Coates' Canons Blog: HB2 Reset Beyond Bathrooms . . . Local Government Contracting Limitations Repealed

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Earlier today the General Assembly passed **H142 (S.L. 2017-4)**, **Reset of S.L. 2016** repealing HB2 (S.L. 2016-3), the Public Facilities Privacy and Security Act, which was enacted during a special session held in March 2016. In repealing HB2, H142 enacts a new statute preempting state agency and local governments from regulating access to multiple occupancy restrooms, showers, or changing facilities except to the extent authorized by the General Assembly. H142 also imposes a moratorium on local government ordinances regulating private employment practices and public accommodations. The moratorium expires on December 1, 2020.

While HB2 is perhaps best known for its regulation of bathrooms, it also placed limits on the contracting authority of cities and counties. This post addresses the impact of HB2's repeal on these contracting restrictions. The repeal brings back to life the earlier versions of these restrictions, but the new moratorium overrides some of the authority that would have been available under the pre-HB2 version of the statutes.

The contracting limitations imposed on cities and counties under HB2 are discussed in detail in this blog post. To briefly summarize, HB2 amended the contracting statutes for cities (G.S. 160A-20.1(a)) and for counties (G.S. 153A-449(a)) in three ways:

1. Expanded the existing prohibition against 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 expansion under HB2 prohibited 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. Added 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. Extended 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, G.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).

As amended by HB2, the city and county contracting statutes read as follows:

(a) A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in. *A city may not require a private contractor under this section to abide by regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a contract or a qualification-based selection, except as otherwise required or allowed by State law.*

What does the repeal of HB2 mean for city and county contracting authority? **Simply put, the city and county contracting statutes revert back to their pre-HB2 status,** so the statutes now read like this:

(a) A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in. *A city may not require a private contractor under this section to abide by any restriction that the city could not impose on all employers in the city, such as paying minimum wage or providing paid sick leave to its employees, as a condition of bidding on a contract.*

So, what can cities and counties do or not do now that their contracting statutes have reverted to their pre-HB2 status? Cities and counties must still comply with the limitations on their contracting authority that existed prior to HB2's enactment last year. Cities and counties still cannot require bidders to abide by employment-related restrictions that these local governments do not have the legal authority to impose on all employers within their jurisdictions, such as living wage requirements or requiring paid sick leave. To the extent that existing law might be interpreted to grant cities and counties the authority to enact local ordinances establishing employment-related requirements on private employers that then could be imposed on bidders**, H142 now imposes a moratorium on city and county ordinances regulating employment practices. So at least until 2020, cities and counties are prohibited from enacting any local ordinances through which they could then impose employment-related requirements on bidders.**

Perhaps the more significant impact on city and county contracting authority is the repeal of the prohibition under HB2 against imposing anti-discrimination requirements on bidders. For example, under HB2, a city or county could not require bidders to provide a statement that the bidder does not discriminate on the basis of sexual orientation, transgender, or gender identity because state law under HB2 did not prohibit discrimination on those grounds. Now, with the repeal of HB2, there does not appear to be a legal barrier to a city or county imposing such an anti-discrimination requirement on bidders.

Because the comparison of pre-HB2 status, HB2 status, and post-HB2 status of city and county contracting statutes can be confusing, here's a simple comparison for two specific scenarios:

- Can a city or county require a contractor to pay his employees a living wage or give his employees paid sick leave?
    - Pre-HB2: No
    - HB2: No
    - Post HB2: No

- Can a city or county require a contractor to have an anti-discrimination policy relating to the contractor's suppliers or subcontractors that includes nondiscrimination on the basis of sexual orientation, transgender, or gender identity?
    - Pre-HB2: Yes
    - HB2: No
    - Post-HB2: Yes

Finally, the scope of the contracting limitations discussed above is narrowed to pre-HB2 contracts, which are those subject to competitive bidding requirements. Under HB2, the contracting limitations were expanded to include contracts subject to qualification-based selection requirements (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). With the repeal of HB2, the contracting limitations discussed above no longer apply to these contracts.

H142 was signed into law by the Governor this afternoon so it is now law, and the changes discussed in this post are effective immediately.

Links

- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2017&BillID=h142&submitButton=Go
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015E2&BillID=h2&submitButton=Go
- canons.sog.unc.edu/beyond-bathrooms-special-session-legislation-impacts-city-and-county-contracts/
- 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