

# Basic Legal Requirements for Construction Contracting with North Carolina Local Governments

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Local governments in North Carolina are subject to specific legal requirements that govern contracting for construction and repair projects. This outline summarizes basic procurement requirements under North Carolina law, specific legal requirements for construction and repair contracts, additional legal requirements for projects involving public buildings, and exceptions to competitive procurement requirements specific to construction and repair projects.

## I. Basic Public Procurement Requirements

Public entities, including local governments, must comply with all applicable competitive bidding requirements to avoid the contract being rendered void and unenforceable. Local governments may not assume responsibility for construction contracts or guarantee payments for materials or labor unless all competitive bidding requirements are followed. [G.S. 143-129(b)]<sup>2</sup>

### Basic Procurement Method Analysis: Contract Type + Cost = Procurement Method

To know which procurement method is required for a specific contract, first identify the type of contract and that contract's estimated cost:



#### 1. Type of Contract

- a. Purchase – purchase of supplies, materials, apparatus, and equipment
- b. Construction and repair

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<sup>1</sup> This outline was originally prepared with the generous assistance of Eileen Youens, former Assistant Professor of Public Law with the School of Government. <http://youensconsulting.com/>.

<sup>2</sup> *Howkins v. Town of Dallas*, 229 N.C. 561, 50 S.E.2d 561 (1948); *Nello L. Teer Co. v. North Carolina State Hwy. Comm'n*, 265 N.C. 1, 143 S.E.2d 247 (1965).

- c. Mini-Brooks Act services – surveying, architectural, engineering, construction management-at-risk, design-build, design-build bridging, and public-private partnership
- d. Everything else (example: service contracts not subject to Mini-Brooks Act)

