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## Coates' Canons Blog: Emergency Procurement – When is an emergency really an emergency?

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A tornado has ripped through Coatesville, damaging its water and sewer system, tearing the

roof off of town hall, destroying the police department's vehicles, and leaving tons of debris in its wake. The town declares a state of emergency and immediately begins mobilizing to recover from the disaster. Citizens are without water and sewer, town hall is virtually unusable, law enforcement has no patrol vehicles, and roadways are clogged with debris. Town leaders are anxious to begin repairs to critical infrastructure, get police back on the road, and hire contractors to start clearing debris. Surely if any situation warranted use of the emergency exception to state bidding laws, this is it. Is it? Not so fast.

### *Emergency exception to state competitive bidding requirements*

Under normal circumstances, purchase or construction contracts costing over \$30,000 are subject to either informal or formal competitive bidding requirements. (G.S. 143-129 and G.S. 143-131) These requirements do not apply in "cases of special emergency involving the health and safety of the people or their property." (G.S. 143-129(e)(2)) This broad language would seem to cover all the calamities that Coatesville suffered, especially since the town declared a state of emergency. However, the North Carolina Supreme Court has interpreted the emergency exception to state bidding laws narrowly, thus limiting its application, perhaps even in situations involving natural disasters.

### *Limitations on the emergency exception*

In *Raynor v. Commissioners for Town of Louisburg*, 220 N.C. 348, 17 S.E.2d 495 (1941), the court held that the circumstances under which the Town of Louisburg purchased new diesel engines for its power plant did not constitute an "emergency" within the meaning of the exception to the bidding statutes. The town argued that the aging engines in its power plant needed replacement and failure of the engines would pose a threat to public health and safety. In disagreeing with the town's assertion that these circumstances constituted an emergency, the court held that the emergency must be present, immediate, and existing, and cannot be a situation that is merely anticipated to arise in the future. The court noted that bids for the engines could have been advertised for just one week with replacement ensuing soon after. This means that if competitive bidding requirements can be followed without causing harm to public health and safety (or if that harm can be temporarily mitigated), the emergency exception cannot be used.

So, how do these limitations on the emergency exception impact Coatesville's ability to immediately respond to the tornado damage? Although no North Carolina court has interpreted this exception in the context of a natural disaster, some reasonable assumptions can be made in light of the *Raynor* decision. Let's take each challenge Coatesville faces one by one:

- Damaged water and sewer system – Access to water and sewer service is directly related to public health and

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safety. Making temporary repairs to the town's damaged water and sewer system would likely fall within the emergency exception. Depending on the extent of the damage, however, long-term repairs probably won't be considered an emergency if temporary measures have to be put in place in order to maintain service during the process of reconstruction.

- Town hall's missing roof – Although no doubt greatly inconvenient, it is not likely that the loss of a roof on town hall poses a threat to public health and safety unless some function performed within the town hall building fits that description (for example, a 911-communications dispatch center). Temporary repairs could be contract for without bidding to forestall further immediate damage. However, as with the water and sewer system repairs, there is no justification for avoiding the bidding requirements on a project that will take some time to complete. In other words, if there is time to complete the work, there is time to bid it. The contract for repairs to town hall should be let according to applicable statutory bidding procedures.
- New law enforcement vehicles – Law enforcement operations can be especially critical during the aftermath of a natural disaster to protect property from further damage and looting and ensure public safety under turbulent circumstances (such as enforcing curfews). However, given that the town could take temporary measures such as requesting law enforcement assistance from other jurisdictions under the state-wide mutual aid system operated by the NC Division of Emergency Management, it is questionable whether the emergency exception would apply to the purchase of new law enforcement vehicles. The town could use other exceptions to competitive bidding requirements to expedite the process of obtaining new vehicles, either through lease, purchase of used vehicles, or purchasing directly from another governmental unit at the federal, state, or local level anywhere in this country. (GS 143-129(e)(1)).
- Debris removal – Debris removal is considered a service contract and normally does not involve purchases or construction. Since service contracts are not subject to state competitive bidding requirements, the town could contract directly with debris haulers without having to utilize the emergency exception (*note: see discussion below about competitive procurement requirements that apply to FEMA funds*).

#### *Suggested board procedures*

If the town chooses to use the emergency exception, the town's governing board should adopt a resolution setting out those facts that constitute the emergency. If there isn't time to do this before the contract is made, the board can do it after the fact. Documenting the circumstances for using the emergency exception can be important in defending the board's action. If the board's failure to follow state competitive bidding requirements is challenged, the burden of proof would be on the unit of government to demonstrate that justification for using the emergency exception existed. Although the court in *Raynor* stated that such a declaration by a governing board would not be binding on a court, it does provide documentation of the facts that support the decision to use the emergency exception.

