Coates' Canons Blog: New Construction Contractor Prequalification Requirements

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Since 1995, local governments have had express statutory authorization to prequalify bidders for public construction contracts under **G.S. 143-135.8**. If you look to this statute for guidance on the criteria or process to be used for prequalifying bidders, you will find the following:

"Bidders may be prequalified for any public construction project."

That's it? That's it. For almost 20 years, local governments have had the legal authority to prequalify bidders for construction projects but have had no statutory guidance on how to do it. Not many local governments use prequalification, and those that do often look to the NC State Construction Office's prequalification forms and scoring matrix for guidance (these documents are available on the **SCO website**). Now, thanks to legislation recently enacted by the General Assembly, specific statutory procedures and requirements will apply to the prequalification process.

What is the new law and where did it come from?

During the 2013 legislative session, the General Assembly created the Purchase and Contract Study Committee to study "the issue of prequalification on public nontransportation construction work for both local and State government projects." (**S.L. 2013-401, s. 8**). The committee met during the 2013-14 legislative interim and found that the existing statutory authorization for prequalification was broad and open to subjective interpretation (you can read the committee's report, meeting minutes, and presentation materials on the **committee's website**.) The committee's recommendations took the form of **H1043** which was introduced when the General Assembly reconvened in May. The legislation passed and was signed into law by the Governor on June 30th.

The new law, **S.L. 2014-42 (H1043)**, amends G.S. 143-135.8 by establishing specific procedural requirements for when and how local governments may prequalify construction contractors to bid on construction and repair contracts (these new requirements also apply to the prequalification of first-tier subcontractors by a construction manager at risk under **G.S. 143-128.1(c)**). The focus of these new requirements is to ensure that a prequalification process is conducted transparently using criteria that relate to the specific project being bid and which are applied objectively and fairly to all bidders. The new requirements also give bidders an opportunity to learn why they were denied prequalification and to appeal that denial. The changes go into effect on October 1, 2014, and apply to all contracts *awarded* on or after that date.

What is prequalification?

Prequalification is defined under the new G.S. 143-135.8(f)(2) as "[a] process of evaluating and determining whether potential bidders have the skill, judgment, integrity, sufficient financial resources, and ability necessary to the faithful performance of a contract for construction or repair work." This statutory definition mirrors the definition of a responsible bidder articulated by the North Carolina Court of Appeals interpreting the lowest responsive, responsible bidder standard of award for purchase and construction contracts in the informal and formal competitive bidding ranges.[1] Thus, the statutory definition of prequalification is the same as the legal standard articulated by the courts for determining whether a bidder is responsible.

Practically speaking, when a local government uses prequalification in a bidding process, it conducts its responsible bidder determination *prior* to receiving bids instead of when considering bids *after* they have been received. The local government first prequalifies potential bidders and then accepts bids only from those bidders who were prequalified. The local government may still apply the responsible bidder standard when evaluating bids, but it may not reject a bidder based on a specific factor for which the local government granted prequalification for bidding on that contract.

When may prequalification be used?

Under the new version of G.S. 143-135.8, prequalification is prohibited unless the requirements of the statute are followed. Prequalification may be used only when all of the following conditions in the new G.S. 143-135.8(b) are met:

1. The local government is using one of the construction methods authorized in **G.S. 143?128(a1)(1) through G.S. 143?128(a1)(3)**(single-prime, separate-prime or dual bidding).
2. The governing body adopts an objective prequalification policy applicable to all construction or repair work; the policy must be adopted *prior to* advertising the contract for which the governmental entity intends to prequalify bidders.
3. The local government adopts the assessment tool and criteria for that specific project, which must include the prequalification scoring values and minimum required score for prequalification on that project.

When is prequalification prohibited?

Prequalification is specifically prohibited when selecting architects, engineers, surveyors, construction managers at risk, design-builders, preliminary designers for design-build bridging projects, and private developers for public-private partnership contracts (all of these categories of contracts are subject to the Mini-Brooks Act under **G.S. 143-64.31**). However, a construction manager at risk must follow the new procedures when prequalifying first-tier subcontractors under **G.S. 143-128.1(c)).**

Is there a dollar threshold for using (or prohibiting the use of) prequalification?