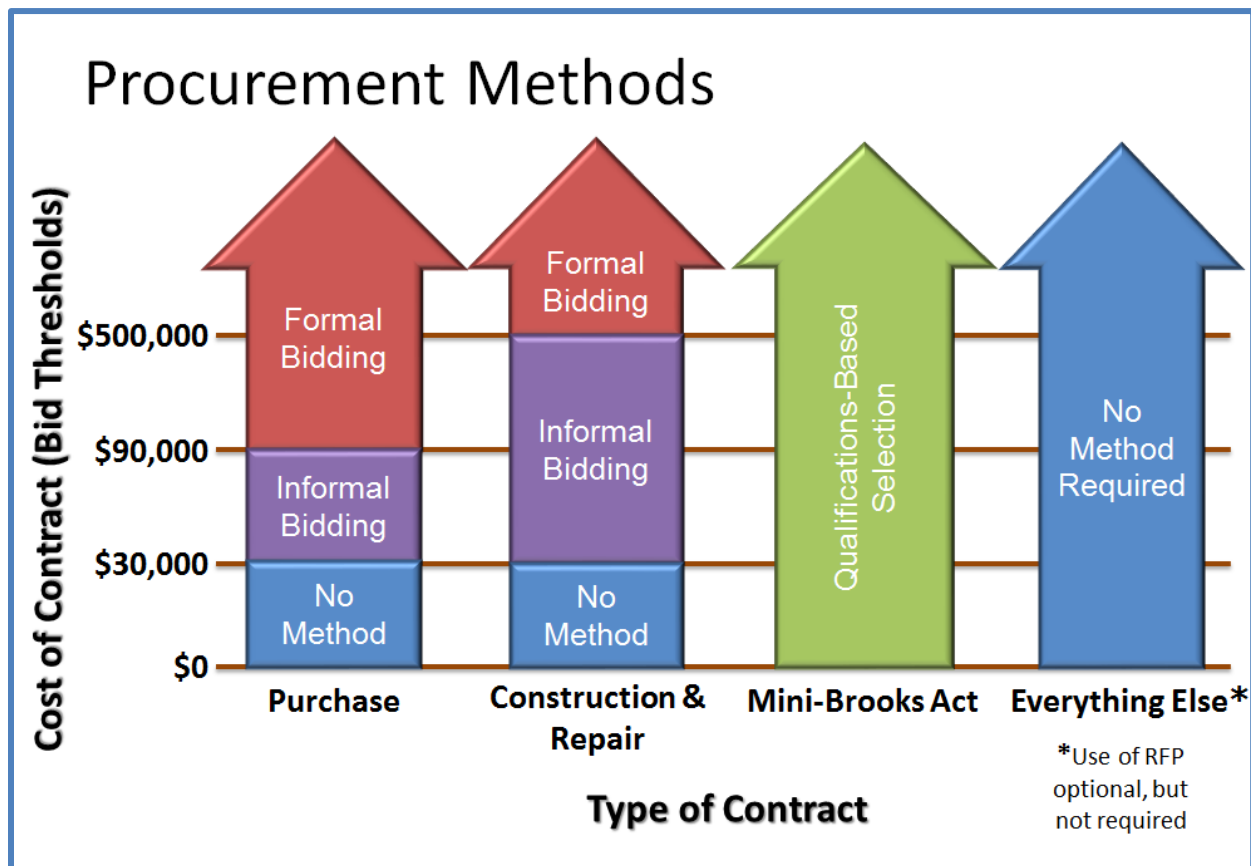
**2. Cost (Bid Thresholds)**

- 1. \$30,000 – informal bid threshold for purchase and construction & repair contracts
- 2. \$90,000 – formal bid threshold for purchase contracts
- 3. \$500,000 – formal bid threshold for construction & repair contracts

**3. Procurement Methods**

- a. Informal bidding - purchase and construction & repair contracts
- b. Formal bidding - purchase and construction & repair contracts
- c. Qualifications-based selection (QBS) - required for Mini-Brooks Act services
- d. Request for Proposals (RFP) - optional for all service contracts other than Mini-Brooks Act services

The chart below combines the type of contract, bid thresholds, and procurement methods:



## II. Specific Bidding Requirements for Construction/Repair Contracts

The following legal requirements apply to all construction and repair contracts, including contracts for building construction and repair, unless otherwise noted. They are organized in a step-by-step outline that generally follows the construction contracting process.

### *Step 1: Develop project specifications*

1. **Selecting project designers** – In hiring an architect and/or engineer, a local government must use the Qualifications Based Selection (QBS) process unless the local government exempts itself. [G.S. 143-64.31, -64.32]
2. **Licensure requirements notice** – Architects and/or engineers preparing specifications must include information about licensure requirements in the invitation to bidders and project specifications. [G.S. 87-15]

### *Step 2: Solicit bids*

1. **Informal bidding** – Bids for projects in the informal bidding range must be “secured.” The statutes do not specify any particular requirements for securing informal bids, so local governments can solicit by any method they choose, such as a newspaper ad, website posting, email, mail, or phone. [G.S. 143-131(a)]
2. **Formal bidding** – Formal advertisement is required for projects in the formal bidding range. Advertisements must meet statutory requirements:
  - a. Advertise in a newspaper of general circulation within the local government’s jurisdiction, by electronic means, or both, for at least 7 full days before the bid opening; advertising by electronic means only requires governing board approval at a regular meeting.
  - b. Advertisement must include the time and location where plans and specifications are available, the time, date, and location of the bid opening, and a statement reserving the local government’s right to reject any and all bids. [G.S. 143-129(b)]

### *Step 3: Receive bids (form of bids)*

1. **Informal bids may be received in any form** – Informal bids are not required to be sealed or received in any form, so they may be received via fax, electronically, by phone, or in any other form specified by the local government. [G.S. 143-131]

2. **Formal bids must be received sealed** – Formal bids must be received sealed and in paper form. Unlike formal purchase bids, formal construction bids cannot be received electronically [G.S. 143-129.9]; no formal bids may be received by fax or phone.
3. **Formal bids must remain sealed** – Knowingly opening a formal construction bid envelope or package prior to the date and time of opening without the bidder's permission is a Class 1 misdemeanor. [G.S. 143-129(b)]

#### **Step 4: Open Bids**

1. **Informal bids** – Informal bids are not required to be opened at a public bid opening. [G.S. 143-131]
2. **Formal bids** – Formal bids must be opened in public at the time, date, and location advertised in the notice. [G.S. 143-129(b)]
  - a. **Minimum number of bids for formal bid opening** – Bids in the formal bidding range cannot be opened unless the local government receives 3 bids from qualified and reputable contractors regularly engaged in their respective lines of work. If 3 bids are not received, the local government must re-advertise. If 3 bids are still not received, the local government may award to the lowest responsive, responsible bidder, even if only one bid is received. Bids received without an accompanying bid deposit/bond (see 2b below) cannot be counted toward 3-bid minimum. [G.S. 143-132; G.S. 143-129(b)]
  - b. **Bid deposit/bond** – Bids on projects in the formal bidding range must be accompanied by a bid deposit in the amount of at least 5% of the bid and must be in the form of cash, cashier's check, certified check, or bond. The bid deposit/bond must accompany the bid *at the time* the bid is filed with the local government; bids received without an accompanying bid deposit/bond *cannot* be opened and *do not* count toward the 3-bid minimum (see 2a above). The winning bidder forfeits his bid deposit/bond if he does not execute the contract within 10 days after award *or* fails to provide performance and payment bonds (See Step 8, 1 and 3). [G.S. 143-129(b); G.S. 143-132]
  - c. **When bidders may withdraw their bids** – A formal bid can be withdrawn without penalty (meaning the bid deposit is not forfeited) at any time *before* the bid opening. However, *after* bids have been opened, a bidder can withdraw his bid without penalty *only* if the bid price was based on a substantial error or omission that was clerical (not a judgment error), and the bid was submitted in good faith. The bidder must submit a written request to withdraw the bid within 72 hours after the bid opening unless the bid instructions allow a longer time. The local government must promptly hold a hearing on the bidder's request, and must issue a written decision within 5 days of the hearing. The bidder may appeal a denial to

