statutory requirements is void.").

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html