



Local Government Construction Contracting

*Purchase and Contract Study Committee
North Carolina General Assembly*

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UNC School of Government
February 12, 2014



Today We'll Discuss:

1. Construction & Repair Contracting Requirements
2. Building Construction Contracting Requirements
3. Construction Delivery Methods
4. Prequalification



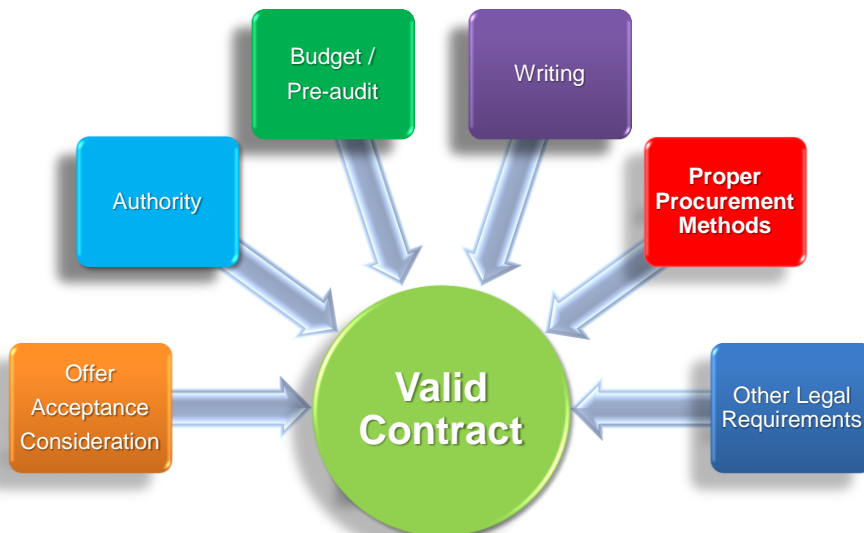
CONSTRUCTION & REPAIR



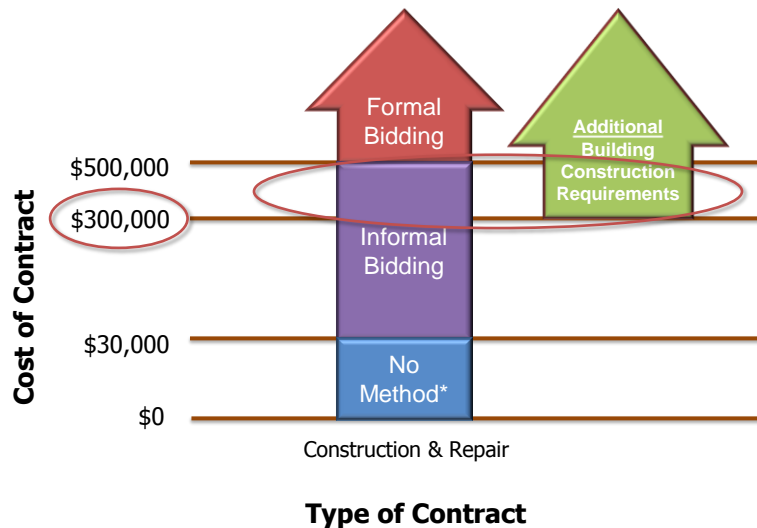
CONTRACTING REQUIREMENTS



What is a Valid **Public** Contract?



Statutory Procurement Methods



**Local governments may impose lower bid thresholds by local policy*



Basic Construction Contracting Requirements

Requirement	Informal Bidding	Formal Bidding
Solicitation / Advertisement	No method specified	Newspaper publication/ electronic at least 7 days before bid opening
Form / Minimum #	Any form; keep record of bids; no minimum #	Sealed paper bids received by deadline; 3-bid minimum to open
Public bid opening	Not required	Required
Standard of Award	Lowest responsive, responsible bidder	Lowest responsive, responsible bidder
Board Approval	Not required	Required (may not delegate)
Public Record	Record of bids not public until contract awarded	Bids public when opened
Bonds	Not required	All bidders: 5% bid deposit Winning Bidder: P/P bonds for \$50,000+ contracts on \$300,000 Projects

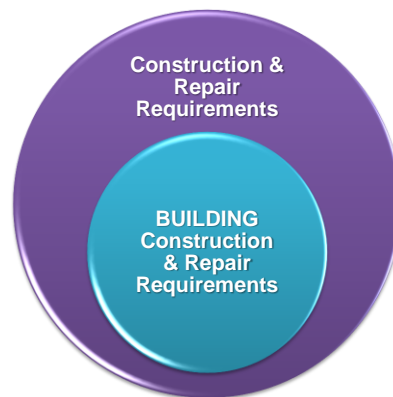


CONSTRUCTION CONTRACTING REQUIREMENTS FOR BUILDING CONSTRUCTION & REPAIR



Building Construction & Repair

- Additional legal requirements for construction & repair of **buildings**
- Requirements apply to building construction and repair costing **over \$300,000** (*unless otherwise noted*)



What is a “Building”?



