
Coates' Canons Blog: Prequalification: Good, bad, or indifferent?

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Your local government is planning a major construction project, and the engineering firm working with you on the project has strongly recommended prequalifying contractors before bidding. The engineer tells you that this will ensure that the bids you receive are only from serious, qualified bidders, making the bidding process more efficient. This sounds appealing to you, but since you've never done it before, you have some concerns. First, do you have the legal authority to prequalify contractors? And, if so, what criteria can you use? And what are the benefits and drawbacks to prequalification?

Can you prequalify?

The answer to the first question is yes. G.S. 143-135.8 (which says, simply, "Bidders may be prequalified for any public construction project") gives local governments the authority to prequalify contractors on public construction projects. What the statute doesn't say, on the other hand, could fill a book. The statute doesn't tell local governments how to prequalify bidders, when to prequalify bidders, or how to reconcile prequalification with the lowest responsive, responsible bidder standard of award for informal or formal bidding. So we have to read the statute in the context of the rest of Article 8 of Chapter 143 to figure out the answers to these questions.

What criteria can you use to prequalify?

We know that local governments must award construction and repair contracts costing \$30,000 or more to the "lowest responsible bidder or bidders, taking into consideration quality, performance and the time specified in the proposals for the performance of the contract." (G.S. 143-131(a) applies this standard of award to informal bids—construction and repair contracts costing from \$30,000 up to \$500,000—and G.S. 143-129(b) applies this standard of award to formal bids—construction and repair contracts costing \$500,000 or more.) There is nothing in the prequalification statute that suggests that prequalification can be used to avoid or expand this standard of award. Since a local government's authority to award contracts is limited to the authority given to them by the General Assembly, we have to assume that prequalification can be used to determine, in advance of bidding, whether a bidder is "responsible"—no more, and no less.

So what does "responsible" mean? In *Kinsey Contracting Co v. City of Fayetteville*, 106 N.C. App. 383, 385, 416 S.E.2d 607, 609 (1992), the North Carolina Court of Appeals held that "the term responsibility implies skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability." In other words, you can use prequalification to assess a potential bidder's

- experience,
- financial situation, and
- past performance.

But you cannot use prequalification to disqualify a potential bidder for reasons not based on "responsibility," such as the bidder's:

- geographic location (whether the bidder is "local" or not), or
- percentage of minority, women, or local employees.

Benefits to prequalification

Engineers seem to like prequalification because it is a way to limit the pool of potential bidders to qualified, serious bidders. Proponents of prequalification say that it's easier to eliminate the bidders who are not responsible before you start the bidding process so that when you make your recommendation to the board, the only bidders under consideration are bidders who are qualified to perform the work. This means that you don't have to explain to the board why you want to reject an unqualified bidder whose bid is \$150,000 less than the next lowest bidder (who is qualified). Some people also say that the simply requiring prequalification discourages bids from bidders who aren't serious about performing the project. In times like these, when local governments are seeing twice or three times as many bids as usual on every project, prequalification can seem like an easy way to make the bidding process more efficient.

Drawbacks to prequalification

However, there are drawbacks to prequalification, mostly because the statute is so vague about what prequalification means. Telling a contractor that they can't bid because they didn't prequalify may make them more eager to bring a protest than rejecting the bidder's bid because you've determined that they are not responsible. Contractors understand that having the opportunity to bid doesn't guarantee that they'll win the contract, but having the opportunity to bid is very important to them.

The Court of Appeals in *Kinsey* recognized that local governments have the authority to reject a bidder who is not responsible, giving local governments pretty broad discretion in determining whether a bidder is responsible. But no North Carolina courts have addressed prequalification, and a court could find that local governments have less discretion when deciding to keep a potential bidder from bidding at all than when rejecting a bid from a bidder who is not responsible.

Another concern with prequalification is the issue of how to handle a bid from a bidder who claims that they were unaware of the prequalification process and found out about the bid after the deadline for prequalification. Should you reject their bid as non-responsive because they didn't participate in the prequalification process? Well, yes, if prequalification was required as a part of the bidding process, a bid from that bidder is not responsive to the bid specifications. But what if this bidder is actually "responsible"? Then you've eliminated at least one responsible bidder from your pool of bidders—and that bidder could have been your lowest responsible bidder. Accordingly, another option might be to accept the bid but require the bidder to "qualify" using the same criteria that you used to prequalify the other bidders.

What are the risks? Well, if you reject the bidder who didn't participate in the prequalification process, they may bring a protest—and since we don't know how a court will interpret G.S. 143-135.8, it's unclear whether the protest will succeed. On the other hand, if you accept a bid from a bidder who didn't participate in the prequalification process, another bidder may protest, arguing that you should have rejected the bid as non-responsive.

So here's my recommendation: if you want to avoid a protest from the bidder who didn't prequalify and avoid a protest from a bidder who has lost the contract to the bidder who was allowed to bid without prequalifying, don't prequalify! You have ample authority to reject bidders who are not responsible through the regular bidding process without going through prequalification.

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Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-135.8.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-131.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html