

# LOCAL GOVERNMENT LAW

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David M. Lawrence, Editor

## ALTERNATIVE CONTRACTING METHODS FOR NORTH CAROLINA PUBLIC BUILDING PROJECTS

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### Introduction

In 1995, the North Carolina General Assembly increased the dollar threshold at which multi-prime bidding is required for public building projects from \$100,000 to \$500,000. At the same time, the General Assembly authorized local governments and state agencies to request approval from the State Building Commission (SBC) to use alternative contracting methods, including the single-prime method on projects where multi-prime bidding would otherwise be required.<sup>1</sup> This article describes the rules and procedures the SBC has developed to implement

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1. For more information about the composition of the State Building Commission (SBC), and about its earlier discussions of alternative contracting methods, see Frayda S. Bluestein, "Single- and Multi-prime Contracting in North Carolina Public Construction," *Popular Government*, Institute of Government, The University of North Carolina at Chapel Hill, Vol. 60, no. 4 (Spring 1995); 18-25.



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this statutory authorization, and summarizes the SBC's disposition of applications it has received so far.

### Statutory Authority, Rules, and Application Procedure

The statute authorizing alternative contracting methods authorizes the SBC to adopt rules to use in considering applications, but also contains several significant limitations on the SBC's authority to grant approval for alternative methods. As set forth in N.C.G.S. § 143-135.26(9), these limitations are:

- authorization shall apply only to a single project;
- the applicant must demonstrate to the SBC that the alternative method is necessary because the project *cannot be completed* under the methods otherwise required by statute, or "for such other reasons as the Commission, pursuant to its rules and criteria, deems appropriate and in the public's interest";
- the application must be approved by two-thirds of the SBC members present and voting; and
- the SBC *shall not waive* the competitive bidding and "three bid" requirements of N.C.G.S. §§ 143-129 and 143-132.

The temporary rules under which the SBC is currently administering alternative contracting method applications provide additional limitations on entities seeking approval.<sup>2</sup> These rules, to be codified at 1 NCAC § 30G.0101-0105, contain several sets of criteria for considering applications. The following "general criteria" are applied to all applications:

- whether the public owner has adequately justified that the requested exemption is applicable to the project;
- whether the public owner has adequately demonstrated that the project cannot reasonably be completed under the methods otherwise required by statute and whether the proposed alternative method is necessary; and
- whether the public owner has been responsible in the pre-planning stages of the project.

1 NCAC § 30G.0105(a).

In addition, the rules delineate specific criteria for exemptions. These are circumstances under which the

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2. North Carolina Register, May 15, 1996, Vol. II, Issue 4, pp. 194-196, effective July 1, 1996. The North Carolina Department of Administration is pursuing approval of permanent rules.

SBC recognizes that approval of alternative methods may be appropriate and in the public interest:

- Special Technology or Equipment: where a project involves the erection or construction of special or unique technology or equipment and where the vendor either requires that its services be used or refuses to guarantee the technology or equipment unless its services are used;
- Unusual Complexity: where a project involves (1) very specialized or complex construction involving unconventional techniques or materials, or unusual working conditions; (2) major renovations or an addition to an existing facility requiring continuous coordination or occupied programs or operations "necessary for the public health or safety"; or (3) extensive repairs, renovation or addition to a building listed in the North Carolina or Federal Register of Historic Properties.
- Accelerated Schedule: where a "fast track" schedule is required due to actual or impending judicial intervention under a state or federal court order, or to address actual or impending regulatory mandates or a citation for noncompliance.

1 NCAC § 30G.0105(b).

Finally, the rules define "alternative contracting method" to include:

- single prime contracting, where not otherwise authorized under N.C.G.S. § 143-128;
- design-build delivery system, defined as a contract for a fee with a single person, firm or corporation for the design, management, and construction of a project; and
- construction management delivery system, defined as a contract with a person, firm or corporation other than the general contractor, for administration of the separate contractors, coordination and management for the owner, and under which the owner remains liable to the separate contractors.<sup>3</sup>

1 NCAC § 30G.0103. Applicants are free to request other alternative contracting methods as long as the general and specific criteria for exemption listed earlier are satisfied.

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3. There appears to be nothing in the competitive bidding statutes that would prohibit local governments from entering into this type of contract without approval from the SBC.

The SBC has developed a written application form which must be completed for a request to be considered. The SBC generally meets on the fourth Tuesday of every month and will review a request for an alternative contracting method within sixty days of receiving a *complete* application. Incomplete applications will be returned with a written explanation of what is deficient. Applications can be obtained by contacting the State Construction Office, Suite 450, North Carolina Education Building, 301 North Wilmington Street, Raleigh, North Carolina 27601-2827; telephone (919) 733-7962. Fifteen copies of the application must be submitted.

