



NORTH CAROLINA

Board of Examiners for Engineers and Surveyors

MINIBROOKS ACT

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The following represents questions raised during a CEC/NC Special Conference on the proper application of the Board's new requirement under the Rules of Professional Conduct pertaining to G.S. 143-64-31 (MiniBrooks Act). The following represent the official position of the North Carolina Board of Examiners on these issues.

Question: Is a two envelope system, where qualifications are placed in one envelope and price is placed in the second envelope with an assurance from the public body that the price will not be opened until the selection has been made based upon qualifications, acceptable under the provisions of the MiniBrooks Act?

Answer: No. A project price may not be provided until a firm has been selected based upon a qualification based process. Once selected, the firm can then negotiate a project price with the public body.

Question: Are all licensees obligated to report known violation of board rules?

Answer: Yes. All licensees are obligated to report known violations of board rules under the requirements of the Rules of Professional Conduct. This would include reporting Professional Engineers or firms that submit prices in response to request for proposals for publicly funded projects that have not been exempted under the provision the MiniBrooks Act.

Question: What about the delivery of unit prices for the project?

Answer: The delivery of unit prices as a response to a request for proposals identifies relative information with respect to general fees and is not specific to tasks related to the project. The submission of any information, which can be easily correlated to a fixed price or a bid, is prohibited unless the project has been exempted.

Question: If the proposed fee is less than \$30, 000.00, is an exemption still required?

Answer: Yes. All exemptions must be in writing and are required on a project by project basis.

Question: What is an appropriate way to respond to a request for a price?

Answer: Currently the Consulting Engineers Council of North Carolina has developed a standard letter that is sent to the party who is requesting the price. This letter includes detailed information regarding the Mini-Brooks Act and the obligation by the licensee not to submit a price.

Question: Will the Board of Examiners respond to a specific request for clarification of rule?

Answer: Yes. The Board of Examiners will respond to any request for clarification of responsibility concerning the proper application of the MiniBrooks Act but the Board's jurisdiction is limited to licensees. The Board has no authority to enforce the provisions of the MiniBrooks Act for NCDOT or local units of government.

Question: If a resolution of exemption is obtained from the requesting entity, may the licensee submit a price?

Answer: Yes. The ability to exempt projects is provided to NCDOT and local units of government.

Question: Are their exemptions for special conditions?

Answer: Yes. The Act provides for exceptions in the "cases of special emergency involving the health and safety of the people or their property."

Question: What does the effective date of the resolution need to be and must the resolution or exemption be project specific?

Answer: The resolution to exempt a project must be in force before a licensee may provide a project price. Each exemption must be project specific.

Question: How far does the responsibility of the engineer go as it relates to prime/sub-consultants (architectural type of contracting arrangement)?

Answer: The Board of Examiners has ruled that the provisions of the MiniBrooks apply even in situations of prime/subconsultants. If the project involves public funds from a project that has not been exempted, the sub-consultants must be selected through a qualification-based process. The North Carolina Attorney General has been asked to render an opinion on this issue. **(see statement below)

Question: What about design build and alternative delivery systems? How should the licensee handle this issue?

Answer: Same as above.

Question: What is the licensee's responsibility as it relates to assure that the resolution of exemption is valid?

Answer: The licensee must exercise prudent judgement to determine that an exemption has been properly executed in writing for the specified project.

Question: What about multiple Phase contracts?

Answer: Unless specifically exempted, multiple phase contracts are subject to the requirements of the MiniBrooks Act.

Question: There seems to some gray area in environmental work, such as wetlands delineation. Now with this new rule engineers cannot bid, but environmental professionals can. Is there some way that we can address this situation?

Answer: The MiniBrooks Act only pertains to professional services listed as "...architectural, engineering or surveying services..." Professional Engineers and Firms may offer prices for projects that they are legally capably of

providing, i.e. geology, soil science, landscape architecture.

Question: Is it permissible to submit project prices for projects that have been exempted?

Answer: Yes. If the exemption is by a local unit of government or NCDOT and is in writing, it is permissible for licensees to submit total project prices.

