Coates' Canons Blog: Mini-Brooks Act FAQ's

By Norma Houston

Article: https://canons.sog.unc.edu/mini-brooks-act-faqs/

This entry was posted on September 28, 2011 and is filed under Design Services / Mini-Brooks Act, Purchasing, Construction, Property Transactions

NOTE: This post has been updated to reflect changes enacted by the General Assembly in 2013 and 2014.

In North Carolina, the procurement of professional services performed by architects, engineers, surveyors, and construction managers at risk is governed by G.S. 143-64.31, sometimes referred to as the "Mini-Brooks Act." Following are some frequently asked questions about the Mini-Brooks Act and a trivia bonus question that will explain why the picture above is included in this post.

What is QBS?

The QBS process is a procurement process that focuses on the qualifications of potential firms rather than their fees or the price of the contract. Local governments must use this process when selecting an architect, engineer, surveyor, construction manager at risk, design-builder, or private developer for a public-private partnership development contract (additional procedural requirements apply when selecting a design-builder or a public-private partnership developer – for more information, see my posts on design-build, design-build bridging, and P3). The firm that the local government wishes to contract with is selected based on "demonstrated competence and qualification for the type of professional services rendered." (G.S. 143-64.31(a)) This is often done by using a request for qualifications (RFQ) to solicit responses from interested firms and individuals.

Is QBS the same as competitive bidding? Can we solicit price?

No. QBS is *not* competitive bidding, which focuses on price under the lowest responsive responsible bidder standard of award. In fact, the initial determination of which firm is the best qualified must be done "without regard" to the fee or price other than unit cost (an example of unit cost would be a general hourly fee, but articulation of fees that can be easily correlated as a fixed price or bid is prohibited, such as including both hourly fees and an estimate of the number of hours to complete the project). So, the unit of government cannot request firms to submit an estimated total fee or contract price when responding to the RFQ, and firms are prohibited from submitting this information whether or not requested by the local government. And, if a firm submits price information, the local government is prohibited from considering it.

What else cannot be solicited in the RFQ?

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In addition to the prohibition on soliciting, submitting, or considering price, local governments may not solicit (and firms may not submit) work product or designs in response to the RFQ. The local government may request and firms may submit *prior* work product generated for past projects, but the local government may not request that firms generate work product or designs on the project that is the subject of the RFQ. Nor may firms generate work product or designs and submit it in response to the RFQ. For example, a local government cannot request that firms competing for an architectural contract develop conceptual renderings of the project, but it can request copies of drawings from previous projects and discuss with the firms their approaches to and concepts of the project. But, drawings, renderings, or other work product cannot be requested, submitted, or considered.

When can price be considered?

After evaluating RFQ responses submitted by interested firms, the unit of government can negotiate a "fair and reasonable" price for the contract with the firm the unit has determined is the best qualified based on the evaluation criteria used by the unit to evaluate responses. The unit of government can also consider price if it exempts itself from the requirements of the Mini-Brooks Act under G.S. 143-64.32, which is discussed later in this post.

What if negotiations with the best qualified firm fail?

If the unit of government is not able to negotiate a fair and reasonable contract price with the best qualified firm, it must terminate negotiations with that firm and initiate negotiations with the next best qualified firm. This requirement suggests that firms should be ranked in order of quality when responses to the RFQ are evaluated.

What if negotiations with the next best qualified firm fail?

While G.S. 143-64.31 does not specifically authorize continued negotiations with firms beyond the next best qualified, it is reasonable to interpret the statute to allow this (although the courts have not addressed this question). Under federal law, continued negotiations with lower-ranked firms in priority order is actually required, obligating the agency head to undertake negotiations with the next qualified firm on the list and so on, and "continuing the process until an agreement is reached." (40 U.S.C. § 1104(b)) Given that North Carolina's Mini-Brooks Act is patterned after federal law (the Brooks Act, which is discussed at the end of this post), one could argue that the intent of G.S. 143-64.31 is to give similar authorization to continue negotiations with subsequent firms until a contract agreement is eventually reached, assuming the unit wishes to do so. The unit could also stop all negotiations and start over in the hope of a more successful outcome, or it could exempt itself from the QBS process requirements entirely under G.S. 143-64.32 (see below).