Building Construction Requirements (\$300,000+)

1. Certain projects drawn by design professionals
2. Separate specs for:
 - HVAC
 - Plumbing
 - Electrical
 - General
3. HUB requirements
 - \$30,000-\$300,000 informal
 - \$300,000+ formal
4. Construction methods
 - Separate (Multi)-Prime
 - Single Prime
 - Dual Prime
 - Construction Manager At-Risk
 - DB / DBB / P3
5. Dispute resolution (**ALL** building construction regardless of cost)

Performance and Payment bonds also required at \$300,000, but requirement not limited to building construction

HUB Requirements

Cost	Goals	Good Faith Efforts	Reporting
Below \$30,000	Not required	Not required	Not required
\$30,000 - \$300,000 <i>Informal HUB</i>	Not required (10% goal: \$100,000 or more and funded with state funds*)	<u>Local Government:</u> Informal solicitation <u>Bidders:</u> No requirements	<u>Local Government:</u> Informal reporting to HUB Office
\$300,000 and above <i>Formal HUB</i>	Required	<u>Local Government:</u> Formal outreach and good faith efforts <u>Bidders:</u> Formal good faith efforts	<u>Local Government:</u> Formal reporting to HUB Office

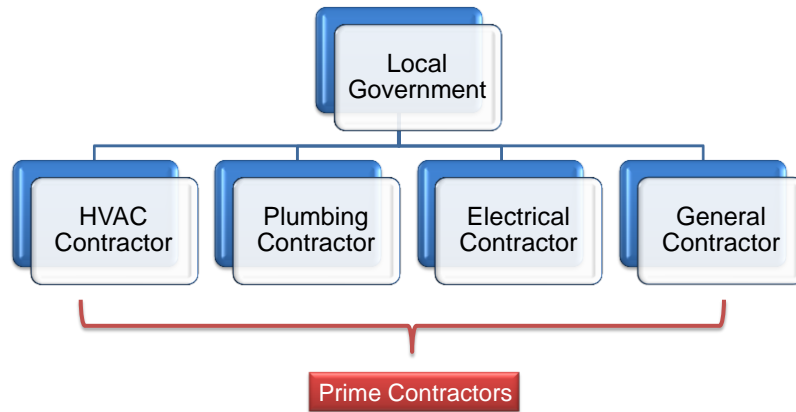
*For projects costing \$100,000 or more and funded wholly or in part with state funds, state law requires a local government use a 10% goal unless the local government has previously established and maintained another verifiable goal.

CONSTRUCTION DELIVERY METHODS



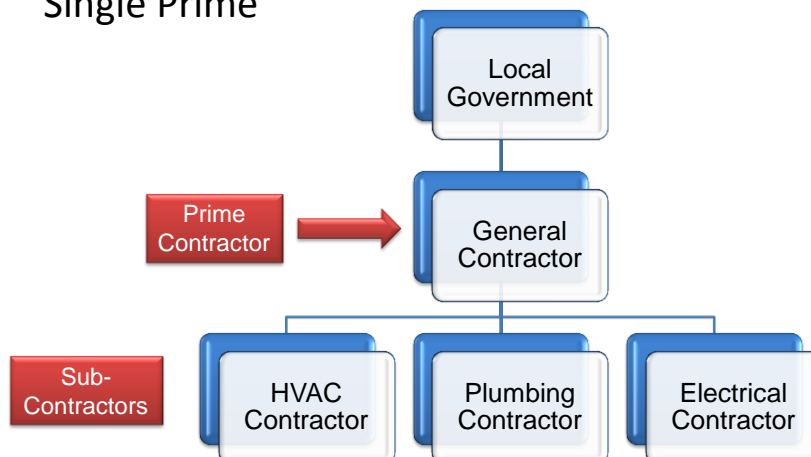
Construction Methods

Separate-Prime (Multi-Prime)