The statute does not set a threshold or minimum contract cost for using prequalification, so the process may be used regardless of the cost of the project. While prequalification can only be used when the local government is employing the single-prime, separate-prime, or dual-bidding contracting methods, these methods are not limited to building construction projects costing $300,000 or more (although they are among several contracting methods specifically authorized for such projects). Local governments are not prohibited from using these contracting methods for other types of constructions projects, and in fact, they are the primary methods used on most construction and repair projects. Thus, whenever a local government is using the single-prime, separate-prime, or dual bidding methods, it may prequalify bidders if it chooses to do so as long as it follows the new statutory requirements.

What must be included in a prequalification criteria policy?

The new prequalification statute specifically requires that a local government's prequalification criteria policy must:

1. Be uniform, consistent, and transparent in its application to all bidders.
2. Allow all bidders who meet the prequalification criteria to be prequalified to bid on the construction or repair work project (in other words, a bidder who meets the prequalification criteria must be allowed to bid on the project).
3. Clearly state the prequalification criteria, which must comply with all of the following:
    1. Be rationally related to construction or repair work.
    2. Not require that the bidder has previously been awarded a construction or repair project by the governmental entity.
    3. Permit bidders to submit history or experience with projects of similar size, scope, or complexity.
4. Clearly state the assessment process of the criteria to be used.
5. Establish a process for a bidder to protest to the governmental entity its denial of prequalification. The protest process must be completed prior to the bid opening to allow sufficient time for a bidder whose protest is successful to submit a bid on that project.
6. Outline a process by which the basis for denial of prequalification will be communicated in writing, upon request, to a bidder who is denied prequalification.

What type of notice must be given to bidders when prequalification is used?

Although the new prequalification statute does not require a specific method of notice to bidders, public agencies should include notice that prequalification will be used on the project as part of the notice for the opportunity to submit bids on the project (for example, in the legal advertisement required under formal bidding procedures in **G.S. 143-129(b)**). In addition, the local government should make available its prequalification criteria policy and the criteria for that particular project to ensure that interested bidders are able to fully comply with the local government's requirements for submitting qualifications. I recommend that the prequalification criteria policy and criteria be included as part of the specifications for that project.

What happens if a bid is received from a bidder who is not prequalified?

The new prequalification statute specifically states that a bid submitted by a bidder who was not prequalified "shall" be rejected as being nonresponsive. However, the local government may not reject a bid from a bidder who was initially denied prequalification and then subsequently prequalified after filing a denial protest under the local government's prequalification policy.

When do these new prequalification requirements go into effect?

The changes to G.S. 143-135.8 go into effect on October 1, 2014, and apply to all contracts *awarded* on or after that date. If the bidding process on a construction project is initiated *prior* to October 1st, but the contract will be *awarded* after October 1st, the new prequalification requirements and process *will apply* if the local government intends to prequalify bidders for that contract.

Is there an example of prequalification criteria?

As I mentioned at the beginning of this post, many local governments look to the NC State Construction Office's prequalification forms and scoring matrix for guidance (these documents are available on the **SCO website**). It is important to note that the new prequalification statute requires that the local government's governing board adopt a

prequalification criteria policy and assessment tool *prior* to advertising for bids. The local government cannot adopt its criteria policy or develop its assessment tool (which must include prequalification scoring values and the minimum required score for prequalification) after it has initiated the bidding process. If the local government wishes to change its criteria policy, that change will require governing board approval.

[1] *Kinsey Contracting Co., Inc. v. City of Fayetteville,* 106 N.C. App. 383, 385, 416 S.E.2d 607, 609 (1992).

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-135.8
- www.nc-sco.com/prequalforms.aspx
- www.ncleg.net/Sessions/2013/Bills/House/HTML/H857v8.html
- www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=248
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=H1043&submitButton=Go
- www.ncleg.net/Sessions/2013/Bills/House/HTML/H1043v6.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-128.1
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-128
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-64.31
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129