- withdraw his bid to Superior Court within 20 days of receiving the local government's ruling. Any bidder who withdraws may *not* rebid on the project or provide materials, equipment, or labor to a contractor or subcontractor performing on the contract from which the bidder withdrew without the written permission of the local government; a violation of this second prohibition is a Class 1 misdemeanor. A withdrawn bid counts toward the 3-bid minimum required for formal bid opening. [G.S. 143-129.1]
3. **When bid documents become public records** – Bid documents submitted by bidders eventually become open to public inspection<sup>3</sup>. The point in time when bids submitted by bidders become public varies depending on the procurement method.
    - a. **Below informal bidding range** – Bid documents become open for public inspection when they are received by the local government (or, if sealed, when opened).
    - b. **Informal bidding range** – The record of bids (and bid documents) become open for public inspection when the contract is awarded.
    - c. **Formal bidding range** – Bid documents become open for public inspection when the bids are opened at the public bid opening.

#### **Step 5: Evaluate Bids**

1. **Evaluation** – Once bids are received (informal) or opened (formal), the local government must evaluate bids to determine if the bids conform to the project specifications and meet all applicable legal requirements.
2. **Bidders must be licensed** – A licensed general contractor must oversee the project if it costs over \$30,000. [G.S. 87-1(a)] General contractor oversight is not required if the local government is acting as its own general contractor by using its own forces. [G.S. 143-135, G.S. 87-1(b)(2)] If the local government is acting as its own general contractor, it must submit an owner-contractor affidavit to the local building inspector attesting to its eligibility to act as its own general contractor. [G.S. 87-14]<sup>4</sup>

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<sup>3</sup> Information in bids that is a “trade secret” remains confidential even after the bid becomes public. [G.S. 132-1.2; G.S. 66-152] For more information on trade secrets, see, Youens, Eileen, “[Bidding Confidential](#),” Coates’ Canons Local Government Law blog, UNC School of Government, April 8, 2010. For more information on when bid documents become public records, see Youens, Eileen, [When are Bids and Proposals Subject to Public Inspection?](#), LGLB No. 119, UNC School of Government (February 2009).

<sup>4</sup> The affidavit requirement for owner-contractor construction projects was enacted by the General Assembly in 2011 ([S.L. 2011-376](#)). More information about this new requirement and a sample affidavit are available on the SOG’s [Local Government Purchasing and Contracting website](#) under “[Legislative Updates](#).”

3. **Record of bids** – For bids on projects in the informal bidding range, local governments must keep a record of all bids received [G.S. 143-131]; bids on projects in the formal bidding range are normally summarized in bid tabulations.
4. **Negotiations with bidders** – The local government cannot negotiate with bidders on projects in the formal bidding range unless the bid submitted by the apparent lowest responsive, responsible bidder exceeds funds available for the project. In this case, the local government may negotiate with that bidder and make “reasonable” changes in specifications and plans to bring the contract price to within funds available, and then it may award the contract to that bidder. If negotiations are unsuccessful, the project must be re-bid. [G.S. 143-129(b)]

#### **Step 6: Determine Successful Bidder (Standard of Award)**

1. **Standard of Award** – For projects in both the informal and formal bidding ranges, the local government must award the contract to the lowest, responsive, responsible bidder taking into consideration quality, performance, and time specified in proposals for performance of the contract. [G.S. 143-129(b), G.S. 143-131(a)]
  - a. **Lowest cost** – The lowest proposed cost among all bidders for the contract.
  - b. **Responsive Bid** – Bid documents conform to bid specifications and meet all applicable legal requirements.<sup>5</sup>
  - c. **Responsible Bidder** – North Carolina courts have interpreted “responsible” to imply “skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability.”<sup>6</sup>
2. **Waiving deviations** – Minor deviations or defects in bid submittals (which goes to the *responsiveness* of the bid) can be waived if the waiver does not disadvantage other bidders; the local government cannot waive material deviations in bid submittals or statutory requirements (such as advertised deadlines, bid deposits, and licensure requirements). Under no circumstances may the bidder modify or correct his bid.

#### **Step 7: Award the Contract**

1. **Projects below informal bidding range** - Governing board approval is not required (unless by local policy); the contract can be awarded by any official or employee authorized by the governing board to award contracts on behalf of the local government.