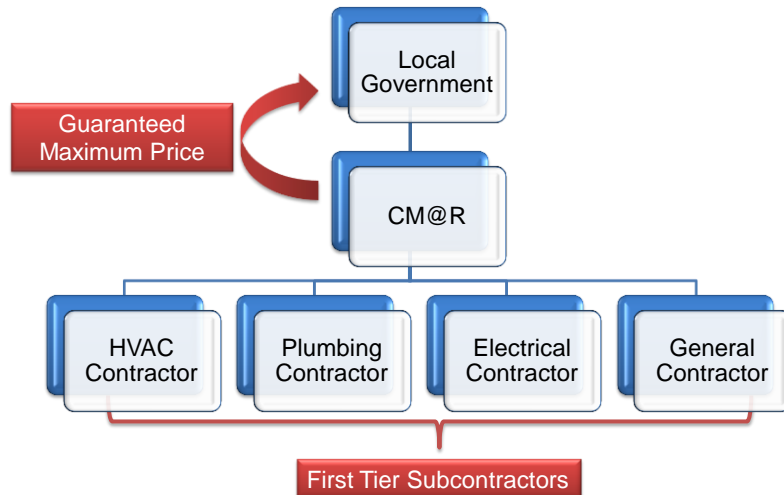
Construction Methods

Single Prime



Construction Methods

Construction Manager At Risk



New Construction Methods

Design-Build

- One contract
- DB team
- 100% of design & construction

Design-Build Bridging

- Two contracts
- Designer for 35% of design
- DB team for rest of design & construction

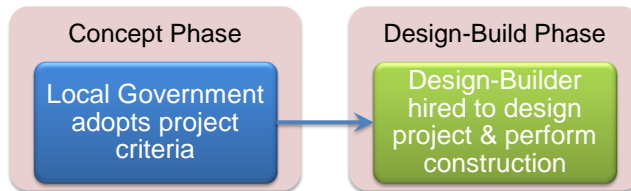
Public-Private Partnership

- One contract
- Private developer
- Shared costs & responsibilities

S.L. 2013-401 / S857

DB versus DBB

Design-Build:



Design-Build Bridging:



PREQUALIFICATION



Prequalification Statutory Authority

§ 143-135.8. Prequalification.

Bidders may be prequalified for any public construction project.

- SB437 enacted in 1995 session
(S.L. 1995-367, Sec. 8)
- Sec. 8 added by House; Senate concurred in House Com Sub
- Effective October 1, 1995

What is Prequalification?

“A special skill or type of experience or knowledge that makes someone suitable to do a particular job or activity” . . . “determined preparatory to or as a prerequisite.”

<http://www.merriam-webster.com>

“Preliminary stage in a bidding process where it is determined if an applicant has the requisite resources and experience to complete the job as required.”

<http://www.businessdictionary.com>

What is Prequalification?



“Pre-qualification is a process of evaluating and determining the competency of companies that appear qualified to perform construction services that meet the owner’s expectations for such services. Pre-qualification systems may be used during all levels of a construction project.”

*Pre-qualification For Construction Services:
Using A Qualifying System In Publicly Bid Projects
Carolinas Associated General Contractors*

Construction Manager At Risk

G.S. 143-128.1(c):

- CMR **must** prequalify first-tier subcontractors
- Prequalification criteria set by public owner and CMR
- Criteria addresses quality, performance, time for performance under contract, oversight cost, time for completion, capacity to perform, and other factors deemed appropriate by public owner



Guaranteed Energy Savings Contract



§ 143-64.17(5) “Qualified provider” means a person or business experienced in the design, implementation, and installation of energy conservation measures **who has been prequalified by the State Energy Office according to the prequalification criteria established by that Office.**

(S.L. 2013-396 / S547)



Build-to-Suit Schools



§ 115C-532(h) Build-to-Suit Capital School Leases **(Expires 7/1/2015)**

- Private developer (or CMR) **may** prequalify contractors
- Prequalification criteria set by local school board and developer (or CMR)
- Criteria addresses quality, performance, time for performance under contract, oversight cost, time for completion, capacity to perform, and other factors deemed appropriate by public owner



“De facto” Prequalification

Examples of “prequalification” in existing statutory requirements:

- Licensure (\$30,000+)
- Bonding (\$300,000+)
- Insurance
- HUB good faith efforts (\$300,000+)
- E-Verify Compliance (S.L. 2013-418 / H786)
- LRRB Standard of Award (\$30,000+)



