

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013**

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**HOUSE BILL 857
Committee Substitute Favorable 5/13/13
PROPOSED COMMITTEE SUBSTITUTE H857-PCS30548-ST-60**

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,



1 The General Assembly of North Carolina enacts:

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

3 **"§ 143-64.31. Declaration of public policy.**

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

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

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

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

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

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

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

44 **"§ 143-64.32. Written exemption of particular contracts.**

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

- 47 (a) ~~Proposed of proposed~~ projects where an estimated professional fee is in an
48 amount less than ~~thirty thousand dollars (\$30,000), or fifty thousand dollars~~
49 (\$50,000.00).

1 (b) ~~Other particular projects exempted in the sole discretion of the Department~~
2 ~~of Transportation or the unit of local government, stating the reasons~~
3 ~~therefor and the circumstances attendant thereto."~~

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

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

8 (1) Separate-prime bidding.

9 (2) Single-prime bidding.

10 (3) Dual bidding pursuant to subsection (d1) of this section.

11 (4) Construction management at risk contracts pursuant to G.S. 143-128.1.

12 (5) Alternative contracting methods authorized pursuant to G.S. 143-135.26(9).

13 (6) Design-build contracts pursuant to G.S. 143-128.1A.

14 (7) Design-build bridging contracts pursuant to G.S. 143-128.1B.

15 (8) Public-private partnership construction contracts pursuant to
16 G.S. 143-128.1C."

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

19 "**§ 143-128.1A. Design-build contracts.**

20 (a) Definitions for purposes of this section:

21 (1) Design-builder. – As defined in G.S. 143-128.1B.

22 (2) Governmental entity. – As defined in G.S. 143-128.1B.

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

26 (1) The extent to which the governmental entity can adequately and thoroughly
27 define the project requirements prior to the issuance of the request for
28 qualifications for a design-builder.

29 (2) The time constraints for the delivery of the project.

30 (3) The ability to ensure that a quality project can be delivered.

31 (4) The capability of the governmental entity to manage and oversee the project,
32 including the availability of experienced staff or outside consultants who are
33 experienced with the design-build method of project delivery.

34 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
35 recruit and select small business entities. The governmental entity shall not
36 limit or otherwise preclude any respondent from submitting a response so
37 long as the respondent, itself or through its proposed team, is properly
38 licensed and qualified to perform the work defined by the public notice
39 issued under subsection (c) of this section.

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

42 (1) The project site.

43 (2) The project scope.

44 (3) The anticipated project budget.

45 (4) The project schedule.

46 (5) The criteria to be considered for selection, and the weighting of the
47 qualifications 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 participation.

- 1 (7) Other information provided by the owner to potential design-builders in
2 submitting qualifications for the project.
- 3 (8) A statement providing that each design-builder shall submit in its response
4 to the request for qualifications an explanation of its project team selection,
5 which shall consist of either of the following:
- 6 a. A list of the licensed contractors, licensed subcontractors, and
7 licensed design professionals whom the design-builder proposes to
8 use for the project's design and construction.
- 9 b. An outline of the strategy the design-builder plans to use for open
10 contractor and subcontractor selection based upon the provisions of
11 Article 8 of Chapter 143 of the General Statutes.

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

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

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

31 **§ 143-128.1B. Design-build bridging contracts.**

32 (a) Definitions for purposes of this section:

- 33 (1) Design-build bridging. – A design and construction delivery process
34 whereby a governmental entity contracts for design criteria services under a
35 separate agreement from the construction phase services of the
36 design-builder.
- 37 (2) Design-builder. – A person, partnership, corporation, joint venture, or other
38 legally eligible entity that offers to provide or provides, directly or indirectly
39 through properly licensed subcontractors, design and construction services
40 under a single contract.
- 41 (3) Design criteria. – The requirements for a public project, expressed in
42 drawings and specifications sufficient to allow the design-builder to make a
43 responsive bid proposal.
- 44 (4) Design professional. – Any professional licensed under Chapter 83A,
45 Chapter 89A, or Chapter 89C of the General Statutes.
- 46 (5) First-tier subcontractor. – A subcontractor who contracts directly with the
47 design-builder or general contractor, excluding design professionals.
- 48 (6) Governmental entity. – Every officer, board, department, commission, or
49 commissions charged with responsibility of preparation of specifications or
50 awarding or entering into contracts for the erection, construction, alteration,

1 or repair of any buildings for the State, or for any county, municipality, or
2 other public body.

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

6 (1) The extent to which the governmental entity can adequately and thoroughly
7 define the project requirements prior to the issuance of the request for
8 proposals for a design-builder.

