
Coates' Canons Blog: COVID-19: Procurement Questions for North Carolina's Local Governments

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COVID-19 has arrived in North Carolina and units of local government across the state are facing tough questions as they purchase goods and services. This post addresses some of the legal issues under North Carolina law confronting local procurement officials.

May a unit of local government legally award contracts in the “formal” bidding range if it does not hold a publicly accessible, in-person bid opening?

First, as a reminder, formal bidding procedures contained in G.S. 143-129 apply **only** 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. If your contract does not fall in either of those categories, state law does not require a public bid opening.

Under state law, **only** bids for contracts in the formal range must “be opened in public.” See G.S. 143-129(b). A public bid opening need not take place at a public meeting of a unit’s governing board—but, we continue to interpret G.S. 143-129(b), under ordinary circumstances, to require that a unit of local government allow in-person access to a formal bid opening. Among other reasons, that requirement exists to ensure that the public can verify that the bids remained sealed until the bid opening.

Despite the public opening requirement, G.S. 143-129(e)(2) provides an “emergency” exception which a unit of local government may wish to invoke in restricting in-person bid openings. This is uncharted territory, so I cannot say with certainty that a court would agree that the “emergency” exception allows a local unit to restrict in-person access to a formal bid opening, but it is a credible argument.

G.S. 143-129(e)(2) states that the “requirements of [Article 8 of Chapter 143, where G.S. 143-129(b) is located] do not apply to . . . [c]ases of **special emergency involving the health and safety of the people** or their property.” (emphasis added). Because Article 8 requires a “public” bid opening and the “emergency” exception waives *all* of Article 8’s requirements, there is a plausible argument to be made that operating under the “emergency” exception waives *all* competitive bidding requirements, including the “public” bid opening requirement.

There is only one reported case interpreting the scope of the “emergency” exception. See *Raynor v. Commissioners for Town of Louisburg*, 220 N.C. 348, 17 S.E.2d 495 (1941). Norma Houston has written a blog post on that case, but the critical requirement to invoke the exception is the existence of a “present, immediate, and existing” emergency—not just a “condition which may or may not arise in the future.” There is no requirement that a unit’s governing board declare a state of emergency to waive ordinary formal competitive bidding procedures, but the local government must have a credible basis for determining that an emergency exists in order to invoke the exception.

To my knowledge, a local government has not invoked G.S. 143-129(e)(2) during the spread of a communicable disease to restrict access to an in-person bid opening and waive the ordinary requirements of G.S. 143-129(b).

Before restricting public access, a unit of local government first should consider whether it is truly necessary at this time to acquire goods or work ordinarily requiring a public bid opening. For contracts necessary to a unit's response to fight COVID-19, the "emergency" exception likely applies to waive all competitive bidding requirements. For contracts not necessary to such response, the applicability of the "emergency" exception is less clear. The only sure method to avoid any uncertainty under existing law is to postpone the formal bid opening until an ordinary, in-person bid opening may be held.

Because it is uncertain whether the emergency exception is applicable, and to avoid a potential legal challenge, I advise taking every reasonable measure to ensure that bidders and members of the public may view the formal bid opening:

- If possible, open the bids in a room large enough to employ social distancing practices in accordance with directions from state and local health officials. Include a witness in the room who, using appropriate social distancing practices, could verify that the bids remained sealed until the bid opening and that other applicable requirements were observed.
- Broadcast the bid opening via a publicly available videoconference line with audio capability. This should be done in a manner to ensure that virtual attendees can verify that all bids remained sealed until the time that the bids were opened. If at all possible, I recommend live-streaming video and audio of the bid opening to allow for contemporaneous public viewing. Live streaming mirrors ordinary circumstances as closely as possible. In normal times, members of the public would have the right to visually inspect sealed bid packages *at a bid opening*, not merely the opportunity to view or listen to a recording of the bid opening at a later time. In my opinion, under existing law, restricting in-person access in any manner due to the COVID-19 outbreak requires a unit's reliance on the "emergency" exception to legally award contracts falling in the formal range. If a court were to deem the "emergency" exception inapplicable to a particular contract, a unit might minimize risk of invalidation by mirroring ordinary procedures closely.
- Prior to any formal bid opening in which public access is restricted in any manner, draft a document setting forth (i) why COVID-19 sets forth a "present, immediate, and existing" emergency involving the health and safety of the people of the unit, and (ii) why restricting public access is necessary to protect the health and safety of the people of the unit. That document should be made available to the public. The policy should not apply indefinitely, and its applicability should be considered on a contract-by-contract basis. If possible, it would be helpful for the unit's governing board to adopt a resolution setting forth the facts contained in that document, but there is no legal requirement that the governing body do so.

Please note that this analysis is limited to North Carolina law and does not necessarily apply to projects involving federal funds. **If federal funds are involved or your unit intends to seek reimbursement from FEMA, the federal Uniform Guidance (2 C.F.R. Part 200) continues to apply.**

What are the requirements in the Uniform Guidance?

The Uniform Guidance contains an "emergency and exigent circumstances" exception to certain federal procurement requirements where the "public exigency or emergency for the requirement will not permit a delay resulting from the competitive solicitation." See 2 C.F.R. 200.320(f)(2). Under FEMA guidance issued on March 17, 2020, FEMA has determined that all contracts entered into or used on or after January 27, 2020 for emergency protective measures related to COVID-19 qualify under the exception for FEMA grant applicants. **Despite this exception, however, a number of procurement requirements in the Uniform Guidance continue to apply. Those requirements are beyond the scope of this post on state law. For more detailed information on the Uniform Guidance and FEMA's recent guidance for COVID-19 related contracts, please see information available on the School of Government's COVID-19 Microsite under the "Emergency Management" page.**

May a unit use or require electronic bids during the COVID-19 outbreak?