Question: Is it a violation of the Rules of Professional Conduct for a licensee, placed in a responsible role for a public body, to request other professionals to provide a total project price on behalf of the owner?

Answer: Yes. All licensees of the Board are required to comply with the provisions of the MiniBrooks Act.

Question: Has there been any consideration to Maryland's rescinding the price prohibition?

Answer: No. This is outside the Board's jurisdiction.

Question: Currently the State of North Carolina is required to request bids for construction and the contractor then typically hires sub-consultants through a bid process. Is it a violation for a licensee to provide a total project price under such circumstances?

Answer: Yes. The MiniBrooks Act applies to all publicly funded projects and professional services must be selected based upon a qualification based process unless exempted under the provisions of the act. The North Carolina Attorney General has been requested to render an opinion on this issue. ** (see statement below)

Question: Paragraph F of Section 21-56.0701 is only applied/enforced relative to GS143-64.31. Does this apply to public funds only?

Answer: The MiniBrooks Act only pertains to public funds. The Board Rules do not prohibit licensee from offering total project prices for privately funded projects.

Question: What about primarily planning studies with engineering elements? Is this considered a violation?

Answer: This would be dictated by the nature of the services to be rendered for the specific project. If the services are professional in nature, the MiniBrooks Act would apply.

Question: What about state agencies, are they covered by GS143-64.31?

Answer: No exemptions are allowed for state agencies other than NCDOT.

Question: What about State Universities?

Answer: There currently exists an exemption for capital improvement projects for The University of North Carolina, which exemption will expire July 1, 2001

Question: Do other non-DOT agencies have the ability to exempt themselves on state directed projects?

Answer: There are no exceptions allowed for State agencies except for State

Capital Improvement Projects where the total cost is less than \$100,000.00.

Question: What about exemptions for municipalities?

Answer: Local units of government or NCDOT may in writing exempt particular projects in the case of:

1. Proposed projects where an estimated professional fee is in an amount less than thirty thousand dollars (\$30,000), or
2. Other particular projects exempted in the sole discretion of the Department of Transportation or the unit of local government, stating the reasons therefor and the circumstances attendant thereto.

Question: Is a non-license violation a criminal violation?

Answer: No. A violation of the MiniBrooks Act would be considered a civil violation.

Question: Does the rule apply to GIS?

Answer: Yes

Question: What is considered a fee bid?

Answer: The submission of any information that would allow the public entity to determine a total project fee would be considered a "fee bid."

Question: Would an RFP that request man-hours without unit prices be considered a bid?

Answer: The Act only allows for "unit price information" and qualifications. Man-hours would not be considered a "unit price."

Question: During a short list or interview type of arrangement, if the interviewing party requests a price, is the licensee free to give a price at that time?

Answer: No. Price should not be given until the consultant is selected as the most qualified to provide the services requested and negotiations may then begin to establish the fee.

Question: What about licensed city/state engineers, architects and surveyors, are they in violation if they send out RFP's requesting a price.

Answer: Yes. All licensees must comply with the requirements of the MiniBrooks Act.

Question: Who must issue the written exemption?

Answer: The exemption can only be issued by the entity that is authorized to award the contract.

Question: What if a sub-consultant asks for a price and it is thought that there is a sole source selection being performed?

Answer: The licensee should make every effort to verify that the proposed project is a sole source selection, which should include confirmation in writing from the requesting entity.

Question: What if a client (public) asks for prices of recent projects, is this a violation?

Answer: Currently, government form 255 requires prices for similar types of previous work effort as a basis for qualifications. It is not a violation of the Mini Brooks Act to provide this form as a part of the QBS process for publicly funded projects.

****The Attorney General's Advisory Opinion determined that the selection of sub-consultants is not subject to the Mini-Brooks Act.**

The Attorney General's advisory opinion states that the application of the Mini-Brooks act does not extend beyond the contracts awarded by the government unit. The government unit can achieve qualifications based selection of the professional services by requiring a list of subcontractors in the qualifications package that can only be changed with the consent of the government unit or even require that the prime consultant use qualifications based selection for the sub-consultants.