Is there a minimum cost threshold for QBS requirements?

No. Unlike formal and informal purchase and construction and repair contracts, there are no cost thresholds that trigger the requirements of the Mini-Brooks Act. Unless the unit of government exempts itself from these requirements under G.S. 143-64.32 (see below), the requirements of G.S. 143-64.31 apply regardless of whether the estimated cost of the contract is $100 or $1 million dollars.

Must the RFQ be formally advertised?

No. The Mini-Brooks Act does not require formal advertisement like formal purchase and construction contracts under G.S. 143-129(b). Instead, the unit of government must "announce all requirements" for the services sought, but the statute does not define what "announce" means. When a word is not specifically defined, it is given its plain meaning for

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purposes of statutory interpretation. Webster's defines "announce" as "to make publicly known; to proclaim." So, the announcement must be done in some public fashion and for some reasonable period of time to allow firms the opportunity to respond. In her blog post, Eileen offers good suggestions such as posting on the unit of government's website, advertising in trade journals or the newspaper, or contacting firms directly. Regardless of which method is used, the goal is to get competition for the services needed so the unit can secure the best qualified firm.

Do minority business participation requirement apply?

Yes. The unit of government must make a good faith effort to notify minority firms of the opportunity to submit their qualifications for the services sought. The statute does not specify what these good faith efforts must consist of, so a good practice is to use the same methods as those used to encourage minority participation in informal construction and repair contracts. This is another reason to think broadly about the methods to use in announcing the requirements for the services sought.

Is there a minimum number of responses that have to be received?

No. Unlike formal construction contracts that require a minimum of three bids, the Mini-Brooks Act does not require the unit to receive a minimum number of responses before any can be considered, so presumably if only one response is received, the unit may still consider the qualifications of that firm.

Must responses be submitted sealed?

No. The Mini-Brooks Act does not require responses to be sealed, but the unit can elect to require this if it chooses. If it chooses to do so, it should include this requirement in the RFQ.

Must responses be opened at a public opening?

No. The Mini-Brooks Act does not require this, and units of government do not normally elect to set a specific time and location for opening responses (and, if the unit does not require responses to be submitted sealed, setting a time for opening is irrelevant). If the unit sets a deadline for *receiving* responses, this deadline should be included in the RFQ.

Are responses a matter of public record?

Yes. Unless the unit of government requires responses to be submitted sealed, responses will be open to public inspection when received by the unit of government. If required to be sealed, the response will be open to public inspection when it is unsealed (literally, when the envelope is opened). In addition, rankings and any other written evaluations of qualifications and responses will also be open to the public and subject to inspection by anyone, including the firms that have submitted responses.

What are "resident firm" preferences and do they apply?

Yes. G.S. 143-64.31(a1) requires reciprocal resident firm preferences. This means that the unit of government must give preference to "resident" firms in this state over "nonresident" firms from another state to the same extent that the other state grants a resident preference to its in-state firms. A "resident" firm is one that has paid unemployment taxes or income taxes in North Carolina and whose principal place of business is located in this state. Note that this is not a "local

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preference" in the sense that a firm in one geographic area in this state, such as a city or county, can be given preference over a firm from another in-state geographic area. Since this type of preference requires an analysis of price, it would only come into play if the unit of government exempts itself from the Mini-Brooks Act (see below). For a more detailed discussion of local preferences in general, see Eileen's six-series blog posts on local preferences (the sixth post is linked here; links to the five prior installments are contained within that post).

How does a local government exempt itself from the Mini-Brooks Act?

G.S. 143-64.32 authorizes a unit of local government to exempt itself from the Mini-Brooks Act, which means that it will not be required to use the QBS process and may select an architect, engineer, surveyor, or alternative construction delivery method firm by whatever method it chooses (or no method at all). The statute does not impose much by way of requirements for utilizing the exemption – it simply requires the unit to put the exemption in writing. However, the exemption is capped at $50,000, meaning the estimated cost of the contract cannot exceed this amount. Contracts with an estimated cost of $50,000 or more *cannot* be exempted and the QBS process *must* be used. Governing board approval is not required, but many local governments choose to do so anyway, which is a good practice to follow. Sample language for a board resolution is available on the SOG local government purchasing website.

What justification must be given for the exemption?

G.S. 143-64.32 does not require the unit to provide any justification for utilizing the exemption. The statute merely requires the exemption be in writing and the estimated cost of the contract be less than $50,000. Although units are not required to provide a justification for using the exemption, units may choose to do so as long as the justification is not for an illegal purpose (for example, citing a justification that constitutes unlawful discrimination).

Can a local government adopt a "blanket" exemption?

Local governments often prefer to have exemptions approved by their governing boards, but may find it cumbersome to take each individual exemption to the board for adoption, especially when the contracts involve small projects. And sometimes, a local government may wish to put an architect or engineer on retainer for a period of time, such as for a fiscal year, to call upon on a case-by-case basis, but may not have any specific projects in mind when the architect or engineer is hired. Can the local government adopt a "blanket" exemption in these instances?

G.S. 143-64.32 states that the local government may exempt "particular projects" from the requirements of the Mini-Brooks Act. In my opinion (as was Eileen's, although opinions on this question vary as Eileen notes in her post), this language suggests that "blanket exemptions" are not authorized. While the courts have not yet decided this question, the NC Board of Examiners for Engineers and Surveyors has taken the position that exemptions must be granted on a project-by-project basis, so an engineer runs the risk of violating licensing requirements by responding to a RFQ that solicits price if the exemption of that project is not legally valid. To avoid an inadvertent violation of the statute (by any party), the safer course is to assume that blanket exemptions are not authorized and that the exemption must be adopted on a project-by-project basis. However, it does not seem inconsistent with the statute to include multiple projects in one exemption if the unit has identified several specific projects it plans to contract for. Furthermore, given that governing board approval is not statutorily required, the board could authorize a staff member such as the manager to grant exemptions (in writing, of course) for certain projects so long as the contracts entered into under the exemption are less than $50,000.

Trivia Bonus Question: Where did the name "Mini-Brooks Act" come from?

The name "Mini-Brooks Act" comes from the federal law, the Brooks Act, after which our state law was patterned. The Brooks Act was passed by Congress in 1972 to establish the QBS process for procuring architectural and engineering

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services by federal agencies. 40 U.S.C. 1101 – 1104 (P.L. 92-582). In the ensuing years, most states have adopted versions of the Brooks Act commonly referred to as "Little Brooks Acts" or "Mini-Brooks Acts" (North Carolina's version was enacted by our General Assembly in 1987). The federal law is referred to as the Brooks Act after U.S. Rep. Jack Brooks (D-TX), who authored the legislation.

So, what about the picture at the beginning of this post? Rep. Brooks was part of the motorcade in Dallas, Texas, on November 22, 1963, when President John F. Kennedy was assassinated, and later was aboard Air Force One when Lyndon Johnson was sworn in following the President's death (that's Rep. Brooks standing right behind Mrs. Kennedy).

[1] For those who may be wondering, Eileen and her family are doing well since their move home to Texas. Eileen is still actively working in the purchasing field (Eileen Youens Consulting), and presented at the recent NIGP conference.

Links

- canons.sog.unc.edu/mini-brooks-act-faqs/brooks-picture-4/
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-64.31.html
- canons.sog.unc.edu/?p=7493
- canons.sog.unc.edu/?p=7519
- canons.sog.unc.edu/?p=7553
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-64.32.html
- uscode.house.gov/download/pls/40C11.txt
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129
- www.sog.unc.edu/node/765
- www.ncbels.org/faq.html
- bioguide.congress.gov/scripts/biodisplay.pl?index=B000880

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