

MINI-BROOKS ACT REFRESHER

S. Wesley Tripp III

Board Counsel, North Carolina Board of Examiners for Engineers and
Surveyors

ACEC-NC, March 28, 2024



MEET THE BOARD

Chair
Cedric D. Fairbanks, PhD, PE
2024

Vice Chair
Brenda L. Moore, PE
2025

Secretary
Vinod K. Goel, PhD, PE
2026

Jonathan S. Care, Public
2024

John M. Logsdon, PLS
2025

Toynia E.S. Gibbs, PLS
2027

Dennis K. Hoyle, PE, PLS
2028

Carol W. Salloum, Public
2028

Timothy E. Bowes, PLS
2028

REGULATING THE PROFESSION

Licensure

- Education
- Examinations
- Experience

Enforcement and Interpretation

- Chapter 89C (and other statutes)
 - Includes non-licensed practice
- Board Rules (21 NCAC 56)

HISTORY OF THE BROOKS ACT



N.C.'s Mini-Brooks Act is modeled after the federal Brooks Act



Passed by Congress in 1972



Named after its author, Texas representative Jack Brooks



Established Qualifications Based Selection (QBS) for the procurement of architectural and engineering services by federal agencies



JACK BROOKS

- Jack Brooks was part of the motorcade in Dallas, TX when President Kennedy was assassinated.
- Jack Brooks is pictured behind Former First Lady Jackie Kennedy when President Lyndon Johnson took the oath of office to become President aboard Air Force One

FEDERAL BROOKS ACT

- 40 USC § 1101–1104
- “The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.”

SPREADING TO THE STATES

- After Congress passed the Brooks Act, many states adopted their own version
- Little Brooks Act
- Mini-Brooks Act
- North Carolina adopted its version in 1987



NORTH CAROLINA'S MINI-BROOKS ACT

- Our act concerns the procurement of professional services performed by architects, engineers, surveyors, and construction managers at risk
- N.C. Gen. Stat. § 143-64.31
- Chapter 143 – State Departments, Institutions, and Commissions
- Article 3D – Procurement of Architectural, Engineering, and Surveying Services



WHAT IS QBS?



Mini-Brooks requires Qualifications Based Selection (QBS)



Procurement process that focuses on the qualifications of potential firms rather than their fees or the price of the contract.



This is often done by using a request for qualifications (RFQ) to solicit responses from interested firms and individuals.



QBS is not competitive bidding (i.e. lowest responsible bidder)

DECLARATION OF PUBLIC POLICY

- N.C. Gen. Stat. § 143-64.31
- “It is the public policy of this State and all public subdivisions and Local Government Units thereof . . . to announce all requirements for architectural, engineering, surveying, construction management at risk services, design-build services, and public private partnerships . . .”
- The act applies to all units of government in N.C.
 - State
 - Counties
 - Municipalities



DECLARATION OF PUBLIC POLICY

- Units of government must announce all requirements for professional design services ...
- "... to select firms qualified to provide such services on the basis of demonstrated competence and qualification for the type of professional services required without regard to fee other than unit price information at this stage, and thereafter to negotiate a contract for those services at a fair and reasonable fee with the best qualified firm."



HOW DO YOU DETERMINE QUALIFICATIONS?

- The firm that the government entity wishes to contract with is selected based on “demonstrated competence and qualification for the type of professional services rendered.”
- Request for qualifications (RFQ) to solicit responses from firms and individuals



FORMAL ADVERTISEMENT?



Must the RFQ be formally advertised?



No



Formal advertisement is not required as with formal purchase and construction contracts under N.C. Gen. Stat. § 143-129(b)



The unit of government must “announce all requirements” for the services sought



Statute does not define what announce means



“to make publicly known; to proclaim”

WHAT CAN BE SOLICITED?

ALLOWED

- Members and qualifications of design team
- General information about the firm
- Examples of prior completed work
- Discussions of concepts and approaches to project
- References
- Unit Cost

PROHIBITED

- Total price (or information that could reasonably lead to total price)
- Conceptual drawings, designs, or other work product generated about the project (i.e., in response to the RFQ)

SOLICITING PRICE

- Government cannot do it
- The unit of government cannot request firms to submit an estimated total fee or contract price when responding to the RFQ
- Firms are prohibited from submitting this information whether or not requested by the local government
- If a firm submits price information, the local government is prohibited from considering it

WHAT IS UNIT PRICE?

ALLOWED

- General fees
- Hourly rates
- Contract prices for past projects

PROHIBITED

- Hourly rates + estimated hours for the project
- Past project prices + comparison to project
- Any information that could reasonably lead to calculation of total prices
- Requesting total price during interview

IS THERE A COST THRESHOLD?



No



This is different than formal and informal purchase and construction and repair contracts



Exemption?

We'll discuss that later...

