

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

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HOUSE BILL 857
PROPOSED COMMITTEE SUBSTITUTE H857-PCS10380-ST-55

Short Title: Public Contracts/Construction Methods/DB/P3.

(Public)

Sponsors:

Referred to:

April 15, 2013

A BILL TO BE ENTITLED
AN ACT AUTHORIZING PUBLIC CONTRACTS TO UTILIZE THE DESIGN-BUILD
METHOD OR PUBLIC-PRIVATE PARTNERSHIP CONSTRUCTION CONTRACTS.

Whereas, the legislature recognizes that there is a public need for the design, construction, improvement, renovation, and expansion of high-performing public buildings within the State of North Carolina; and

Whereas, the public need may not be, in limited situations, wholly satisfied by existing procurement methods in which public buildings are designed, constructed, improved, renovated, or expanded; and

Whereas, many local government entities request special legislative authorization to enter into public-private partnerships and use design-build contracting every legislative session; and

Whereas, in some instances, more efficient delivery of quality design and construction can be realized when a governmental entity is authorized to utilize an integrated approach for the design and construction of a project under one contract with a single point of responsibility; and

Whereas, the design-build integrated approach to project delivery, based upon qualifications and experience, in some instances, can yield improved collaboration among design professionals, builders, and owners throughout the entire process and deliver a quality and cost-efficient building; and

Whereas, certain governmental entities within the State lack the financial resources required to undertake capital building construction projects that are necessary to satisfy critical public needs; and

Whereas, partnerships with private developers may offer an effective financial mechanism for governmental entities to secure public buildings to satisfy critical public needs that cannot otherwise be met; and

Whereas, the legislature recognizes that the general public must have confidence in governmental entities' processes for construction contracting; and

Whereas, the legislature realizes that open competition delivers the best value for taxpayers and public owners; and

Whereas, the legislature seeks to create transparent, fair, and equitable contracting procedures for the use of public funds in government construction contracting; and

Whereas, the legislation proposed in this act is not intended to affect the existing statutes, regulations, or practices relevant to projects administered by the North Carolina Department of Transportation; Now, therefore,

The General Assembly of North Carolina enacts:



* H 8 5 7 - P C S 1 0 3 8 0 - S T - 5 5 *

1 **SECTION 1.** G.S. 143-64.31 reads as rewritten:

2 "**§ 143-64.31. Declaration of public policy.**

3 (a) It is the public policy of this State and all public subdivisions and Local
4 Governmental Units thereof, except in cases of special emergency involving the health and
5 safety of the people or their property, to announce all requirements for architectural,
6 engineering, ~~surveying and surveying~~, construction management at risk ~~services, services,~~
7 design-build services, and public-private partnership construction services to select firms
8 qualified to provide such services on the basis of demonstrated competence and qualification
9 for the type of professional services required without regard to fee other than unit price
10 information at this stage, and thereafter to negotiate a contract for those services at a fair and
11 reasonable fee with the best qualified firm. If a contract cannot be negotiated with the best
12 qualified firm, negotiations with that firm shall be terminated and initiated with the next best
13 qualified firm. Selection of a firm under this Article shall include the use of good faith efforts
14 by the public entity to notify minority firms of the opportunity to submit qualifications for
15 consideration by the public entity.

16 (a1) A resident firm providing architectural, engineering, surveying, ~~or~~ construction
17 management at risk ~~services—services, design-build services, or public-private partnership~~
18 construction services shall be granted a preference over a nonresident firm, in the same manner,
19 on the same basis, and to the extent that a preference is granted in awarding contracts for these
20 services by the other state to its resident firms over firms resident in the State of North
21 Carolina. For purposes of this section, a resident firm is a firm that has paid unemployment
22 taxes or income taxes in North Carolina and whose principal place of business is located in this
23 State.

24 (b) Public entities that contract with a construction manager at ~~risk-risk, design-builder,~~
25 or private developer under a public-private partnership under this section shall report to the
26 Secretary of Administration the following information on all projects where a construction
27 manager at ~~risk-risk, design-builder, or private developer under a public-private partnership~~ is
28 utilized:

- 29 (1) A detailed explanation of the reason why the particular construction manager
30 at ~~risk-risk, design-builder, or private developer~~ was selected.
- 31 (2) The terms of the contract with the construction manager at ~~risk-risk,~~
32 design-builder, or private developer.
- 33 (3) A list of all other firms considered but not selected as the construction
34 manager at ~~risk-risk, design-builder, or private developer,~~ and the amount of
35 their proposed fees for services.
- 36 (4) A report on the form of bidding utilized by the construction manager at ~~risk~~
37 risk, design-builder, or private developer on the project.

38 (c) The Secretary of Administration shall adopt rules to implement the provisions of
39 this subsection including the format and frequency of reporting.

40 (d) For purposes of this Article, the definition in G.S. 143-128.1B and G.S. 143-128.1C
41 shall apply."

42 **SECTION 2.** G.S. 143-64.32 reads as rewritten:

43 "**§ 143-64.32. Written exemption of particular contracts.**

44 Units of local government or the North Carolina Department of Transportation may in
45 writing exempt particular projects from the provisions of this Article in the case of:

- 46 (a) ~~Proposed of proposed~~ projects where an estimated professional fee is in an
47 amount less than ~~thirty thousand dollars (\$30,000), or fifty thousand dollars~~
48 (\$50,000.00).
- 49 (b) ~~Other particular projects exempted in the sole discretion of the Department~~
50 of Transportation or the unit of local government, stating the reasons
51 therefor and the circumstances attendant thereto."

1 **SECTION 3.** G.S. 143-128(a1) reads as rewritten:

2 "(a1) Construction methods. – The State, a county, municipality, or other public body
3 shall award contracts to erect, construct, alter, or repair buildings pursuant to any of the
4 following methods:

- 5 (1) Separate-prime bidding.
- 6 (2) Single-prime bidding.
- 7 (3) Dual bidding pursuant to subsection (d1) of this section.
- 8 (4) Construction management at risk contracts pursuant to G.S. 143-128.1.
- 9 (5) Alternative contracting methods authorized pursuant to G.S. 143-135.26(9).
- 10 (6) Design-build contracts pursuant to G.S. 143-128.1A.
- 11 (7) Design-build bridging contracts pursuant to G.S. 143-128.1B.
- 12 (8) Public-private partnership construction contracts pursuant to
13 G.S. 143-128.1C."

14 **SECTION 4.** Article 8 of Chapter 143 of the General Statutes is amended by
15 adding the following new sections to read:

16 "**§ 143-128.1A. Design-build contracts.**

17 (a) Definitions for purposes of this section:

- 18 (1) Design-builder. – As defined in G.S. 143-128.1B.
- 19 (2) Governmental entity. – As defined in G.S. 143-128.1B.

20 (b) A governmental entity shall establish in writing the criteria used for determining the
21 circumstances under which the design-build method is appropriate for a project, and such
22 criteria shall, at a minimum, address all of the following:

- 23 (1) The extent to which the governmental entity can adequately and thoroughly
24 define the project requirements prior to the issuance of the request for
25 qualifications for a design-builder.
- 26 (2) The time constraints for the delivery of the project.
- 27 (3) The ability to ensure that a quality project can be delivered.
- 28 (4) The capability of the governmental entity to manage and oversee the project,
29 including the availability of experienced staff or outside consultants who are
30 experienced with the design-build method of project delivery.
- 31 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
32 recruit and select small business entities. The governmental entity shall not
33 limit or otherwise preclude any respondent from submitting a response so
34 long as the respondent, itself or through its proposed team, is properly
35 licensed and qualified to perform the work defined by the public notice
36 issued under subsection (c) of this section.

37 (c) A governmental entity shall issue a public notice of the request for qualifications
38 that includes, at a minimum, general information on each of the following:

- 39 (1) The project site.
- 40 (2) The project scope.
- 41 (3) The project budget.
- 42 (4) The project schedule.
- 43 (5) The criteria for selection and the weighting of the qualifications criteria.
- 44 (6) Notice of any rules, ordinances, or goals established by the governmental
45 entity, including goals for minority- and women-owned business
46 participation and small business participation.
- 47 (7) Other information provided by the owner to potential design-builders in
48 submitting qualifications for the project.
- 49 (8) A statement providing that each design-builder shall submit in its response
50 to the request for qualifications an explanation of its project team selection,
51 which shall consist of either of the following:

1 a. A list of the licensed contractors, licensed subcontractors, and
2 licensed design professionals whom the design-builder proposes to
3 use for the project's design and construction.

4 b. An outline of the strategy the design-builder plans to use for open
5 contractor and subcontractor selection based upon the provisions of
6 Article 8 of Chapter 143 of the General Statutes.

7 (d) Following evaluation of the qualifications of the design-builders, the three most
8 highly qualified design-builders shall be ranked. If after the solicitation for design-builders, not
9 as many as three responses have been received from qualified design-builders, the
10 governmental entity shall again solicit for design-builders. If as a result of such second
11 solicitation, not as many as three responses are received, the governmental entity may then
12 begin negotiations with the highest ranked design-builder under G.S. 143-64.31 even though
13 fewer than three responses were received. If the governmental entity deems it appropriate, the
14 governmental entity may invite some or all responders to interview with the governmental
15 entity.

16 (e) The design-builder shall be selected in accordance with Article 3D of this Chapter.
17 Each design-builder shall certify to the governmental entity that each licensed design
18 professional who is a member of the design-build team, including subconsultants, was selected
19 based upon demonstrated competence and qualifications in the manner provided by
20 G.S. 143-64.31.

21 (f) The design-builder shall provide a performance and payment bond to the
22 governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the
23 General Statutes. The design-builder shall obtain written approval from the governmental entity
24 prior to changing key personnel as listed in sub-subdivision (c)(8)a. of this section after the
25 contract has been awarded.

26 **"§ 143-128.1B. Design-build bridging contracts.**

27 (a) Definitions for purposes of this section:

28 (1) Design-build bridging. – A design and construction delivery process
29 whereby a governmental entity contracts for design criteria services under a
30 separate agreement from the construction phase services of the
31 design-builder.

32 (2) Design-builder. – A person, partnership, corporation, joint venture, or other
33 legally eligible entity that offers to provide or provides, directly or indirectly
34 through properly licensed subcontractors, design and construction services
35 under a single contract.

36 (3) Design criteria. – The requirements for a public project, expressed in
37 drawings and specifications sufficient to allow the design-builder to make a
38 responsive bid proposal.

39 (4) Design professional. – Any professional licensed under Chapter 83A,
40 Chapter 89A, or Chapter 89C of the General Statutes.

41 (5) First-tier subcontractor. – A subcontractor who contracts directly with the
42 design-builder or general contractor, excluding design professionals.

43 (6) Governmental entity. – Every officer, board, department, commission, or
44 commissions charged with responsibility of preparation of specifications or
45 awarding or entering into contracts for the erection, construction, alteration,
46 or repair of any buildings for the State, or for any county, municipality, or
47 other public body.

48 (b) A governmental entity shall establish in writing the criteria used for determining the
49 circumstances under which engaging a design criteria design professional is appropriate for a
50 project, and such criteria shall, at a minimum, address all of the following:

- 1 (1) The extent to which the governmental entity can adequately and thoroughly
2 define the project requirements prior to the issuance of the request for
3 proposals for a design-builder.
- 4 (2) The time constraints for the delivery of the project.
- 5 (3) The ability to ensure that a quality project can be delivered.
- 6 (4) The capability of the governmental entity to manage and oversee the project,
7 including the availability of experienced staff or outside consultants who are
8 experienced with the design-build method of project delivery.
- 9 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
10 recruit and select small business entities. The governmental entity shall not
11 limit or otherwise preclude any respondent from submitting a response so
12 long as the respondent, itself or through its proposed team, is properly
13 licensed and qualified to perform the work defined by the public notice
14 issued under subsection (d) of this section.
- 15 (c) On or before entering into a contract for design-build services, the governmental
16 entity shall select or designate a staff design professional, or a design professional who is
17 independent of the design-builder, to act as its design criteria design professional as its
18 representative for the procurement process and for the duration of the design and construction.
19 If the design professional is not a full-time employee of the governmental entity, the
20 governmental entity shall select the design professional on the basis of demonstrated
21 competence and qualifications as provided by G.S. 143-64.31. The design criteria design
22 professional shall develop design criteria in consultation with the governmental entity. The
23 design criteria design professional shall not be eligible to submit a response to the request for
24 proposals nor provide design input to a design-bid response to the request for proposals. The
25 design criteria design professional shall prepare a design criteria package equal to thirty-five
26 percent (35%) of the completed design documentation for the entire construction project. The
27 design criteria package shall include all of the following:
- 28 (1) Programmatic needs, interior space requirements, intended space utilization,
29 and other capacity requirements.
- 30 (2) Information on the physical characteristics of the site, such as a topographic
31 survey.
- 32 (3) Material quality standards or performance criteria.
- 33 (4) Special material requirements.
- 34 (5) Provisions for utilities.
- 35 (6) Parking requirements.
- 36 (7) The type, size, and location of adjacent structures.
- 37 (8) Preliminary or conceptual drawings and specifications sufficient in detail to
38 allow the design-builder to make a proposal which is responsive to the
39 request for proposals.
- 40 (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.
- 41 (d) A governmental entity shall issue a public notice of the request for proposals that
42 includes, at a minimum, general information on each of the following:
- 43 (1) The project site.
- 44 (2) The project scope.
- 45 (3) The project budget.
- 46 (4) The project schedule.
- 47 (5) The criteria for selection and the weighting of the selection criteria.
- 48 (6) Notice of any rules, ordinances, or goals established by the governmental
49 entity, including goals for minority- and women-owned business
50 participation and small business entities.

- 1 (7) The thirty-five percent (35%) design criteria package prepared by the design
2 criteria design professional.
- 3 (8) Other information provided by the owner to design-builders in submitting
4 responses to the request for proposals for the project.
- 5 (9) A statement providing that each design-builder shall submit in its request for
6 proposal response an explanation of its project team selection, which shall
7 consist of a list of the licensed contractor and licensed design professionals
8 whom the design-builder proposes to use for the project's design and
9 construction.
- 10 (10) A statement providing that each design-builder shall submit in its request for
11 proposal a sealed envelope with all of the following:
- 12 a. The design-builder's price for providing the general conditions of the
13 contract.
- 14 b. The design-builder's proposed fee for general construction services.
- 15 c. The design-builder's fee for design services.
- 16 (e) Following evaluation of the qualifications of the design-builders, the three most
17 highly qualified design-builders shall be ranked. If after the solicitation for design-builders, not
18 as many as three responses have been received from qualified design-builders, the
19 governmental entity shall again solicit for design-builders. If as a result of such second
20 solicitation, not as many as three responses are received, the governmental entity may then
21 make its selection. The governmental entity shall select the winning design-builder proposal
22 from the three most highly qualified design-builders using the information supplied to the
23 governmental entity under subdivision (d)(10) of this section. Each design-builder shall certify
24 to the governmental entity that each licensed design professional who is a member of the
25 design-build team, including subconsultants, was selected based upon demonstrated
26 competence and qualifications in the manner provided by G.S. 143-64.31.
- 27 (f) The design-builder shall accept bids based upon the provisions of this Article from
28 first-tier subcontractors for all construction work under this section.
- 29 (g) The design-builder shall provide a performance and payment bond to the
30 governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the
31 General Statutes. The design-builder shall obtain written approval from the governmental entity
32 prior to changing key personnel, as listed under (d)(9) of this section, after the contract has
33 been awarded.
- 34 **"§ 143-128.1C. Public-private partnership construction contracts.**
- 35 (a) Definitions for purposes of this section:
- 36 (1) Construction contract. – Any contract entered into between a private
37 developer and a contractor for the design, construction, reconstruction,
38 alteration, or repair of any building or other work or improvement required
39 for a private developer to satisfy its obligations under a development
40 contract.
- 41 (2) Contractor. – Any person who has entered into a construction contract with a
42 private developer under this section.
- 43 (3) Design-builder. – Defined in G.S. 143-128.1B.
- 44 (4) Development contract. – Any contract between a governmental entity and a
45 private developer under this section and, as part of the contract, the private
46 developer is required to provide at least fifty percent (50%) of the financing
47 for the total cost necessary to deliver the capital improvement project,
48 whether through lease or ownership, for the governmental entity.
- 49 (5) Governmental entity. – Defined in G.S. 143-128.1B.
- 50 (6) Labor or materials. – Includes all materials furnished or labor performed in
51 the performance of the work required by a construction contract whether or

1 not the labor or materials enter into or become a component part of the
2 improvement and shall include gas, power, light, heat, oil, gasoline,
3 telephone services, and rental of equipment or the reasonable value of the
4 use of equipment directly utilized in the performance of the work required
5 by a construction contract.

6 (7) Private developer. – Any person who has entered into a development
7 contract with a governmental entity under this section.

8 (8) Public-private project. – A capital improvement project undertaken for the
9 benefit of a governmental entity and a private developer pursuant to a
10 development contract that includes construction of a public facility or other
11 improvements including paving, grading, utilities, infrastructure,
12 reconstruction, or repair and may include both public and private facilities.

13 (9) State entity. – The State and every agency, authority, institution, board,
14 commission, bureau, council, department, division, officer, or employee of
15 the State. The term does not include a unit of local government as defined in
16 G.S. 159-7.

17 (10) State-supported financing arrangement. – Any installment financing
18 arrangement, lease-purchase arrangement, arrangement under which funds
19 are to be paid in the future based upon the availability of an asset or funds
20 for payment, or any similar arrangement in the nature of a financing, under
21 which a State entity agrees to make payments to acquire or obtain a capital
22 asset for the State entity or any other State entity for a term, including
23 renewal options, of greater than one year. Any arrangement that results in
24 the identification of a portion of a lease payment, installment payment, or
25 similar scheduled payment thereunder by a State entity as "interest" for
26 purposes of federal income taxation shall automatically be a State-supported
27 financing arrangement for purposes of this section.

28 (11) Subcontractor. – Any person who has contracted to furnish labor, services,
29 or materials to, or who has performed labor or services for, a contractor or
30 another subcontractor in connection with a development contract.

31 (b) If the governmental entity determines in writing that it has a critical need for a
32 capital improvement project, the governmental entity may acquire, construct, own, lease as
33 lessor or lessee, and operate or participate in the acquisition, construction, ownership, leasing,
34 and operation of a public-private project, or of specific facilities within such a project,
35 including the making of loans and grants from funds available to the governmental entity for
36 these purposes. If the governmental entity is a public body under Article 33C of this Chapter,
37 the determination shall occur during an open meeting of that public body. The governmental
38 entity may enter into development contracts with private developers with respect to acquiring,
39 constructing, owning, leasing, or operating a project under this section. The development
40 contract shall specify the following:

41 (1) The property interest of the governmental entity and all other participants in
42 the development of the project.

43 (2) The responsibilities of the governmental entity and all other participants in
44 the development of the project.

45 (3) The responsibilities of the governmental entity and all other participants with
46 respect to financing of the project.

47 (4) The responsibilities to put forth a good-faith effort to comply with
48 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business
49 entities.

50 (c) The development contract may provide that the private developer shall be
51 responsible for any or all of the following:

- 1 (1) Construction of the entire public-private project.
2 (2) Reconstruction or repair of the public-private project or any part thereof
3 subsequent to construction of the project.
4 (3) Construction of any addition to the public-private project.
5 (4) Renovation of the public-private project or any part thereof.
6 (5) Purchase of apparatus, supplies, materials, or equipment for the
7 public-private project whether during or subsequent to the initial equipping
8 of the project.
9 (6) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
10 recruit and select small business entities.
11 (d) The development contract may also provide that the governmental entity and private
12 developer shall use the same contractor or contractors in constructing a portion of or the entire
13 public-private project. If the development contract provides that the governmental entity and
14 private developer shall use the same contractor, the development contract shall include
15 provisions deemed appropriate by the governmental entity to assure that the public facility or
16 facilities included in or added to the public-private project are constructed, reconstructed,
17 repaired, or renovated at a reasonable price and that the apparatus, supplies, materials, and
18 equipment purchased for the public facility or facilities included in the public-private project
19 are purchased at a reasonable price. For public-private partnerships using the design-build
20 project delivery method, the provisions of G.S. 143-128.1A shall apply.
21 (e) A private developer and its contractors shall make a good-faith effort to comply
22 with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities.
23 (f) A private developer may perform a portion of the construction or design work only
24 if both of the following criteria apply:
25 (1) A previously engaged contractor defaults, and a qualified replacement
26 cannot be obtained after a good-faith effort has been made in a timely
27 manner.
28 (2) The governmental entity approves the private developer to perform the
29 work.
30 (g) The following bonding provisions apply to any development contract entered into
31 under this section:
32 (1) A payment bond shall be required for any development contract as follows:
33 A payment bond in the amount of one hundred percent (100%) of the total
34 anticipated amount of the construction contracts to be entered into between
35 the private developer and the contractors to design or construct the
36 improvements required by the development contract. The payment bond
37 shall be conditioned upon the prompt payment for all labor or materials for
38 which the private developer or one or more of its contractors or those
39 contractors' subcontractors are liable. The payment bond shall be solely for
40 the protection of the persons furnishing materials or performing labor or
41 services for which the private developer or its contractors or subcontractors
42 are liable. The total anticipated amount of the construction contracts shall be
43 stated in the development contract and certified by the private developer as
44 being a good-faith projection of its total costs for constructing the
45 improvements required by the development contract. The payment bond
46 shall be executed by one or more surety companies legally authorized to do
47 business in the State of North Carolina and shall become effective upon the
48 awarding of the development contract. The development contract may
49 provide for the requirement of a performance bond.
50 (2) Subject to the provisions of this subsection, any claimant who has performed
51 labor or furnished materials in the prosecution of the work required by any

1 contract for which a payment bond has been given pursuant to the provisions
2 of this subsection, and who has not been paid in full therefor before the
3 expiration of 90 days after the day on which the claimant performed the last
4 labor or furnished the last materials for which that claimant claims payment,
5 may bring an action on the payment bond in that claimant's own name to
6 recover any amount due to that claimant for the labor or materials and may
7 prosecute the action to final judgment and have execution on the judgment.

8 a. Any claimant who has a direct contractual relationship with any
9 contractor or any subcontractor but has no contractual relationship,
10 express or implied, with the private developer may bring an action on
11 the payment bond only if that claimant has given written notice of
12 claim on the payment bond to the private developer within 120 days
13 from the date on which the claimant performed the last of the labor
14 or furnished the last of the materials for which that claimant claims
15 payment, in which that claimant states with substantial accuracy the
16 amount claimed and the name of the person for whom the work was
17 performed or to whom the material was furnished.

18 b. The notice required by sub-subdivision a. of this subdivision shall be
19 served by certified mail or by signature confirmation as provided by
20 the United States Postal Service, postage prepaid, in an envelope
21 addressed to the private developer at any place where that private
22 developer's office is regularly maintained for the transaction of
23 business or in any manner provided by law for the service of
24 summons.

25 (3) Every action on a payment bond as provided in this subsection shall be
26 brought in a court of appropriate jurisdiction in a county where the
27 development contract or any part thereof is to be or has been performed. No
28 action on a payment bond shall be commenced after one year from the day
29 on which the last of the labor was performed or material was furnished by
30 the claimant.

31 (4) No surety shall be liable under a payment bond for a total amount greater
32 than the face amount of the payment bond. A judgment against any surety
33 may be reduced or set aside upon motion by the surety and a showing that
34 the total amount of claims paid and judgments previously rendered under the
35 payment bond, together with the amount of the judgment to be reduced or set
36 aside, exceeds the face amount of the bond.

37 (5) No act of or agreement between the governmental entity, a private
38 developer, or a surety shall reduce the period of time for giving notice under
39 sub-subdivision (2)a. of this subsection or commencing action under
40 subdivision (3) of this subsection or otherwise reduce or limit the liability of
41 the private developer or surety as prescribed in this subsection. Every bond
42 given by a private developer pursuant to this subsection shall be
43 conclusively presumed to have been given in accordance with the provisions
44 of this subsection, whether or not the bond is drawn as to conform to this
45 subsection. The provisions of this subsection shall be conclusively presumed
46 to have been written into every bond given pursuant to this subsection.

47 (6) Any person entitled to bring an action or any defendant in an action on a
48 payment bond shall have a right to require the governmental entity or the
49 private developer to certify and furnish a copy of the payment bond, the
50 development contract, and any construction contracts covered by the bond. It
51 shall be the duty of the private developer or the governmental entity to give

1 any such person a certified copy of the payment bond and the construction
2 contract upon not less than 10 days' notice and request. The governmental
3 entity or private developer may require a reasonable payment for the actual
4 cost of furnishing the certified copy. A copy of any payment bond,
5 development contract, and any construction contracts covered by the bond
6 certified by the governmental entity or private developer shall constitute
7 prima facie evidence of the contents, execution, and delivery of the bond,
8 development contract, and construction contracts.

9 (7) A payment bond form containing the following provisions shall comply with
10 this subsection:

- 11 a. The date the bond is executed.
- 12 b. The name of the principal.
- 13 c. The name of the surety.
- 14 d. The governmental entity.
- 15 e. The development contract number.
- 16 f. All of the following:

17 1. "KNOW ALL MEN BY THESE PRESENTS, That we, the
18 PRINCIPAL and SURETY above named, are held and firmly
19 bound unto the above named [governmental entity],
20 hereinafter called [governmental entity], in the penal sum of
21 the amount stated above, for the payment of which sum well
22 and truly to be made, we bind ourselves, our heirs, executors,
23 administrators, and successors, jointly and severally, firmly
24 by these presents."

25 2. "THE CONDITION OF THIS OBLIGATION IS SUCH, that
26 whereas the Principal entered into a certain development
27 contract with [governmental entity], numbered as shown
28 above and hereto attached."

29 3. "NOW THEREFORE, if the Principal shall promptly make
30 payment to all persons supplying labor and material in the
31 prosecution of the construction or design work provided for
32 in the development contract, and any and all duly authorized
33 modifications of the contract that may hereafter be made,
34 notice of which modifications to the surety being hereby
35 waived, then this obligation to be void; otherwise to remain in
36 full force and virtue."

37 4. "IN WITNESS WHEREOF, the above bounden parties have
38 executed this instrument under their several seals on the date
39 indicated above, the name and corporate seal of each
40 corporate party being hereto affixed and these presents duly
41 signed by its undersigned representative, pursuant to authority
42 of its governing body." Appropriate places for execution by
43 the surety and principal shall be provided.

44 (8) In any suit brought or defended under the provisions of this subsection, the
45 presiding judge may allow reasonable attorneys' fees to the attorney
46 representing the prevailing party. Attorneys' fees under this subdivision are
47 to be taxed as part of the court costs and shall be payable by the losing party
48 upon a finding that there was an unreasonable refusal by the losing party to
49 fully resolve the matter which constituted the basis of the suit or the basis of
50 the defense. For purposes of this subdivision, the term "prevailing party"
51 means a party plaintiff or third-party plaintiff who obtains a judgment of at

1 least fifty percent (50%) of the monetary amount sought in a claim or a party
2 defendant or third-party defendant against whom a claim is asserted which
3 results in a judgment of less than fifty percent (50%) of the amount sought in
4 the claim defended. Notwithstanding the provisions of this subdivision, if an
5 offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a
6 "prevailing party" is an offeree who obtains judgment in an amount more
7 favorable than the last offer or is an offeror against whom judgment is
8 rendered in an amount less favorable than the last offer.

9 (9) The rights afforded claimants by the provisions of this subsection shall be in
10 addition to and not in lieu of any other rights which claimants may have by
11 law or contract, and the provisions of this subsection shall not be construed
12 so as to limit such rights. Provided, however, if a payment bond is obtained
13 for a development contract and maintained throughout the public-private
14 project pursuant to this section, the provisions of Article 2 of Chapter 44A of
15 the General Statutes shall not apply to that public-private project.

16 (h) The governmental entity shall determine its programming requirements for facilities
17 to be constructed under this section and shall determine the form in which private developers
18 may submit their qualifications. The governmental entity shall advertise a notice for interested
19 private developers to submit qualifications in a newspaper having general circulation within the
20 county in which the governmental entity is located. Prior to the submission of qualifications,
21 the governmental entity shall make available, in whatever form it deems appropriate, the
22 programming requirements for facilities included in the public-private project. Any private
23 developer submitting qualifications shall include the following:

24 (1) Evidence of financial stability. However, "trade secrets" as that term is
25 defined in G.S. 66-152(3) shall be exempt from disclosure under Chapter
26 132 of the General Statutes.

27 (2) Experience with construction of similar projects.

28 (3) Explanation of project team selection by either listing of licensed
29 contractors, licensed subcontractors, and licensed design professionals
30 whom the private developer proposes to use for the project's design and
31 construction or a statement outlining a strategy for open contractor and
32 subcontractor selection based upon the provisions of this Article.

33 (4) Statement of availability to undertake the public-private project and
34 projected time line for project completion.

35 (5) Any other information required by the governmental entity.

36 (i) Based upon the qualifications package submitted by the private developers and any
37 other information required by the governmental entity, the governmental entity may select one
38 or more private developers with whom to negotiate the terms and conditions of a contract to
39 perform the public-private project. The governmental entity shall advertise the terms of the
40 proposed contract to be entered into by the governmental entity in a newspaper having general
41 circulation within the county in which the governmental entity is located at least 30 days prior
42 to entering into the development contract. If the governmental entity is a public body under
43 Article 33C of this Chapter, the development contract shall be considered in an open meeting of
44 that public body.

45 (j) The governmental entity shall make available a summary of the development
46 contract terms, which shall include a statement of how to obtain a copy of the complete
47 development contract.

48 (k) Capital leases and operating leases entered into under this section are subject to
49 approval as follows:

50 (1) If entered into by a unit of local government as defined in G.S. 159-7, by the
51 Local Government Commission under Article 8 of Chapter 159 of the

1 General Statutes if they meet the standards set out in G.S. 159-148(a)(1),
2 159-148(a)(2), and 159-148(a)(3), 159-148(a)(4) or 159-153. For purposes
3 of determining whether the standards set out in G.S.159-148(a)(3) have been
4 met, only the five hundred thousand dollar (\$500,000) threshold applies.

5 (2) If entered into by a State entity that constitutes a State-supported financing
6 arrangement and requires payments thereunder that are payable, whether
7 directly or indirectly, and whether or not subject to the appropriation of
8 funds for such payment, by payments from the General Fund of the State or
9 other funds and accounts of the State that are funded from the general
10 revenues and other taxes and fees of the State or State entities, not including
11 taxes and fees that are required to be deposited to the Highway Fund or
12 Highway Trust Fund, shall be subject to the approval procedures required for
13 special indebtedness by G.S. 142-83 and G.S. 142-84. This requirement shall
14 not apply to any arrangement where bonds or other obligations are issued or
15 incurred by a State entity to carry out a financing program authorized by the
16 General Assembly under which such bonds or other obligations are payable
17 from moneys derived from specified, limited, nontax sources, so long as the
18 payments under that arrangement by a State entity are limited to the sources
19 authorized by the General Assembly.

20 (l) A capital lease or operating lease entered into under this section may not contain
21 any provision with respect to the assignment of specific students or students from a specific
22 area to any specific school.

23 (m) This section shall not apply to any contract or other agreement between or among
24 The University of North Carolina or one of its constituent institutions, a private, nonprofit
25 corporation established under Part 2B of Article 1 of Chapter 116 of the General Statutes, or
26 any private foundation, private association, or private club created for the primary purpose of
27 financial support to The University of North Carolina or one of its constituent institutions."

28 **SECTION 5.** G.S. 143-128.1 reads as rewritten:

29 **"§ 143-128.1. Construction management at risk contracts.**

30 (a) For purposes of this section and G.S. 143-64.31:

31 (1) "Construction management services" means services provided by a
32 construction manager, which may include preparation and coordination of
33 bid packages, scheduling, cost control, value engineering, evaluation,
34 preconstruction services, and construction administration.

35 (2) "Construction management at risk services" means services provided by a
36 person, corporation, or entity that (i) provides construction management
37 services for a project throughout the preconstruction and construction
38 phases, (ii) who is licensed as a general contractor, and (iii) who guarantees
39 the cost of the project.

40 (3) "Construction manager at risk" means a person, corporation, or entity that
41 provides construction management at risk services.

42 (4) "First-tier subcontractor" means a subcontractor who contracts directly with
43 the construction manager at risk.

44 (b) The construction manager at risk shall be selected in accordance with Article 3D of
45 this Chapter. Design services for a project shall be performed by a licensed architect or
46 engineer. The public owner shall contract directly with the architect or engineer. The public
47 owner shall make a good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
48 recruit and select small business entities when selecting a construction manager at risk.

49 (c) The construction manager at risk shall contract directly with the public entity for all
50 construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and
51 accept bids from first-tier subcontractors for all construction work under this section. The

1 prequalification criteria shall be determined by the public entity and the construction manager
2 at risk to address quality, performance, the time specified in the bids for performance of the
3 contract, the cost of construction oversight, time for completion, capacity to perform, and other
4 factors deemed appropriate by the public entity. The public entity shall require the construction
5 manager at risk to submit its plan for compliance with G.S. 143-128.2 for approval by the
6 public entity prior to soliciting bids for the project's first-tier subcontractors. A construction
7 manager at risk and first-tier subcontractors shall make a good faith effort ~~to recruit and select~~
8 ~~minority businesses for participation in contracts pursuant to G.S. 143-128.2. to comply with~~
9 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. A construction
10 manager at risk may perform a portion of the work only if (i) bidding produces no responsible,
11 responsive bidder for that portion of the work, the lowest responsible, responsive bidder will
12 not execute a contract for the bid portion of the work, or the subcontractor defaults and a
13 prequalified replacement cannot be obtained in a timely manner, and (ii) the public entity
14 approves of the construction manager at risk's performance of the work. All bids shall be
15 opened publicly, and once they are opened, shall be public records under Chapter 132 of the
16 General Statutes. The construction manager at risk shall act as the fiduciary of the public entity
17 in handling and opening bids. The construction manager at risk shall award the contract to the
18 lowest responsible, responsive bidder, taking into consideration quality, performance, the time
19 specified in the bids for performance of the contract, the cost of construction oversight, time for
20 completion, compliance with G.S. 143-128.2, and other factors deemed appropriate by the
21 public entity and advertised as part of the bid solicitation. The public entity may require the
22 selection of a different first-tier subcontractor for any portion of the work, consistent with this
23 section, provided that the construction manager at risk is compensated for any additional cost
24 incurred.

25 When contracts are awarded pursuant to this section, the public entity shall provide for a
26 dispute resolution procedure as provided in G.S. 143-128(f1). (d) The construction manager
27 at risk shall provide a performance and payment bond to the public entity in accordance with
28 the provisions of Article 3 of Chapter 44A of the General Statutes."

29 **SECTION 6.** This act becomes effective October 1, 2013, and applies to projects
30 bid on or after that date and public-private development contracts entered into on or after that
31 date. This act expires on July 1, 2019.