Legal Standard for Prequalification

“Consequently, in the absence of statutory authorization, boards cannot promulgate a system of prequalification which limits the number of bidders who may compete for a contract. **And even where statutory authority does exist, any system of prequalification tending to stifle competition is invalid.**”

Administrative Discretion Under Lowest Responsible Bidder Statutes, 47 Yale L.J. 832, 834 (1938)

Legal Standard for Prequalification

In NC, look to the “responsible bidder” standard:

“ . . .the term [lowest responsible bidder] must be held to imply **skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability.**”

(Upheld rejection of low bidder for not providing audited financial statement, list of pending claims, and resumes of project supervisors)

*Kinsey Contracting Co., Inc. v. City of Fayetteville,
106 N.C. App. 383, 385, 416 S.E.2d 607, 609 (1992)*

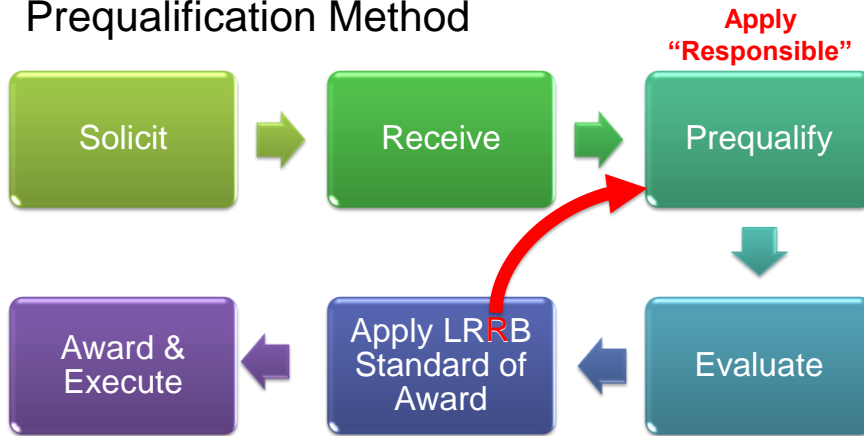
Prequalification in the bidding process

Traditional Method



Prequalification in the bidding process

Prequalification Method



Examples of Prequalification Criteria

- Financial responsibility (audited financial statement, surety statement on bonding capacity, credit history)
- Qualifications of key personnel
- Experience on similar projects
- Expertise in specialized field
- Past performance record
- Reputation for reliability and integrity
- Extent of other current obligations on personnel and equipment
- Prior prequalification denial or revocation / debarment
- Pending claims
- Litigation, dispute resolution & judgments
- Safety record / workers comp record / training programs
- Criminal records of key personnel
- Worker eligibility compliance

Sources: 1APT1 Municipal Legal Forms § 15:147 (2013); 1C Matthews Municipal Ordinances § 37:50 (2d ed.); Pre-qualification For Construction Services: Using A Qualifying System In Publicly Bid Projects, Carolinas Associated General Contractors; JCR-63

Advice on Prequalification

- Specify prequalification **in initial bid advertisement** to ensure adequate notice to all bidders
- **Clearly state** process, criteria, and evaluation methods
- **Limit criteria** to ability to perform under the contract – “**responsible bidder**” standard (*Kinsey case*)
- Prequalify at least **3 bidders** for **formal** construction projects (G.S. 143-132)
- Give bidders opportunity to **debrief** and provide them with **public records** on why they were or were not prequalified
- Reject bid from non-prequalified bidder as **nonresponsive** because of **unfair competitive advantage** by not going through the process

“Responsiveness” Legal Standard

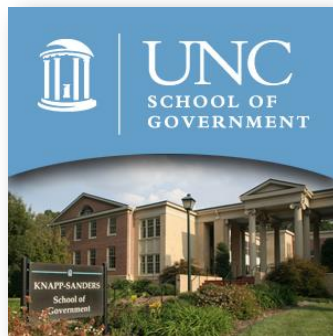
“In the context of public contract bidding, a “responsive” bid is one which conforms substantially with the terms of the request for bids. . . . Whether a bid conforms substantially with the request for bids or whether, instead, it contains a material variance depends on whether the **bidder's proposal gives him an advantage or benefit which is not enjoyed by other bidders.**”

Prof'l Food Servs. Mgmt., Inc. v. N. Carolina Dep't of Admin.,
109 N.C. App. 265, 268-69, 426 S.E.2d 447, 450 (1993)

Questions?



Thank You!



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