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## Coates' Canons Blog: Rejecting Bids – Who Can and When Can They?

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Pauline Purchaser has advertised a contract and is pleased by the number of bids she's received. When she opens the bids, much to her dismay, she discovers that all are way over budget. As Pauline regroups to figure out what went wrong, she realizes there was a flaw in the specifications. She decides to reject all bids, rewrite the specs, and start over. It won't take long – the flaw in the specs is easy to fix – so she can proceed quickly and keep the project on track. As Pauline reports her plan to her manager, he says, "Wait! Don't we have to take all this to the board?" Do they?

The answer is, "it depends." Since that's not a very helpful answer, let's break the original question down into three questions that are key to determining what Pauline should (and should not) do:

1. What kind of contract is it and what is its amount?
2. Has the authority to reject bids been delegated and if so, to whom?
3. What do local policies say?

### ***What kind of contract is it and what is its amount?***

Basically, the authority to reject bids and readvertise is the same as that for awarding contracts. Governing boards are required by statute to approve construction or repair contracts in the formal bidding range (\$500,000 and above) and purchase contracts in the formal bidding range (\$90,000 and above). However, **G.S. 143-129(a)** authorizes a governing board to delegate awarding, rejecting, and readvertising *formal purchase contracts (but not formal construction contracts)* to the manager, chief purchasing official, school superintendent (for local boards of education), or any "other employee" named by the governing board.

There are several types of contracts for which local government boards are *not required* by statute to approve awards or reject bids. These include (1) purchase contracts in the informal bidding range (\$30,000 to \$90,000) [**G.S. 143-131**], (2) construction or repair contracts in the informal bidding range (\$30,000 to \$500,000) [**G.S. 143-131**], and (3) service contracts of any amount. Some local governments may require formal board approval for these and other contracts either by practice or in their written policies. However, a board can still choose to delegate its authority to award and reject informal purchase and construction or repair contracts just as it can formal purchase contracts.

There are three kinds of contracts for which the governing board *cannot* delegate its authority to award or reject bids:

1. construction or repair contracts in the formal range [**G.S. 143-129(a)**];
2. sole-source purchase contracts in the informal and formal ranges [**G.S. 143-129(e)(6)**]; and
3. previously bid or "piggybacking" purchase contracts in the formal range [**G.S. 143-129(g)**].

So, if the bids Pauline wants to reject are for a formal or informal purchase contract (except sole-source or piggybacking), or an informal construction contract, she can do so without board approval *assuming her board has delegated this authority to her* for formal purchase contracts (at a minimum), and preferably for informal contracts as well.

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***Has the authority been delegated and if so, to whom?***

For a purchasing officer, manager, or other employee to have the legal authority to award, reject, or readvertise formal purchase contracts, that authority must actually be delegated by the governing board. And, even though delegated authority is not legally required for informal purchase and informal construction or repair contracts, having this authority made clear through an actual delegation by the board can be helpful (even reassuring). How does this authority get delegated?

A governing board can delegate its authority to award contracts, reject bids, and readvertise either explicitly or implicitly. *Explicit* delegation is made in writing such as through a provision in a city charter, a formal resolution adopted by the governing board, or in a job description or personnel or purchasing policy approved by the board. Authority can also be delegated *implicitly* through the practices of the governing board, such as regularly making payments on contracts that were awarded by an employee.

It is always best to have authority to award contracts and reject bids *explicitly* delegated to a specific employee or employees, such as the manager and the purchasing officer. An explicit delegation provides clear authority for the employee and can confirm the validity of the contract if challenged. Explicit delegation may also be necessary if local policies impose contract award or bid rejection requirements beyond those of state law.

***What do local policies say?***

Some local governments have purchasing policies that go beyond the requirements of state law, such as imposing competitive bidding requirements for projects below the informal bidding range or requiring board approval for informal contracts. Even if state law authorizes delegated authority, local policies may still require board approval of those contracts. If this is the case, for an employee to award contracts and reject bids, it is best to make sure the board clearly and explicitly delegates its authority that employee. This delegation can be blanket for entire categories of purchasing and contracting activities or specific to one particular project (unless otherwise prohibited by state law as discussed above).

***What if an employee rejects a bid without the authority to do so?***

Oops – Pauline rejected the bids, readvertised, and *then* her attorney advises that the bid rejection should have gone to the board. What to do?

Don't panic. The board can, in some instances, approve actions after the fact – this is called “ratification.” Unless otherwise prohibited by law, unauthorized actions taken by an employee can be made legally valid after the fact if the board formally approves those actions. Ratification is limited, however, to actions that the board itself is legally allowed to take. If the board itself doesn't have the authority to take a particular action, it cannot ratify that action if taken by an employee. For example, a board cannot ratify a contract entered into in violation of the prohibition against self-dealing under **G.S. 14-234**.

So, let's go back to Pauline's discussion with her manager. Does she have to go to her board to reject the bids and readvertise the project? If the project is for construction or repair in the formal range, a formal or informal sole-source purchase, or a formal piggybacking purchase, there is no choice – *the board has* to reject the bids and authorize readvertisement. However, if it is a formal purchase contract, Pauline *might* have the authority to reject the bids and readvertise without board approval *if* her board has delegated that authority to her (remember, explicit delegation is always preferable to implicit delegation). Pauline *might* also have the authority to reject bids for informal purchase and construction or repair contracts depending on her local policies. If it is unclear whether a board has explicitly delegated its authority, it's probably safest to assume that it *has not*. In this case, Pauline should first get board approval for this contract. Then, assuming the board *wants* her to have this authority for future contracts, the board should explicitly delegate to help ensure that the legal validity of her actions can't be challenged.

Finally, Pauline should check her local policies to see what, if any, additional requirements may be imposed that might exceed those found in state law, especially for informal (and below) contracts, and determine whether her existing authority (assuming she has it) encompasses those additional requirements. If not, she might need specific authorization from her board. And, last but by no means least, if Pauline has already rejected the bids and readvertised, and *then*



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discovers that she didn't have the legal authority to do so without board approval, she can always take the matter to her board to have it ratify her actions after the fact.

## Links

- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-131](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-131)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-234](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-234)