9 (2) The time constraints for the delivery of the project.

10 (3) The ability to ensure that a quality project can be delivered.

11 (4) The capability of the governmental entity to manage and oversee the project,
12 including the availability of experienced staff or outside consultants who are
13 experienced with the design-build method of project delivery.

14 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
15 recruit and select small business entities. The governmental entity shall not
16 limit or otherwise preclude any respondent from submitting a response so
17 long as the respondent, itself or through its proposed team, is properly
18 licensed and qualified to perform the work defined by the public notice
19 issued under subsection (d) of this section.

20 (c) On or before entering into a contract for design-build services, the governmental
21 entity shall select or designate a staff design professional, or a design professional who is
22 independent of the design-builder, to act as its design criteria design professional as its
23 representative for the procurement process and for the duration of the design and construction.
24 If the design professional is not a full-time employee of the governmental entity, the
25 governmental entity shall select the design professional on the basis of demonstrated
26 competence and qualifications as provided by G.S. 143-64.31. The design criteria design
27 professional shall develop design criteria in consultation with the governmental entity. The
28 design criteria design professional shall not be eligible to submit a response to the request for
29 proposals nor provide design input to a design-bid response to the request for proposals. The
30 design criteria design professional shall prepare a design criteria package equal to thirty-five
31 percent (35%) of the completed design documentation for the entire construction project. The
32 design criteria package shall include all of the following:

33 (1) Programmatic needs, interior space requirements, intended space utilization,
34 and other capacity requirements.

35 (2) Information on the physical characteristics of the site, such as a topographic
36 survey.

37 (3) Material quality standards or performance criteria.

38 (4) Special material requirements.

39 (5) Provisions for utilities.

40 (6) Parking requirements.

41 (7) The type, size, and location of adjacent structures.

42 (8) Preliminary or conceptual drawings and specifications sufficient in detail to
43 allow the design-builder to make a proposal which is responsive to the
44 request for proposals.

45 (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.

46 (d) A governmental entity shall issue a public notice of the request for proposals that
47 includes, at a minimum, general information on each of the following:

48 (1) The project site.

49 (2) The project scope.

50 (3) The anticipated project budget.

51 (4) The project schedule.

- 1 (5) The criteria to be considered for selection, and the weighting of the selection
2 criteria.
- 3 (6) Notice of any rules, ordinances, or goals established by the governmental
4 entity, including goals for minority- and women-owned business
5 participation and small business entities.
- 6 (7) The thirty-five percent (35%) design criteria package prepared by the design
7 criteria design professional.
- 8 (8) Other information provided by the owner to design-builders in submitting
9 responses to the request for proposals for the project.
- 10 (9) A statement providing that each design-builder shall submit in its request for
11 proposal response an explanation of its project team selection, which shall
12 consist of a list of the licensed contractor and licensed design professionals
13 whom the design-builder proposes to use for the project's design and
14 construction.
- 15 (10) A statement providing that each design-builder shall submit in its request for
16 proposal a sealed envelope with all of the following:
- 17 a. The design-builder's price for providing the general conditions of the
18 contract.
- 19 b. The design-builder's proposed fee for general construction services.
- 20 c. The design-builder's fee for design services.
- 21 (e) Following evaluation of the qualifications of the design-builders, the three most
22 highly qualified design-builders shall be ranked. If after the solicitation for design-builders, not
23 as many as three responses have been received from qualified design-builders, the
24 governmental entity shall again solicit for design-builders. If as a result of such second
25 solicitation, not as many as three responses are received, the governmental entity may then
26 make its selection. The governmental entity shall select the winning design-builder proposal
27 from the three most highly qualified design-builders using the information supplied to the
28 governmental entity under subdivision (d)(10) of this section. Each design-builder shall certify
29 to the governmental entity that each licensed design professional who is a member of the
30 design-build team, including subconsultants, was selected based upon demonstrated
31 competence and qualifications in the manner provided by G.S. 143-64.31.
- 32 (f) The design-builder shall accept bids based upon the provisions of this Article from
33 first-tier subcontractors for all construction work under this section.
- 34 (g) The design-builder shall provide a performance and payment bond to the
35 governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the
36 General Statutes. The design-builder shall obtain written approval from the governmental entity
37 prior to changing key personnel, as listed under (d)(9) of this section, after the contract has
38 been awarded.

39 **§ 143-128.1C. Public-private partnership construction contracts.**

40 (a) Definitions for purposes of this section:

- 41 (1) Construction contract. – Any contract entered into between a private
42 developer and a contractor for the design, construction, reconstruction,
43 alteration, or repair of any building or other work or improvement required
44 for a private developer to satisfy its obligations under a development
45 contract.
- 46 (2) Contractor. – Any person who has entered into a construction contract with a
47 private developer under this section.
- 48 (3) Design-builder. – Defined in G.S. 143-128.1B.
- 49 (4) Development contract. – Any contract between a governmental entity and a
50 private developer under this section and, as part of the contract, the private
51 developer is required to provide at least fifty percent (50%) of the financing

1 for the total cost necessary to deliver the capital improvement project,
2 whether through lease or ownership, for the governmental entity.

3 (5) Governmental entity. – Defined in G.S. 143-128.1B.

4 (6) Labor or materials. – Includes all materials furnished or labor performed in
5 the performance of the work required by a construction contract whether or
6 not the labor or materials enter into or become a component part of the
7 improvement and shall include gas, power, light, heat, oil, gasoline,
8 telephone services, and rental of equipment or the reasonable value of the
9 use of equipment directly utilized in the performance of the work required
10 by a construction contract.

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

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

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

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

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

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

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

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

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

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

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

6 (1) Construction of the entire public-private project.

7 (2) Reconstruction or repair of the public-private project or any part thereof
8 subsequent to construction of the project.

9 (3) Construction of any addition to the public-private project.

10 (4) Renovation of the public-private project or any part thereof.

11 (5) Purchase of apparatus, supplies, materials, or equipment for the
12 public-private project whether during or subsequent to the initial equipping
13 of the project.

14 (6) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
15 recruit and select small business entities.

16 (d) The development contract may also provide that the governmental entity and private
17 developer shall use the same contractor or contractors in constructing a portion of or the entire
18 public-private project. If the development contract provides that the governmental entity and
19 private developer shall use the same contractor, the development contract shall include
20 provisions deemed appropriate by the governmental entity to assure that the public facility or
21 facilities included in or added to the public-private project are constructed, reconstructed,
22 repaired, or renovated at a reasonable price and that the apparatus, supplies, materials, and
23 equipment purchased for the public facility or facilities included in the public-private project
24 are purchased at a reasonable price. For public-private partnerships using the design-build
25 project delivery method, the provisions of G.S. 143-128.1A shall apply.

26 (e) A private developer and its contractors shall make a good-faith effort to comply
27 with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities.

28 (f) A private developer may perform a portion of the construction or design work only
29 if both of the following criteria apply:

30 (1) A previously engaged contractor defaults, and a qualified replacement
31 cannot be obtained after a good-faith effort has been made in a timely
32 manner.

33 (2) The governmental entity approves the private developer to perform the
34 work.

35 (g) The following bonding provisions apply to any development contract entered into
36 under this section:

37 (1) A payment bond shall be required for any development contract as follows:
38 A payment bond in the amount of one hundred percent (100%) of the total
39 anticipated amount of the construction contracts to be entered into between
40 the private developer and the contractors to design or construct the
41 improvements required by the development contract. The payment bond
42 shall be conditioned upon the prompt payment for all labor or materials for
43 which the private developer or one or more of its contractors or those
44 contractors' subcontractors are liable. The payment bond shall be solely for
45 the protection of the persons furnishing materials or performing labor or
46 services for which the private developer or its contractors or subcontractors
47 are liable. The total anticipated amount of the construction contracts shall be
48 stated in the development contract and certified by the private developer as
49 being a good-faith projection of its total costs for constructing the
50 improvements required by the development contract. The payment bond
51 shall be executed by one or more surety companies legally authorized to do

1 business in the State of North Carolina and shall become effective upon the
2 awarding of the development contract. The development contract may
3 provide for the requirement of a performance bond.

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

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

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

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

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

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

1 (6) Any person entitled to bring an action or any defendant in an action on a
2 payment bond shall have a right to require the governmental entity or the
3 private developer to certify and furnish a copy of the payment bond, the
4 development contract, and any construction contracts covered by the bond. It
5 shall be the duty of the private developer or the governmental entity to give
6 any such person a certified copy of the payment bond and the construction
7 contract upon not less than 10 days' notice and request. The governmental
8 entity or private developer may require a reasonable payment for the actual
9 cost of furnishing the certified copy. A copy of any payment bond,
10 development contract, and any construction contracts covered by the bond
11 certified by the governmental entity or private developer shall constitute
12 prima facie evidence of the contents, execution, and delivery of the bond,
13 development contract, and construction contracts.