State law provides units of local government clear authority to receive electronic bids for the purchase of "apparatus, supplies, materials, and equipment." See G.S. 143-129.9(a)(2). And, because state law does not impose any competitive bidding requirements for service contracts, units of local government may elect to require electronic bids for service contracts during this time, as well. Except for the City of Charlotte, units of local governments may not use electronic bids

for construction or repair bids in the formal range.

May a unit require bidders to make an in-person appointment with unit staff to hand deliver a formal bid and require submission of the bid at such appointment?

There are two competing considerations here. First, under G.S. 143-129(b), bids in the formal range may only be considered if they are received by the date and at the place contained in the advertisement for the bids. Bidders assume responsibility for delivery to the advertised location by such time, regardless of the bidder's chosen means of delivery.

Second, units do not have unlimited staff to receive bids. If a unit *requires* bidders to deliver bids held at periodic intervals (even minutes apart), the unit provides bidders with unequal amounts of time in which to prepare their bids. That risks giving some bidders an unfair competitive advantage. If staff were unlimited, a unit theoretically could hold all in-person appointments to receive all bids at the same time—but, staff are necessarily limited, especially right now.

In my opinion, *required* use of in-person appointments held at periodic intervals to submit bids would require reliance on the “emergency” exception to competitive bidding requirements contained in 143-129(e)(2). On the other hand, the unit could *offer* to receive bids via in-person appointments for hand delivery as long as it provided bidders an option to otherwise hand deliver or mail in the bid prior to the ultimate bid deadline. I think the latter approach would not require reliance on the “emergency” exception.

May a unit require bidders submit sealed bids by mail only?

No. G.S. 143-129 does not provide clear authority for a unit to dictate the means of delivery. The statute only allows the unit to dictate the “time and place” for the opening of the bids.

Must a unit re-advertise a formal bid if it changes the time or place of the bid opening?

Yes. The unit should issue an addendum to the initial advertisement for bids in this scenario. Also, remember that a decision to advertise bid opportunities electronically instead of in a newspaper must be approved by the local governing board. See G.S. 143-129(b). If a unit changes the time or place of the bid opening, the unit must re-advertise and require at least seven full days to lapse between the date of the re-published notice and the date of the new bid opening.

May a unit accept a bid from a bidder that did not comply with changed, re-advertised instructions regarding the time and place of the opening?

No. A unit must reject the bid if it does not arrive at the place and by the time in the re-advertised notice.

Can a deadline for bid submission be earlier than the time for the bid opening?

No. G.S. 143-129(b) allows a unit to set a “time and place for opening of the proposals[.]” There is no clear authority in the formal bidding statute for units to impose a deadline for submission prior to the time of opening.

What if my unit's facility is closed and the delivery service cannot deliver to our unit prior to the bid deadline?

If the contract is not essential to operations at this time, the unit first should consider postponing the formal bid opening. If the unit elects to proceed with the bid opening, it must maintain a place in which bids can be received. Regardless of the bidder's chosen means of delivery, a bidder assumes responsibility for delivery to the advertised location by the advertised deadline. If the delivery service cannot deliver the bid to the proper location by the deadline, the bid must be rejected as untimely.

What if my local purchasing policy requires public bid openings or disallows electronic bids in all cases?

Some units may have local policies requiring public bid openings for contracts other than those falling within the formal range under state law. Other local policies might prohibit the use of electronic bids in cases where state law might permit it. If this is the case, review provisions in your local policy that address an amendment or temporary suspension of the policy. Consult your local counsel to determine whether board action is required to amend or suspend the policy. Generally speaking, if the policy was adopted via ordinance or resolution of the governing board, it is likely that the board

must approve an amendment. Other policies might be subject to amendment by administrative officials acting alone.

May a unit require virtual pre-bid meetings?

There is no requirement in North Carolina law that a unit of local government hold a pre-bid meeting, either voluntary or mandatory, for any type of contract. A decision to hold a pre-bid meeting is entirely within the discretion of the unit. Therefore, a unit may cancel any pre-bid meeting previously advertised and elect not to require pre-bid meetings during the COVID-19 outbreak. A decision to cancel any previously advertised pre-bid meeting should be communicated clearly to all vendors.

If a unit does require that vendors attend a pre-bid meeting on a remote basis, it must ensure that it makes reasonable accommodations for all vendors to participate remotely. Among other things, this might include broadcasting the pre-bid meeting via a publicly available videoconference or teleconference line.

What do Governor Cooper's COVID-19 executive orders mean for local government purchasing?

Governor Cooper issued Executive Order No. 116 ("EO 116") on March 10, 2020, declaring a state of emergency relating to the outbreak of COVID-19 in North Carolina. Section 20 of EO 116, entitled "Purchase and Contract Regulation Waivers," temporarily waives certain state regulations applicable to the State Division of Purchase of Contract "to the extent necessary to permit NCDHHS, DPS, and local governmental entities to enter into contracts to secure resources and equipment needed to respond to COVID-19."

This may assist state agencies in quickly procuring resources to fight COVID-19, but EO 116 does **not** directly waive any competitive bidding requirements ordinarily applicable to units of local government. Local governments may wish to purchase items using new contracts established by a state agency—and, as is the case under ordinary circumstances, purchases under those state contracts would not be subject to otherwise applicable competitive bidding requirements. See G.S. 143-129(e)(9).

Links

- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_143/GS_143-129.pdf
- www.sog.unc.edu/resources/microsites/coronavirus-covid-19
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.9.html
- www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2007-2008/SL2007-158.pdf
- files.nc.gov/governor/documents/files/EO116-SOE-COVID-19.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html