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<sup>5</sup> *Prof'l Food Servs. Mgmt. v. N.C. Dep't of Administration*, 109 N.C. App. 265, 426 S.E.2d 447 (1993).

<sup>6</sup> *Kinsey Contracting Co. v. City of Fayetteville*, 106 N.C. App. 383, 385, 416 S.E.2d 607, 609, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 149 (1992).

2. **Project in the informal bidding range** – Governing board approval is not required (unless by local policy); the contract can be awarded by any official or employee authorized by the governing board to award contracts on behalf of the local government.
3. **Projects in the formal bidding range** - Governing board approval is required and cannot be delegated to an individual officer or employee. [G.S. 143-129(a)]

### Step 8: Execute the Contract

1. **Who can execute** – Contracts for projects in both the informal and formal bidding ranges (as well as contracts below the statutory competitive bidding threshold) can be executed by the governing board chair or any other official or employee authorized by board to execute contracts on behalf of the local government. The statutes do not impose a specific time frame within which the *local government* must execute the contract. However, for contracts in the formal bidding range, the *contractor* is required to execute the contract within 10 days of award or else forfeit his bid deposit/bond (see Step 4, 2b). [G.S. 143-129(b)]
2. **Contracts must be in writing** – For cities, *all* contracts must be in writing *regardless* of the cost of the contract, so *all* municipal contracts for construction and repair work *must* be in writing. [G.S. 160A-16] For other local governments, written contracts are statutorily required for construction and repair projects in the formal bidding range.<sup>7</sup> [G.S. 143-129(c)] Because all local government contracts are subject to the preaudit requirement [G.S. 159-28], all such contracts should be in writing *even if* state statutes do not require the contract be in written form.
3. **Performance and Payment Bonds** – For projects costing more than \$300,000,<sup>8</sup> performance and payments bonds must be received from *each* contractor with a contract costing over \$50,000. Each bond must be for 100% of the contract amount and must be executed by a NC-licensed surety. Bonds are effective when the contract is awarded. If contractor does not provide performance and payment bonds, the contractor forfeits his bid bond/deposit. If a public official or employee who is responsible for obtaining performance and payment bonds does not do so, that official or employee is guilty of a Class 1 misdemeanor. [G.S. 44A-26; G.S. 44A-32; G.S. 143-129(b), (c)]

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<sup>7</sup> When purchasing supplies, materials, apparatus, and equipment, the Uniform Commercial Code requires a written contract for the sale of goods costing \$500 or more. This requirement does not apply to construction and repair contracts.

<sup>8</sup> Note that the \$300,000 amount is less than the \$500,000 threshold for projects in the formal bidding range.

1. **Performance Bond** – A performance bond protects the *public entity* by ensuring faithful performance of the contractor in accordance with the plans, specifications and terms of the contract.
2. **Payment Bond** – A payment bond protects *subcontractors* by ensuring prompt payment for all labor and materials for which the contractor or subcontractor is liable.

### **Step 9: Contract Management: Retainage**

1. **Retainage** – Retainage is the amount of payment the local government withholds (“retains”) until the construction project has been satisfactorily completed. Retainage is *not allowed* on projects costing less than \$100,000. For projects costing \$100,000 or more, specific requirements apply to the amount of payment that may be withheld and when payments may be withheld at various points during the construction project:
  - a. Until the project is 50% complete, the local government cannot retain more than 5% per periodic payment owed to the prime contractor.
  - b. When the project is 50% complete, no further retainage is allowed as long as performance is satisfactory.
  - c. When a certificate of substantial completion is issued or upon beneficial occupancy, all remaining retainage must be released, although the local government may retain up to 2 ½ times the value of remaining work to secure completion or correction of that work.
  - d. “Line-item” release of retained funds is required for “early finishing trades” (subcontractors who complete 100% of their work before the project is 50% complete<sup>9</sup>).

In addition to these requirements, local governments may also withhold additional amounts in certain instances generally involving unsatisfactory performance and defective workmanship. [G.S. 143-134.1]

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<sup>9</sup> “Early finishing trades” include structural steel, piling, caisson, and demolition. [G.S. 143-134.1(b2)]



### III. Additional Requirements for Large Building Construction & Repair Contracts

The following legal requirements apply to the erection, construction, alteration, or repair of a building where the cost of the contract is *over \$300,000* (unless otherwise noted). These requirements are *in addition* to the requirements for construction and repair contracts outlined in Section II.