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

- 16 a. The date the bond is executed.
- 17 b. The name of the principal.
- 18 c. The name of the surety.
- 19 d. The governmental entity.
- 20 e. The development contract number.
- 21 f. All of the following:

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

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

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

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

49 (8) In any suit brought or defended under the provisions of this subsection, the
50 presiding judge may allow reasonable attorneys' fees to the attorney
51 representing the prevailing party. Attorneys' fees under this subdivision are

1 to be taxed as part of the court costs and shall be payable by the losing party
2 upon a finding that there was an unreasonable refusal by the losing party to
3 fully resolve the matter which constituted the basis of the suit or the basis of
4 the defense. For purposes of this subdivision, the term "prevailing party"
5 means a party plaintiff or third-party plaintiff who obtains a judgment of at
6 least fifty percent (50%) of the monetary amount sought in a claim or a party
7 defendant or third-party defendant against whom a claim is asserted which
8 results in a judgment of less than fifty percent (50%) of the amount sought in
9 the claim defended. Notwithstanding the provisions of this subdivision, if an
10 offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a
11 "prevailing party" is an offeree who obtains judgment in an amount more
12 favorable than the last offer or is an offeror against whom judgment is
13 rendered in an amount less favorable than the last offer.

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

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

29 (1) Evidence of financial stability. However, "trade secrets" as that term is
30 defined in G.S. 66-152(3) shall be exempt from disclosure under Chapter
31 132 of the General Statutes.

32 (2) Experience with construction of similar projects.

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

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

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

41 (i) Based upon the qualifications package submitted by the private developers and any
42 other information required by the governmental entity, the governmental entity may select one
43 or more private developers with whom to negotiate the terms and conditions of a contract to
44 perform the public-private project. The governmental entity shall advertise the terms of the
45 proposed contract to be entered into by the governmental entity in a newspaper having general
46 circulation within the county in which the governmental entity is located at least 30 days prior
47 to entering into the development contract. If the governmental entity is a public body under
48 Article 33C of this Chapter, the development contract shall be considered in an open meeting of
49 that public body following a public hearing on the proposed development contract. Notice of
50 the public hearing shall be published in the same notice as the advertisement of the terms under
51 this subsection.

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

4 (k) Leases entered into under this section are subject to approval as follows:

5 (1) If a capital lease or operating lease is entered into by a unit of local
6 government as defined in G.S. 159-7, that capital lease or operating lease is
7 subject to approval by the Local Government Commission under Article 8 of
8 Chapter 159 of the General Statutes if they meet the standards set out in
9 G.S. 159-148(a)(1), 159-148(a)(2), and 159-148(a)(3), 159-148(a)(4) or
10 159-153. For purposes of determining whether the standards set out in
11 G.S.159-148(a)(3) have been met, only the five hundred thousand dollar
12 (\$500,000) threshold applies.

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

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

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

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

38 **"§ 143-128.1. Construction management at risk contracts.**

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

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

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

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

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

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

8 (c) The construction manager at risk shall contract directly with the public entity for all
9 construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and
10 accept bids from first-tier subcontractors for all construction work under this section. The
11 prequalification criteria shall be determined by the public entity and the construction manager
12 at risk to address quality, performance, the time specified in the bids for performance of the
13 contract, the cost of construction oversight, time for completion, capacity to perform, and other
14 factors deemed appropriate by the public entity. The public entity shall require the construction
15 manager at risk to submit its plan for compliance with G.S. 143-128.2 for approval by the
16 public entity prior to soliciting bids for the project's first-tier subcontractors. A construction
17 manager at risk and first-tier subcontractors shall make a good faith effort ~~to recruit and select~~
18 ~~minority businesses for participation in contracts pursuant to G.S. 143-128.2. to comply with~~
19 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. A construction
20 manager at risk may perform a portion of the work only if (i) bidding produces no responsible,
21 responsive bidder for that portion of the work, the lowest responsible, responsive bidder will
22 not execute a contract for the bid portion of the work, or the subcontractor defaults and a
23 prequalified replacement cannot be obtained in a timely manner, and (ii) the public entity
24 approves of the construction manager at risk's performance of the work. All bids shall be
25 opened publicly, and once they are opened, shall be public records under Chapter 132 of the
26 General Statutes. The construction manager at risk shall act as the fiduciary of the public entity
27 in handling and opening bids. The construction manager at risk shall award the contract to the
28 lowest responsible, responsive bidder, taking into consideration quality, performance, the time
29 specified in the bids for performance of the contract, the cost of construction oversight, time for
30 completion, compliance with G.S. 143-128.2, and other factors deemed appropriate by the
31 public entity and advertised as part of the bid solicitation. The public entity may require the
32 selection of a different first-tier subcontractor for any portion of the work, consistent with this
33 section, provided that the construction manager at risk is compensated for any additional cost
34 incurred.

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

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