
Coates' Canons Blog: Taking (Personal) Advantage of Public Contracts

By Eileen R Youens

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Carolina County has just awarded a contract for uPad tablet computers. Bill Goats, the purchasing officer for Carolina County, is having lunch with his friend in the public works department, Steve Jabs. Bill mentions the contract to Steve. “My daughter won’t stop talking about those uPads,” Steve says. “She really wants one.”

“Yeah, my son wants one, too,” says Bill.

“Wait a minute,” Steve says excitedly, “could we buy uPads off of the County’s contract for our kids? I’m sure you got a good deal for them.”

“Of course I did,” replies Bill, “but I don’t think we can do that.”

“Why not?” asks Steve. “We wouldn’t be stealing anything. We’d pay for them.”

“I don’t know,” says Bill. “That just doesn’t sound right to me.”

Bill’s intuition is absolutely correct. Generally speaking, government contracts are only for use by the government—not the government’s staff or officials (or their friends or relatives). But you won’t find this prohibition in the bidding statutes—it’s in the North Carolina Constitution. **Article I, Section 32** (scroll down to find Section 32) of our Constitution says that “[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” This means that a local government can’t give special privileges (like discounts on personal property) to someone unless that person is providing a public service in exchange. (And, no, doing the job you’re paid to do is not considered a “public service”—although it probably feels like that sometimes!) In other words, if someone is getting a personal benefit from a discount negotiated by your local government, that is a violation of Article I, Section 32 of the North Carolina Constitution.

There are two other problems with this kind of transaction that Bill and Steve should consider. One is that local governments generally do not have the authority to act as a retailer—and that is essentially what Carolina County would be doing in this situation: the County would be “selling” the uPads to Bill and Steve. (Note that most public entities in North Carolina are expressly prohibited from acting as a retailer under **the Umstead Act**. Although counties and municipalities are exempt from the Act, they still generally don’t have the authority to sell goods to the general public.) That “sale” would be a void contract. And, second, this is a fraud on the vendor, who presumably gave this discount to the County for the County’s use only.

Now let’s explore a few variations on this theme:

Variation 1: Bill and Steve Buy the uPads Directly From the uPad Vendor

What if Bill and Steve purchase their uPads directly from the uPad vendor, and ask for the County discount, making it clear that the uPads would be for their personal use? If the vendor agrees to give them the discount, it would be legal for Steve to buy a uPad at the discounted price, but Bill should probably stay away from this special deal. Why? Well, Bill is in charge of awarding the uPad contract, and Steve isn’t. A substantial discount on uPads could be considered a gift or favor from the uPad vendor. **G.S. 133-32** makes it a Class 1 misdemeanor for public officers or employees who are involved in procurement—specifically, those involved in preparing plans, specifications, or estimates for public contract; or awarding or administering public contracts; or inspecting or supervising construction—to receive gifts or favors from past (within one year), current, or potential future contractors or vendors. Because Bill, as the County’s Purchasing Officer, is involved in

procurement, taking advantage of that discount would violate G.S. 133-32. (There are five types of gifts that are permitted under the statute—(1) **honoraria**, (2) advertising items or souvenirs of **nominal** value (nominal is not defined in the statute), (3) meals at banquets, (4) gifts to professional organizations, and (5) gifts from family or friends who are also vendors—but none of these exceptions would apply to Bill's use of this discount.)

Also, **G.S. 14-234(a)(3)** makes it a Class 1 misdemeanor for any public officer or employee to “solicit or receive any gift, favor, reward, service, or promise of reward, including a promise of future employment, in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves.” Because Bill is in the position of recommending and influencing the County's uPad contract, he may risk being seen as accepting a favor in exchange for recommending an award to this particular uPad vendor, even if he's sure the discount did not impact his decision to award the contract to a particular vendor.

Variation 2: The County's uPad Contract Gives County Employees the County Discount

Let's say the uPad vendor has a practice of offering the county discount to county employees and writes that discount into its contract with the County's. Can Steve or Bill take advantage of the discount then? Steve certainly can. Bill should probably still stay away, for the same reasons outlined in Variation 1. Even if the discount is available to all county employees, Bill—and any other county employees or officers involved in making or administering this contract—will risk violating G.S. 133-32 and G.S. 14-234(a)(3) if he takes advantage of the discount. (Note that you should **not** include this type of condition—that is, requiring the vendor to provide the same discount to all government employees—in your specifications. If the lowest responsive, responsible bidder offers to extend its discount to your entity's employees, that's fine, but you don't want to have to reject bidders who are unwilling to do so.)

Variation 3: Bill and Steve Need the uPads to Do Their Jobs

Now what if Bill and Steve didn't plan to buy the uPads for their kids, but actually need the uPads to more effectively perform their County responsibilities? In that case, it is probably OK for the County to purchase the uPads for Bill and Steve (even if they occasionally take the uPads home with them and use them for personal business), because the County will benefit from Bill's and Steve's use of the uPads and from their increased proficiency with the uPads.

A Related Question

When the County is ready to get rid of the uPads and holds an auction to sell them, can Bill or Steve buy the uPads at the auction? For the answer to that question, refer to my 2009 blog post titled “**When can a local government employee or official buy surplus property from the local government? Part 2.**” (Short answer: Steve can, Bill can't.)

Links

- www.ncga.state.nc.us/Legislation/constitution/article1.html
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=66-58
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_133/GS_133-32.html
- en.wikipedia.org/wiki/Honorarium
- www.thefreedictionary.com/nominal
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-234.html
- canons.sog.unc.edu/?p=793