WHEN CAN PRICE BE CONSIDERED?

After evaluating RFQ responses submitted by interested firms, the unit of government can negotiate a “fair and reasonable” price for the contract with the firm the unit has determined is the best qualified based on the evaluation criteria used by the unit to evaluate responses.



WHAT HAPPENS WHEN NEGOTIATIONS FAIL?

- “If a contract cannot be negotiated with the best qualified firm, negotiations with that firm shall be terminated and initiated with the next best qualified firm.”
- This suggests a ranking of firms in order of the quality of responses to RFQ
- Many RFQs will award a certain amount of points based on on responses



DECLARATION OF PUBLIC POLICY

- Units of government must ...
- “include the use of good faith efforts by the public entity to notify minority firms of the opportunity to submit qualifications for consideration by the public entity.”



MINORITY BUSINESSES

- Unit of government must make a good faith effort to notify minority firms of the opportunity to respond to RFQ.
- What are good faith efforts? Statute does not define them.
- Governments should likely use same methods as those used in informal construction and repair contracts.

NUMBER OF RESPONSES

- Is there a minimum number of responses required?
- No
- Formal construction contracts require a minimum of three bids, but no such requirement under Mini-Brooks Act
- One could be enough





RESIDENT FIRMS

- Units of government must give preference to resident firms over non-resident firms to the same extent that the other state grants a resident preference to its in-state firms
- A resident firm is one that paid unemployment taxes or income taxes in North Carolina and whose principal place of business is located here in North Carolina.
- This is not a “local preference” or “geographic preference”

EXEMPTIONS

- N.C. Gen. Stat. § 143-64.32
- Authorizes units of local government and N.C. DOT to exempt themselves from projects where the professional fee is less than \$50,000
- QBS will not be required
- Can use any method they choose (or none at all)
- Anything over \$50,000, the Act applies and QBS must be used.





HOW DO EXEMPTIONS WORK?

- Act does not impose many requirements
- “in writing”
- Governing Board approval is not required, but many choose to do so anyway
- No justification required, but units may choose to state them as long as not for an illegal purpose

BLANKET EXEMPTIONS?

- Local governments often prefer to have exemptions approved by governing boards, but may want to avoid taking each individual exemption before the Board for approval especially for small projects
- A local government may want to put an architect or engineer on retainer for a period of time or on an on-call basis
- The statute states that “particular projects” may be exempted; however, some local governments have adopted blanket exemptions for all projects below \$50,000
- Is this legal?

BLANKET EXEMPTIONS

- Prior Board Counsel has taken the position that blanket exemptions are not permissible based on the wording of the statute (i.e., “particular project”)
- Projects should be exempted on a project-by-project basis
- Courts have not decided this issue
- This has not been a common disciplinary issue

FURTHER EXEMPTIONS

N.C. Gen. Stat. § 143-64.34

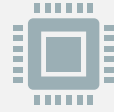
(1) State capital improvement projects under the jurisdiction of the State Building Commission;

(2) capital improvement projects at UNC System; and

(3) community college capital improvement projects

Less than \$500,000

WHAT DO BOARD RULES SAY?



21 N.C.Admin. Code 56.0701(f)(3)



Rule of professional conduct



“Shall . . . comply with [the Act]” (state and federal)



“shall not knowingly cooperate in a violation of [the Act].”

AMERICAN RESCUE PLAN

- Passed in response to Covid Pandemic. Lots of money to state and local governments to boost economy.
- Federal regs/policies adopted in response conflicted with QBS under N.C. law in public design-build arena
- In December 2021, General Assembly passed a law (SL 2021-189, § 1.6) resolving conflict
- Allows local governments expending federal grant funds to consider price when issuing RFQ for design-build services
- Effective for contracts entered until December 31, 2025

HOW TO RESPOND?

If you think a unit of local government is violating the Mini-Brooks Act ...

1. Reach out to the local government and ask for the justification. That may resolve the issue.
2. You can reach out to the Board for advice and guidance; however, we have no authority over units of local government. We cannot tell them what to do.
3. If you believe the RFQ violates the Act, do not respond to the RFP.

SOURCES CITED

- Houston, Norma, *Mini-Brooks Act FAQ's*, UNC School of Government, <https://canons.sog.unc.edu/2011/09/mini-brooks-act-faqs/>.
- Crews, Connor, *Design-Build Contracting in North Carolina using Coronavirus State and Local Fiscal Recovery Funds*, UNC School of Government, https://canons.sog.unc.edu/2022/04/design-build-contracting-in-north-carolina-using-coronavirus-state-and-local-fiscal-recovery-funds/#_ftnref6.

QUESTIONS?

S. Wesley Tripp III “Wes”

wtripp@ncbels.org

919-791-2000 Ext. 111

Andrew Ritter

aritter@ncbels.org

919-791-2000