

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

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HOUSE BILL 857
Committee Substitute Favorable 5/13/13
Committee Substitute #2 Favorable 5/15/13
PROPOSED SENATE COMMITTEE SUBSTITUTE H857-PCS80376-ST-72

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 governmental 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



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1 Whereas, the legislation proposed in this act is not intended to affect the existing
2 statutes, regulations, or practices relevant to projects administered by the North Carolina
3 Department of Transportation; Now, therefore,
4 The General Assembly of North Carolina enacts:

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

6 "**§ 143-64.31. Declaration of public policy.**

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

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

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

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

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

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

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

47 "**§ 143-64.32. Written exemption of particular contracts.**

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

- 1 (a) ~~Proposed of proposed~~ projects where an estimated professional fee is in an
2 amount less than ~~thirty thousand dollars (\$30,000), or fifty thousand dollars~~
3 (\$50,000.00).
4 (b) ~~Other particular projects exempted in the sole discretion of the Department~~
5 ~~of Transportation or the unit of local government, stating the reasons~~
6 ~~therefor and the circumstances attendant thereto."~~

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

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

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

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

22 "**§ 143-128.1A. Design-build contracts.**

23 (a) Definitions for purposes of this section:

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

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

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

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

- 45 (1) The project site.
46 (2) The project scope.
47 (3) The anticipated project budget.
48 (4) The project schedule.
49 (5) The criteria to be considered for selection and the weighting of the
50 qualifications criteria.

1 (6) Notice of any rules, ordinances, or goals established by the governmental
2 entity, including goals for minority- and women-owned business
3 participation and small business participation.

4 (7) Other information provided by the owner to potential design-builders in
5 submitting qualifications for the project.

6 (8) A statement providing that each design-builder shall submit in its response
7 to the request for qualifications an explanation of its project team selection,
8 which shall consist of either of the following:

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

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

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

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

29 (f) 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 in sub-subdivision (c)(8)a. of this section after the
33 contract has been awarded.

34 **"§ 143-128.1B. Design-build bridging contracts.**

35 (a) Definitions for purposes of this section:

36 (1) Design-build bridging. – A design and construction delivery process
37 whereby a governmental entity contracts for design criteria services under a
38 separate agreement from the construction phase services of the
39 design-builder.

40 (2) Design-builder. – A person, partnership, corporation, joint venture, limited
41 liability company, or other legally eligible entity that offers to provide or
42 provides, directly or indirectly through properly licensed subcontractors,
43 design and construction services under a single contract.

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

47 (4) Design professional. – Any professional licensed under Chapters 83A, 89A,
48 or 89C of the General Statutes.

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

1 (6) Governmental entity. – Every officer, board, department, commission, or
2 commissions charged with responsibility of preparation of specifications or
3 awarding or entering into contracts for the erection, construction, alteration,
4 or repair of any buildings for the State, or for any county, municipality, or
5 other public body.

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

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

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

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

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

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

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

36 (1) Programmatic needs, interior space requirements, intended space utilization,
37 and other capacity requirements.

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

40 (3) Material quality standards or performance criteria.

41 (4) Special material requirements.

42 (5) Provisions for utilities.

43 (6) Parking requirements.

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

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

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

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

51 (1) The project site.

- 1 (2) The project scope.
2 (3) The anticipated project budget.
3 (4) The project schedule.
4 (5) The criteria to be considered for selection and the weighting of the selection
5 criteria.
6 (6) Notice of any rules, ordinances, or goals established by the governmental
7 entity, including goals for minority- and women-owned business
8 participation and small business entities.
9 (7) The thirty-five percent (35%) design criteria package prepared by the design
10 criteria design professional.
11 (8) Other information provided by the owner to design-builders in submitting
12 responses to the request for proposals for the project.
13 (9) A statement providing that each design-builder shall submit in its request for
14 proposal response an explanation of its project team selection, which shall
15 consist of a list of the licensed contractor and licensed design professionals
16 whom the design-builder proposes to use for the project's design and
17 construction.
18 (10) A statement providing that each design-builder shall submit in its request for
19 proposal a sealed envelope with all of the following:
20 a. The design-builder's price for providing the general conditions of the
21 contract.
22 b. The design-builder's proposed fee for general construction services.
23 c. The design-builder's fee for design services.

24 (e) Following evaluation of the qualifications of the design-builders, the governmental
25 entity shall rank the design-builders who have provided responses, grouping the top three
26 without ordinal ranking. If after the solicitation for design-builders, not as many as three
27 responses have been received from qualified design-builders, the governmental entity shall
28 again solicit for design-builders. If as a result of such second solicitation, not as many as three
29 responses are received, the governmental entity may then make its selection. From the grouping
30 of the top three design-builders, the governmental entity shall select the design-builder who is
31 the lowest responsive, responsible bidder based on the cumulative amount of fees provided in
32 accordance with subdivision (d)(10) of this section and taking into consideration quality,
33 performance, and the time specified in the proposals for the performance of the contract. Each
34 design-builder shall certify to the governmental entity that each licensed design professional
35 who is a member of the design-build team, including subconsultants, was selected based upon
36 demonstrated competence and qualifications in the manner provided by G.S. 143-64.31.

37 (f) The design-builder shall accept bids based upon the provisions of this Article from
38 first-tier subcontractors for all construction work under this section.

39 (g) The design-builder shall provide a performance and payment bond to the
40 governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the
41 General Statutes. The design-builder shall obtain written approval from the governmental entity
42 prior to changing key personnel, as listed under subdivision (d)(9) of this section, after the
43 contract has been awarded.

44 **"§ 143-128.1C. Public-private partnership construction contracts.**

45 (a) Definitions for purposes of this section:

- 46 (1) Construction contract. – Any contract entered into between a private
47 developer and a contractor for the design, construction, reconstruction,
48 alteration, or repair of any building or other work or improvement required
49 for a private developer to satisfy its obligations under a development
50 contract.

- 1 (2) Contractor. – Any person who has entered into a construction contract with a
2 private developer under this section.
- 3 (3) Design-builder. – Defined in G.S. 143-128.1B.
- 4 (4) Development contract. – Any contract between a governmental entity and a
5 private developer under this section and, as part of the contract, the private
6 developer is required to provide at least fifty percent (50%) of the financing
7 for the total cost necessary to deliver the capital improvement project,
8 whether through lease or ownership, for the governmental entity.
- 9 (5) Governmental entity. – Defined in G.S. 143-128.1B.
- 10 (6) Labor or materials. – Includes all materials furnished or labor performed in
11 the performance of the work required by a construction contract whether or
12 not the labor or materials enter into or become a component part of the
13 improvement and shall include gas, power, light, heat, oil, gasoline,
14 telephone services, and rental of equipment or the reasonable value of the
15 use of equipment directly utilized in the performance of the work required
16 by a construction contract.
- 17 (7) Private developer. – Any person who has entered into a development
18 contract with a governmental entity under this section.
- 19 (8) Public-private project. – A capital improvement project undertaken for the
20 benefit of a governmental entity and a private developer pursuant to a
21 development contract that includes construction of a public facility or other
22 improvements, including paving, grading, utilities, infrastructure,
23 reconstruction, or repair, and may include both public and private facilities.
- 24 (9) State entity. – The State and every agency, authority, institution, board,
25 commission, bureau, council, department, division, officer, or employee of
26 the State. The term does not include a unit of local government as defined in
27 G.S. 159-7.
- 28 (10) State-supported financing arrangement. – