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## Coates' Canons Blog: Good Faith Efforts? Prove It!

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Article: <https://canons.sog.unc.edu/good-faith-efforts-prove-it/>

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Your local government has just received single-prime bids on the construction of a new civic center. After evaluating the bids you've received, you determine that Crafty Contractor Construction Company ("Crafty") is the apparent lowest responsive, responsible bidder. Crafty identified four historically underutilized businesses (HUBs, that is, minority and women-owned businesses) that it will use on the project, and states that the HUBs will perform \$250,000 worth of their \$1 million bid. (Your HUB participation goal for the project is 10%.) Crafty also submits an affidavit of good faith efforts made, but it shows that they did not make any good faith efforts.

You notify Crafty that they are the apparent lowest responsive, responsible bidder, and ask them to submit "the documentation required under G.S. 143-128.2(c)." Crafty submits documentation of good faith efforts to meet the participation goal (efforts not listed in their bid), but does not submit an affidavit showing what percentage of the work will be performed by the four HUBs. You ask them for the affidavit, and they tell you they've provided the documentation required under G.S. 143-128.2(c), and they don't need to provide you with an affidavit. Is Crafty correct? And do you have to award the contract to them?

### What's a HUB?

**G.S. 143-128.2** refers to "minority businesses," not HUBs. But **G.S. 143-128.4(a1)** states that the term "minority business" means a "historically underutilized business." G.S. 143-128.4 also defines "historically underutilized businesses"—it's too long of a definition to include here, so I encourage you to review the definition in the statute. Remember that only those businesses that have been certified as HUBs by the State HUB office "count" towards HUB participation goals. (I discussed this certification program in an earlier post.) I'm using the term HUB throughout this post to refer to the businesses defined in G.S. 143-128.4.

### What are the HUB participation requirements?

G.S. 143-128.2 requires that local governments adopt goals for HUB participation in building construction projects funded solely by the local government costing \$300,000 or more, and for building construction projects funded in whole or in part by the state costing \$100,000 or more. (The State has also required compliance with G.S. 143-128.2 for other types of construction funded by the State. So, if you're using any State money for a construction project, check with the agency providing the funding to find out if they will require compliance with G.S. 143-128.2.) These goals are just that: goals. They do not require award to HUBs or to the contractor who uses the most HUBs—in fact, the statute (and possibly the constitution) prohibit awarding a contract based solely on the race or gender of the contractor or subcontractors.

In addition to adopting participation goals (as described in the paragraph above), G.S. 143-128.2 also requires that local governments make good faith efforts to encourage HUB participation *and* requires (in most cases) that bidders make good faith efforts to encourage HUB participation. This post focuses on the second requirement—the good faith efforts—outlined in G.S. 143-128.2(c).

### What is the process?

A bidder can meet its obligations under G.S. 143-128.2 in one of three ways: (1) meeting or exceeding the public entity's HUB participation goal, (2) making sufficient good faith efforts, or (3) performing all of the work on its own, without subcontractors. The statute outlines a four-step process summarized below:



1. Each contractor submits a bid, including both (1) a list of HUBs it will use on the project (if any) and (2) the total dollar value of the bid that will be performed by HUBs (if any). Each contractor must also submit **either**:
  - an affidavit of good faith efforts made (each specific good faith effort listed in the statute is assigned a point value by **1 N.C. Admin. Code 301.0102**, and the contractor must earn at least 50 points under that point system for their bid to be considered responsive, if they're planning to base their compliance with G.S. 143-128.2 on their good faith efforts), OR
  - an affidavit that the contractor will perform all of the work itself (also known as an affidavit of self-performance).
2. The public entity notifies the apparent lowest responsive, responsible bidder (LRRB) that it must provide additional documentation in the time specified by the public entity, as follows:
  - If the percentage of work performed by HUBs (as stated in the LRRB's bid) meets or exceeds the public entity's goal for HUB participation on that project, the LRRB must provide an affidavit that includes a description of the portion of work to be executed by minority businesses, expressed as a percentage of the total contract price, which is equal to or more than the applicable goal. (This affidavit gives rise to a presumption that the bidder has made the required good faith efforts.)
  - If the percentage of work performed by HUBs (as stated in the LRRB's bid) is less than the public entity's goal for HUB participation on that project, and the LRRB did not submit an affidavit of self-performance, the LRRB must provide documentation of its good faith efforts to meet the goal.
  - If the apparent LRRB submitted an affidavit of self-performance, the LRRB doesn't have to provide documentation to support its identification of minority businesses. And it doesn't have to provide documentation to support its affidavit of good faith efforts, because it wasn't required to submit that affidavit with its bid. So a self-performing LRRB only has to worry about step 4 below.
3. If the apparent LRRB doesn't provide the required information, that is "grounds for rejection of the bid," per G.S. 143-128.2(c). In other words, the public entity may reject the bid, but is not required to reject the bid. If entity chooses to reject the bid, the entity must go back to step 2 with the next apparent LRRB, and so on, until a bidder provides the required documentation.
4. Once the contract is awarded, the entity notifies the winning bidder that, within 30 days after award of the contract, the bidder must provide a list of all identified subcontractors that the contractor will use on the project (if any).

The alternatives I've outlined in step 2 are only my own interpretation of the statute. The way G.S. 143-128.2(c) is written seems to give more flexibility in step 2. For example, it seems to suggest that a bidder could list several HUBs on its bid, and state that the total dollar value of the work to be performed by HUBs will be 50% of the total value of the project. Then, when the local entity asks for supporting documentation, the bidder could provide documentation about its good faith efforts instead of documenting which HUBs will perform the work and what exact percentage of work each HUB will perform. The problem with this is that it makes it too easy for a contractor to list HUBs on its bid, and then choose to perform the work with other, non-HUB subcontractors, but claim to meet its obligations under the statute by documenting the good faith efforts made—even if those good faith efforts weren't made until after the contract was awarded (if at all)! Or, alternatively, a bidder who failed to make good faith efforts could still attest that it made good faith efforts on its bid, and then when asked to document its good faith efforts, instead find enough HUB subcontractors to meet or exceed the participation goal. In both situations, the bidder will get an unfair advantage over the other bidders by being given additional time to find subcontractors who will perform the work at a lower cost, giving the bidder a higher profit margin. I don't think this is what the drafters of the statute intended.

### What about Crafty?

You made your preliminary determination that Crafty was the lowest responsive, responsible bidder based on the fact that their bid claimed that they would have 25% HUB participation, not because of their good faith efforts. **1 N.C. Admin. Code 301.0101** says that "[b]idders must earn at least 50 points from the good faith efforts listed in Rule .0102, **or** comply with the requirements of G.S. 143-128.2 (c)(1)(a) [the part of the statute requiring the affidavit listing the HUB subcontractors], in order for their bids to be considered responsive." So, if Crafty refuses to submit the affidavit, that would be "grounds for rejection" of their bid. That is, you can reject their bid as being non-responsive, or you can accept it. In making your decision, you'll want to consider what message you want to send to contractors and subcontractors on future projects. Of course, you'll also have to consider cost, time, and politics.



## Links

- [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-128.2.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-128.2.html)
- [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-128.4.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-128.4.html)
- [ncrules.state.nc.us/ncac/title%2001%20-%20administration/chapter%2030%20-%20state%20construction/subchapter%20i/01%20ncac%2030i%20.0102.html](http://ncrules.state.nc.us/ncac/title%2001%20-%20administration/chapter%2030%20-%20state%20construction/subchapter%20i/01%20ncac%2030i%20.0102.html)
- [ncrules.state.nc.us/ncac/title%2001%20-%20administration/chapter%2030%20-%20state%20construction/subchapter%20i/01%20ncac%2030i%20.0101.html](http://ncrules.state.nc.us/ncac/title%2001%20-%20administration/chapter%2030%20-%20state%20construction/subchapter%20i/01%20ncac%2030i%20.0101.html)