#### *Following state bidding requirements may still be the better option*

Local officials understandably want to respond to a disaster as quickly as possible. Drawing up specifications for building repairs or vehicle purchases can take time. However, the purpose of the emergency exception is not to circumvent competitive bidding requirements and speed up the procurement process for projects that will still take months to complete. And, for some types of contracts, complying with state competitive bidding requirements may be just as easy as proceeding under the emergency exception *and* critical to getting FEMA reimbursement.

Keep in mind the bid thresholds for purchase and construction contracts mentioned above. Formal bidding requirements only apply to purchase contracts costing \$90,000 or more and construction contracts costing \$500,000 or more. Purchase and construction contracts costing between \$30,000 and the applicable formal bidding threshold are only subject to informal bidding requirements. These requirements are less stringent than formal bidding requirements and, even in the aftermath of a natural disaster, might not be unduly burdensome to comply with (for example, there is no formal advertisement requirement, and cost quotes could be obtained as easily as by making a few phone calls). If the contract for purchase or construction falls into the informal bidding range, it may prove just as easy to simply comply with informal bidding requirements than proceeding under the emergency exception (and, as discussed next, can help avoid violating federal competitive procurement requirements that apply to FEMA funds).

What if the cost of the purchase or construction contract is less than \$30,000? No bidding requirements apply to these contracts under state law. Like service contracts (regardless of cost), purchase and construction contracts costing less than \$30,000 can be awarded using whatever method the local government chooses and are not subject to state

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competitive bidding requirements. So, if a construction contract to repair a damaged roof costs less than \$30,000, there is no need to proceed under the emergency exception because there are no state competitive bidding requirements to become exempt from.

*Caution: federal regulations may still apply*

It is important to note that, even if the emergency exception to state competitive bidding requirements applies (or no competitive bidding requirements apply as is the case with service contracts of any cost and purchase and construction contracts costing less than \$30,000), other state and federal regulations still may require some form of competition in awarding a contract, even in disaster situations. For example, federal public assistance funding made available to local governments under a presidential disaster declaration is subject to the requirements of the federal Grants Management Common Rule (for more information about the GMCR, see the School of Government's Local Government Purchasing and Contracting website for "federal grant tools" under the "Tools" tab). The GMCR requires competitive procurement for most purchase and construction contracts as well as some service contracts. (44 CFR § 13.36) Although there is an exception when "a public exigency or emergency will not permit a delay" (44 CFR § 13.36(d)(4)(i)(B)), local governments should exercise caution in avoiding competitive procurement entirely because a violation of GMCR requirements could result in denial of reimbursement from FEMA for disaster-related expenses such as debris removal. To the extent feasible, local governments should pre-position competitively bid contracts for goods and services that it anticipates needing during a disaster event, such as debris hauling and emergency supplies. Having pre-positioned competitively bid contracts in place can not only expedite disaster recovery by having contractors ready to mobilize immediately after a disaster event, but also avoid potential FEMA reimbursement issues by satisfying the GMCR competitive procurement requirements.

*What if the emergency isn't a natural disaster?*

So far, our discussion of the emergency exception to competitive bidding requirements has focused on what most would consider a real emergency – a natural disaster. Questions sometimes arise about whether the emergency exception applies in situations that do not involve natural disasters. In those instances, the *Raynor* decision provides guidance on when an emergency is really an emergency. Remember the factors outlined by the court in *Raynor* – the emergency must be present, immediate, and existing, and cannot be a situation that is merely anticipated to arise in the future. So, if a town's water and sewer system suffered damage due to an unforeseen explosion that rendered the system totally inoperable, that situation would likely constitute an emergency for which the town could avoid state competitive bidding requirements to undertake immediate emergency repairs (as discussed above, long-term repairs more likely would not fall under the emergency exception). However, anticipating water and sewer system failure in the near future due to neglected maintenance would not constitute an emergency. In fact, this was the situation in the *Raynor* case, and the court specifically noted that local governments cannot take advantage of the emergency exception where the potential emergency has been caused by the local government's own delay in taking action that was foreseeable. And, even in the event of an unforeseen emergency, if the threat to public health and safety can be temporarily mitigated, or if complying with competitive bidding requirements (for example, 7-day advertisement for formal contracts and solicitation of quotes for informal contracts) would not pose a risk of injury to persons or property, then the emergency exception most likely cannot be used.

Perhaps a good rule of thumb is, "when in doubt, bid it out."



## Links

- [canons.sog.unc.edu/wp-content/uploads/2011/07/tornado.jpg](https://canons.sog.unc.edu/wp-content/uploads/2011/07/tornado.jpg)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-131](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-131)
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