#### *Step 1: Develop Project Specifications*

1. **Drawing plans** – Plans and specifications for certain building projects involving the expenditure of public funds must be prepared by an architect or engineer or both, depending on project. The architect and/or engineer must be “particularly qualified by training and experience for the type of work involved.” [G.S. 133-1.1] Projects subject to this requirement are those costing over:<sup>10</sup>
  - a. \$300,000 for repairs not involving major structural change in framing or foundation support systems;
  - b. \$100,000 for repairs affecting “life safety systems;”
  - c. \$135,000 for repairs involving major structural changes in framing or foundation support systems; and
  - d. \$135,000 for construction of, or additions to, public buildings.
2. **Separate specifications** – Separate specifications are required for “subdivisions or branches” of work on the project, meaning certain trades as well as general construction work:
  - a. HVAC and cold storage with a cooling load of 15 tons or more;
  - b. plumbing and gas fittings;
  - c. electrical; and
  - d. all other general work.  
[G.S. 143-128(a)]
3. **Limitations on specifications** – Architects, engineers, and project designers (collectively referred to as “designers”) are subject to certain limitations in drawing project specifications, *regardless* of the cost of the project. Violations are a Class 1 misdemeanor. These limitations are:

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<sup>10</sup> Projects that are not required to be prepared by an architect and/or engineer must receive a certificate of compliance with the State Building Code unless the project (i) is approved by State Construction Office, (ii) is exempt from the State Building Code, or (iii) costs less than \$100,00 and does not involve the alteration of life safety systems. [G.S. 133-1.1(d)]

- a. **Financial interest in materials** – Designers cannot knowingly include specifications for building materials, equipment, or other items manufactured, distributed, or sold by a company in which the designer is a partner, officer, employee, agent or substantial stockholder. [G.S. 133-1]
  - b. **Manufacturer drawing plans** – Designers cannot employ or allow a manufacturer to draw plans or specifications. [G.S. 133-2]
  - c. **Brand names** – Designers must include in plans the specific performance and design characteristics of materials. Where it is impossible or impracticable to include these specifications, brand names for materials can be used, but only if at least three examples that are of equal or equivalent design are included and the specifications indicate that brand names are being used to convey the general style, type, quality, and character of the desired product. If it is impossible to list three or more items, then as many items as are available must be cited. If the unit wishes to specify a brand name product or materials as a preferred brand name alternate, performance standards that support the brand name item must be listed and approved in advance by the owner in an open meeting.<sup>11</sup> [G.S. 133-3]
4. **Certain large buildings approved by DOI** – Plans for buildings that are 20,000 sq. ft. or larger must be approved by the NC Department of Insurance for fire safety. [G.S. 58-31-40(b)]
  5. **Project expediter** – The local government can specify *in its bid documents* that one of the contractors may be assigned responsibility for expediting the construction project. The project expediter can make recommendations on payments to contractors and, if required by the contract, is responsible for developing a project schedule with input from contractors and subcontractors. [G.S. 143-128(e)]

## Step 2: Solicit Bids

1. **Construction methods** – For building construction projects costing more than \$300,000, local governments can only use the following statutorily authorized construction methods. A local government may choose, at its discretion, the specific method it wishes to use.<sup>12</sup> [G.S. 143-128]

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<sup>11</sup> Governing board approval is not specifically required under G.S. 133-3; the approval may be made by an employee to whom this authority has been delegated by the governing board. The meeting at which the approval is given must be open to the public, which suggests reasonable public notice of the meeting (following the public notice procedures for a special meeting of a public body is one recommended approach).

<sup>12</sup> For a discussion of the effectiveness of the authorized construction methods, see Riecke, Valerie Rose, [Public Construction Contracting: Choosing the Right Project-Deliver Method, Popular Government](#), Vo. 70, No. 1, UNC School of Government, (Fall 2004).

- a. **Separate- (or Multi-) Prime** – The local government accepts bids separately and awards to the lowest responsive, responsible bidder for each category of work (“branches or subdivisions”; see Step 1, 2 above) for which separate specifications are required: (i) HVAC and cold storage with a cooling load of 15 tons or more; (ii) plumbing and gas fittings; (iii) electrical; and (iv) all other general work. Additional categories of work also can be contracted separately. Each contractor is directly responsible to the local government and to other contractors for full performance of his or her contract. [G.S. 143-128(b)]
  
- b. **Single-Prime** – The local government accepts bids from general contractors for the *entire* project and awards to the lowest responsive, responsible bidder, and the general contractor contracts with subcontractors for branches or divisions of work on the project. The bidders must identify on their bids the subcontractors for HVAC, electrical, plumbing, and general work. Once the contract is awarded, the general contractor is directly responsible to the local government, and subcontractors are directly responsible to the general contractor. The winning contractor cannot substitute subcontractors unless (i) the contractor determines that a subcontractor’s bid is nonresponsive or nonresponsible; (ii) a subcontractor refuses to enter into the contract; or (iii) with approval by the local government if the contractor shows good cause for the substitution. [G.S. 143-128(d)]
  
- c. **Dual bidding (both Separate- and Single-Prime)**<sup>13</sup> – The local government may choose to accept both separate-prime and single-prime bids for the same project, and then award the contract to the lowest responsive, responsible bidder in either category. In determining whether to award on a separate-prime or single-prime basis, the local government may consider the costs of construction oversight, time for completion, and other factors it deems appropriate. Separate-prime bids must be received – but not opened – one hour before the deadline for single-prime bids. A separate-prime bidder cannot underbid his bid to a single-prime contractor. For projects in the formal bidding range (\$500,000 or more), in counting bids to determine if the 3-bid minimum requirement for opening has been met, each single-prime bid counts as one bid, and each full set of separate prime bids in the 4 branches or divisions specification categories counts as one bid. If 3 single-prime bids are received but a full set of separate-prime bids is not, no separate-prime bids can be opened. [G.S. 143-128(d1), G.S. 143-132]
  
- d. **Construction Management at Risk (CM@R)** – Under a construction management at risk contract, the construction manager, who must be a licensed general contractor, provides construction management services such as preparing and coordinating bid packages and construction administration, and guarantees the cost of the project. The construction manager at risk acts as the fiduciary of the local government in handling and opening bids and awarding contracts. While the construction manager

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<sup>13</sup> Technically speaking, dual bidding is not a contracting method, but rather a bidding method.

manages the project, plans and specifications must be drawn by a licensed architect or engineer who contracts directly with the local government. The construction manager at risk contract is covered by the Mini-Brooks Act and must be selected using the QBS method unless the local government exempts itself. [G.S. 143-128.1, G.S. 143-64.31, -32]<sup>14</sup>

- e. **Design-Build (DB) and Design-Build Bridging (DBB)** – Under these construction delivery methods, the design-builder contracts to provide both design services (architectural and engineering) and construction services under one contract. A design-build contract is subject to a specific statutory RFQ process and the design-builder is initially selected based on qualifications, not estimated costs of the contract. Consistent with the Mini-Brooks Act (G.S. 143-64.31), contract costs can only be negotiated after the best qualified design-builder is initially selected. [G.S. 143-128.1A]

A design-build bridging contract differs from a design-build contract in two primary ways. First, the unit of government contracts separately with a project designer to design 35% of the project and contracts with a design-builder to complete project design and perform construction services. Second, the design-build contract is awarded to the lowest responsive responsible bidder based on estimated costs of performing general contract conditions, design services, and construction services. Design-builders submit these cost estimates with their bids. [G.S. 143-128.1B]

- f. **Public-Private Partnership (P3)** – Under this contracting method, the unit of government contracts with a private developer to jointly develop a capital construction project. The developer is selected based on qualifications through a competitive RFQ process and is required to finance at least 50% of the project cost. [G.S. 143-128.1C]
- g. **Alternative methods** – Alternative construction methods are *only* allowed for building construction and repair projects costing \$300,000 or more if approved by the State Building Commission or by legislative action. Alternative construction methods can be used for building construction and repair projects costing less than \$300,000 as well as all non-building construction and repair projects regardless of cost. [G.S. 143-128(a1)(5), G.S. 143-135.26(9)]

- 2. **HUB Participation Goals and Efforts**<sup>15</sup> – Local governments must establish an appropriate verifiable goal for historically underutilized business participation in the

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<sup>14</sup> The ability of a local government to exempt itself from the Mini-Brooks Act is limited to contracts with an estimated fee of less than \$50,000.

<sup>15</sup> For more information on HUB requirements, see *HUB Participation in Building Construction Contracting by N.C. Local Governments: Statutory Requirements and Constitutional Limitations*, by Norma R. Houston and Jessica Jansepar Ross, LGLB No. 131, February 2013. <http://sogpubs.unc.edu/electronicversions/pdfs/lglb131.pdf>

total value of all building construction projects costing \$30,000 or more.<sup>16</sup> Goals are adopted after notice and public hearing. A “historically underutilized business” is defined as a business that is at least 51% owned and managed by minority or socially and economically disadvantaged persons. A “minority person” is a citizen or lawful permanent resident who is either (i) African American; (ii) Hispanic; (iii) Asian American; (iv) American Indian; (v) handicapped; or (vi) female. A “socially and economically disadvantaged person” is someone who qualifies as such under federal law.<sup>17</sup> HUB’s must be [certified](#) by the NC Office for Historically Underutilized Businesses to count toward meeting participation goals.

In addition to adopting HUB participation goals, local governments and, in some instances bidders, must engage in efforts to recruit HUB participation in certain building construction projects; these efforts vary depending on the cost and funding source of the project.