The application form requests general information about the applicant and about the project, including the project budget and estimated beginning and completion date. Applicants must identify the alternative contracting method requested and the specific criteria that justify the requested exemption. Applicants are required separately to explain why the project cannot reasonably be completed using the statutory method otherwise required, why the alternative method is necessary, why the particular method requested is appropriate, and why the requested method is in the public's interest. Finally, the application requires documentation of how the owner has been responsible in the pre-planning stages of the project, including a list of all actions taken by the owner (with dates) that tend to show that the owner has been responsible.

The application review procedure before the SBC is fairly informal. A person representing the applicant usually attends although this is not required. There is no formal presentation of evidence or testimony. The SBC indicated early on that it did not wish to hear a presentation by the applicant because the "applications should stand on their own."<sup>4</sup> The applicant's representative is, however, expected to respond to questions individual SBC members raise during the committee's discussion prior to its vote on the application.

The SBC can take one of three actions: delay, deny, or approve the application. If the SBC votes to delay, it will request from the applicant additional information necessary to render a decision. Once approved, the authorization is effective for a period determined by the SBC, but no longer than twelve months from the date the SBC approved the application.<sup>5</sup> Although no appeal procedure is specified, it would appear that a denial

4. SBC minutes, Tuesday, July 23, 1996.

5. Since the authorization for an alternative contracting method primarily affects the bidding and contract award process, the be read regulation should that bidding and contract award must take place within twelve months after the application is granted.

would be appealable as a contested case proceeding under the North Carolina Administrative Procedure Act.<sup>6</sup>

### SBC Action to Date<sup>7</sup>

The SBC considered its first applications in July of 1996 and has considered, as of this writing, a total of eight applications. Of the eight applications, seven have been approved for an alternative contracting method. Two applications have been approved for design-build and two have been approved for single-prime contracting. Two applications have been approved for "bidding the project as single prime with contracts awarded multi-prime," a method not specifically described in the regulations, but one that previously has been used by the State Construction Office.<sup>8</sup> Finally, one application has been approved for an award of twenty-two separate-prime contracts, including sixteen separate general contracts!

The first application considered by the SBC was disapproved for single-prime contracting, but when the applicant came back in October and proposed to bid the project single-prime and award contracts multi-prime, the application was approved. This application was submitted by the University of North Carolina (UNC) for the construction of a women's and children's hospital estimated to cost approximately \$118 million. The request to bid the project single-prime was based on: (1) the need to demolish two facilities, which could create access difficulties; (2) the need for good communication and coordination on the project to facilitate the hospital's maintaining its services during construction; and (3) the belief that a "teamwork approach" with a general contractor and subcontractors would work most effectively. These reasons were not sufficient, in the opinion of the SBC, to approve single-prime contracting. According to an SBC member, this type of project had been constructed for years under a multi-prime system, and the applicant had not shown

6. See N.C.G.S. Chapter 150B, Article 3; 150B-22.

7. Information for this section is taken from the official minutes of the SBC, which are available from the State Construction Office.

8. Under this method, single-prime contractors submit bids listing the subcontractors they propose to use along with the prices each subcontractor would charge. Once the successful bidder is chosen, separate contracts are awarded to each of the contractors listed in the bid (HVAC, plumbing, electrical and general). For a further description of this and other alternative contracting methods, see Bluestein, "Single- and Multi-Prime Contracting," *Popular Government*, p. 23.

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sufficient justification for doing it through the single-prime method. Another member stated that the complexity of this project was not unique, and to grant an exemption from multi-prime contracting in this instance would encourage future requests that should not be approved.

In October, UNC came back to the SBC and asked for approval to bid the project single-prime, and award the contracts multi-prime. UNC emphasized again that the team approach was critical on this project because of the restricted nature of the site and the need for hospital operations to continue during construction. The application explained the request along these lines:

This is an extremely complex, large and phased project, in which tight coordination between contractors is essential to on-time project delivery and overall project quality. The multi-prime award system, when it pertains to the role and responsibility of the project expediter, allows for resistance to the control of the project expediter by the other contractors. Under this scenario, the owner typically is forced into a contract coordination role. . . . Under the scenario requested, the single-prime bid/multi-prime awarded project will be coordinated by a skilled general contractor (project expediter) who will be coordinating team members of his own choice, each of which will have a separate contract with the owner.

UNC also expressed its intention to prequalify the teams. The SBC responded that not only the general contractor but also the plumbing, mechanical, and electrical contractors should be pre-qualified. The SBC approved UNC's request to bid single-prime and award multi-prime, so long as all trades were prequalified.

Two additional applications were considered at the July meeting: one for design-build and the other for single-prime. The design-build application was submitted by the State Department of Cultural Resources for a Roanoke Island exhibit construction project. Despite the SBC's support for using design-build on this project, the application was disapproved because it contemplated selecting a design-build firm on the basis of qualifications, and then negotiating a price. The SBC determined this procedure could not be approved, because it would not comply with statutory competitive bidding requirements. The application was resubmitted for consideration at the August meeting, this time proposing a procedure that included competitive bidding. The proposed procedure called for the owner to:

- prepare a written program for the exhibit design;
- advertise for and identify exhibit design firms and ask them to submit letters of interest with

preliminary design proposals in response to the program:

- evaluate and prequalify design-build teams based on their responses and preliminary design proposals;
- receive bids from the prequalified teams to complete the design, construction and installation of exhibits based on the prepared program; and
- award a contract to the lowest responsible, responsive prequalified bidder.

With this procedure in place, the SBC approved the application for design-build.

The last application considered at the SBC's July meeting was submitted by the North Carolina Department of Environment, Health and Natural Resources (DEHNR) for removing and replacing portions of an aquarium at Fort Fisher. DEHNR had requested permission to use single-prime contracting. Although unusual complexity and safety concerns were cited as bases for the request—DEHNR wanted to keep the aquarium open during the work—the more important basis appeared to be a perceived difficulty in getting bidders to take an interest in the project; moving and reinstalling equipment during the project would require plumbing, mechanical and electrical trades to come in and work for short periods, perhaps as little as an hour at a time. The SBC recommended that the project be bid both multi-prime and single-prime, and disapproved the application.

At the October meeting, the design-build delivery system was approved for another exhibits construction project, this one submitted by the State Department of Parks and Recreation for the construction of exhibit halls at five state park visitor centers. This application was approved with the stipulation that it be bid as five separate projects.

Three other applications were considered and approved at the October meeting. A heating, ventilation and air conditioning renovation project submitted by UNC at Chapel Hill School of Medicine for single-prime contracting with a mechanical contractor was approved based on the fact that seventy percent (70%) of the work would be mechanical and the facility would be eighty percent (80%) occupied while the work was being performed.

UNC also submitted an application for the expansion of Kenan Stadium, requesting approval to bid and award sixteen separate contracts for general construction, plus six additional contracts, including stadium seating, elevators, plumbing, heating, ventilation, and air conditioning, electrical and food service. The basis of the application was the limited

period of time between the end of the 1996 football season and the beginning of the 1997 season, which the applicant stated made it impractical to complete the project in a routine manner.

Interestingly, to expedite scheduling and limit the exposure of the individual contractors, UNC intended to make the architect the project expeditor. The architect, in turn, would contract with Turner Thompson Sports to establish, control, and maintain the schedule. It was anticipated that breaking the project into so many small contracts would give the Project Expediter more control over the schedule and assure timely completion. In response to the inquiry on the application about how the public would be served by the project's being done under an alternative contracting method, UNC stated that the public would be put at risk by being in an uncompleted stadium and also that the football schedule would be disrupted by a failure to complete the project on time. The SBC unanimously approved this request.

Finally, the SBC considered an application submitted by the Centennial Authority for a regional sports and entertainment facility in Raleigh, to be bid single-prime with multi-prime award. The Centennial Authority is a relatively new public agency with a governing board of thirteen members, eight of whom were appointed by the General Assembly and five of whom were appointed by the local governments within Wake County.

In its written submission, the applicant represented that the project would require sophisticated construction in which coordination among contractors would be extremely important. As an example, the applicant pointed out that major sports arenas have complex geometry in which there are very few right angles, raising difficult coordination issues and involving extra layout work. A close working arrangement among the contractors is mandatory; otherwise, "every coordination problem becomes a point of contention." This would be especially true in this case, because the contract called for liquidated damages to be assessed to all contractors in the proportion of the percentage of their contracts to the total contract price, making each contractor liable for liquidated damages for any delays by the others.

The applicant also noted that this project was unique in that all thirteen members of the Centennial Authority

were volunteers and were looking for a project delivery system that would ease their administrative burden. The applicant said that there would be no "prompt payment" concerns because, with a multi-prime award, all payments would be made through the owner. All bidders would be prequalified. The SBC approved this application with the proviso that all trades, not just the general contractor, be prequalified.

At the SBC's November meeting, only one application was considered, for a single prime contract at the North Carolina State University College of Engineering. The project involved turning two floors in an existing building into research facilities, with a series of clean rooms, for research in computer chip design. Equipment would be relocated from other places to the new research facility. The project was described by the applicant as: (1) unique, in that a contractor experienced in clean room construction was needed; and (2) complex, in that specialized piping and safety systems would be needed and a single chain of custody and responsibility for the moving of equipment would be essential. Also, providing secured staging and storage for four separate-prime contractors would have a negative impact on the building occupants. North Carolina State University emphasized the need for heightened safety, stating in its application, "The exposure for unsafe conditions resulting from a lack of close coordination and clear accountability is high on this job. The result [of an accident] due to the nature of materials being handled could be catastrophic." The SBC approved North Carolina State University's request for single-prime contracting on this project.

## C. Conclusion

It is evident from just the few applications that have been considered that the SBC is sympathetic to the needs of public owners who wish to employ contracting methods other than the statutorily mandated multi-prime method. The options for alternative contracting methods will continue to evolve as the SBC considers future applications.

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