[G.S. 143-128.2(a), (g); G.S. 143-128.4(a), (a1), (b), ((e); 15 U.S.C. 673(a)(5)-(6)]

- a. **Building construction projects in the informal bidding range (\$30,000-\$500,000)** – Local governments must (i) solicit HUB participation in contracts; (ii) document efforts to recruit HUB participation; (iii) maintain a record of HUB contractors solicited; and (iv) report all data on HUB participation efforts to the NC Office for Historically Underutilized Businesses. [G.S. 143-131(b)]

It is important to note an inconsistent overlap in the statutory requirements for HUB participation for building construction projects costing between \$300,000 and \$500,000. While one statute (G.S. 143-131) imposes the HUB solicitation and reporting requirements described in this subsection on construction projects in the informal bidding range – which extends to projects costing up to \$500,000 – another statute (G.S. 143-128.2) imposes more stringent requirements on building projects costing \$300,000 or more (these requirements are described in the next subsection). *For projects costing between \$300,000 and \$500,000, the safest course of action is to follow the more stringent requirements of G.S. 143-128.2.*

- b. **Building construction projects costing \$300,000 or more** – Local governments must establish *good faith efforts* for HUB participation prior to bid solicitation. Good faith efforts to encourage HUB participation apply to both local governments and bidders:
  - i. **Local government good faith efforts obligations** – The local government must (i) develop and implement a HUB outreach plan; (ii) attend scheduled pre-bid conferences; (iii) notify interested HUBs of the opportunity to bid on a project at

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<sup>16</sup> HUB participation efforts do not apply to building construction projects costing less than \$30,000 or to any construction or repair projects not involving public buildings. Local governments may choose to apply these goals to these categories of projects under their local policies.

<sup>17</sup> 15 U.S.C. 637(a)(5).

least 10 days prior to bid opening; and (iv) advertise the project through media outlets likely to inform HUBs of the opportunity to bid. Local governments also must report certain information regarding each building project to the NC Office for Historically Underutilized Businesses. [G.S. 143-128.2(e); G.S. 143-128.3]

- ii. **Bidder good faith efforts obligations** – The local government must require bidders to take certain actions to encourage HUB participation in their bids. 10 specific actions are listed in the statute. The NC Office for Historically Underutilized Businesses assigns points to be awarded for compliance with the statutory list. Each action can be assigned up to 10 points. No contractor can be required to earn more than 50 points. While bidders must make good faith efforts to solicit HUB participation, the level of minority participation in bidders' bids does not affect the contract award decision. The lowest responsive, responsible bidder standard of award still applies regardless of the level of minority participation. However, failure to submit required documents of good faith efforts renders the bid nonresponsive (see documentation requirements in subsection (3) below). [G.S. 143-128.2(f); 1 NCAC 30I.0102]
  - iii. **Additional bidder documentation obligations** – When submitting a bid, bidders must (i) identify *on their bid* the HUB businesses used on the project; and (ii) include an affidavit listing the bidder's good faith efforts to solicit HUB participation (these good faith efforts are described in subsection (ii) above) and the total dollar value of work to be performed by HUBs.<sup>18</sup> Prior to contract award, the apparent low bidder must submit either (1) an affidavit describing the percentage of HUB work which is equal to or greater than the local government's minority participation goal; or (2) documentation of the bidder's good faith efforts to meet the local government's HUB participation goal. Within 30 days after contract award, the winning bidder must submit a list of all subcontractors that will be used on the project. Failure to provide documentation of good faith efforts is grounds for rejecting the bid. [G.S. 143-128.2(c)]
- c. **Building construction projects funded with state funds costing more than \$100,000** – Local governments must have a 10% goal for HUB participation in the "total value" of the work.<sup>19</sup> If the project costs between \$100,000 and \$300,000, HUB participation is solicited using informal bidding procedures (see 2a above) If the project costs \$300,000 or more, more stringent HUB participation requirements apply (see 2b above) [G.S. 143-128.1(a)]

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<sup>18</sup> If a bidder proposes to perform the work with its own forces (employees), it can submit an affidavit to this effect in lieu of the HUB participation affidavit.

<sup>19</sup> Local governments that adopted different goals prior to December 1, 2001, may continue to rely on those goals if the local government continues to have a justifiable basis.

### ***Steps 3-8: Receive, Open, and Evaluate Bids, Determine Successful Bidder, and Award and Execute the Contract***

For these steps in the construction contracting process, there are no special requirements for large building construction and repair projects beyond those required for all construction and repair projects (See Steps 3-8 in Section II).

### ***Step 9: Contract Management: Dispute Resolution***

1. **Dispute Resolution Procedures** – Local governments are required to use the dispute resolution process adopted by the State Building Commission (see State Building Commission [Dispute Resolution Rules](#)), or else adopt another dispute resolution process that includes mediation. This requirement applies to *all* public building construction projects *regardless of the cost of the project*.<sup>20</sup> The dispute resolution process must be made available to all parties involved in the construction project. The local government may set minimum thresholds for the dollar amount of the dispute (the threshold cannot exceed \$15,000), and may require that the parties participate in mediation prior to initiating litigation. [G.S. 143-128(f1),(g)]

## **IV. Exceptions to Competitive Procurement Requirements**

Construction and repair projects costing \$30,000 or more are exempt from competitive bidding requirements in certain circumstances.

1. **Force Account Work** – Local governments may use their own forces (employees) on construction and repair projects when the total cost of the project is less than \$500,000 *or* the total cost of the labor is less than \$200,000. The work must be performed by employees on the permanent payroll, and approved by the governing board. If the cost of the project is over \$30,000, the local government must submit an owner-contractor affidavit to the local building inspector attesting to its eligibility to act as its own general contractor in lieu of hiring a licensed general contractor to supervise the project.<sup>21</sup> [G.S. 143-135; G.S. 87-14]
2. **Change Orders** – Changes made to the project after award of the contract are not subject to competitive bidding requirements if the original contract was competitively

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<sup>20</sup> The statutes are internally inconsistent on whether a dispute resolution process is required for separate-prime contracts. G.S. 143-128(e) states that the public body “may” provide for a dispute resolution process for separate-prime contracts. However, G.S. 143-128(g) states that the dispute resolution process under subsection (f1) “shall” apply to “any erection, construction, alteration, or repair” of public buildings. Since the language in subsection (g) was enacted after the language in subsection (e), it is reasonable to assume that the General Assembly intended the dispute resolution process to apply to separate-prime contracts as well as all other public building construction projects. (See S.L. 2001-496).

<sup>21</sup> More information about the owner-contractor affidavit requirements and a sample affidavit are available on the School of Government’s [Purchasing and Contracting website](#) under “[Legislative Updates](#).”

bid. There is no limitation on the dollar amount of change order work, but use of change orders should be limited to circumstances that were unforeseen when the contract was awarded. [G.S. 143-129(e)(4)]

3. **Emergencies** – Construction and repair work arising from situations involving public health and safety is exempt from competitive bidding requirements. Use of this exception should be limited to situations involving an imminent or immediate threat to public health and safety; the exception is not allowed if the local government can comply with competitive bidding requirements without exacerbating the threat to public health and safety or damage to property.<sup>22</sup> [G.S. 143-129(e)(2)]
4. **Guaranteed Energy Savings Contracts (GESC)** – A GESC is a contracting and financing method for the repair or upgrade of existing buildings (not new construction) that involve energy-saving improvements where the total cost of the contract is paid for with the energy savings, and the contractor guarantees the amount of energy savings over the life of the contract. A special RFP process is required for advertising, evaluating, and awarding a GESC. [G.S. 143-64.17, -64.17A, -674.17B; G.S. 143-129(e)(8)]
5. **Solid Waste Management and Sludge Management Facilities** – In lieu of competitive bidding procedures, a special RFP process may be used for the design, operation, and construction of solid waste and sludge management facilities. [G.S. 143-129.2]

## V. Resources

### *Websites and Manuals:*

- ❖ School of Government [Local Government Purchasing and Contracting website](#)
- ❖ School of Government [Coates' Canons: NC Local Government Law Blog](#)
- ❖ State Construction Office [Guidelines](#)
- ❖ Department of State Treasurer [Purchasing and Contracting Checklist](#)
- ❖ Department of State Treasurer [Policy Manual for Local Governments, Section 35: Purchasing and Contracting Manual](#)
- ❖ NC Office for Historically Underutilized Businesses [Certification Program](#)
- ❖ NC Office for Historically Underutilized Businesses [Statewide Uniform Certification Procedures Manual](#)

### *Publications:*

- ❖ Fleming Bell, II, *Construction Contracts with North Carolina Local Governments*, 4<sup>th</sup> ed. (2007)
- ❖ Bluestein, Frayda, *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 2<sup>nd</sup> ed. (2004), with 2007 supplement.

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<sup>22</sup> *Raynor v. Town of Louisburg*, 220 N.C. 348, 17 S.E.2d 495 (1941); Houston, Norma, "[When is an Emergency Really an Emergency?](#)" Coates' Canons blog post, UNC School of Government, June 7, 2011.



- ❖ Houston, Norma, and Ross, Jessica Jansepar, *HUB Participation in Building Construction Contracting by N.C. Local Governments: Statutory Requirements and Constitutional Limitations*, Local Government Law Bulletin No. 131, February, 2013. <http://sogpubs.unc.edu/electronicversions/pdfs/jglb131.pdf>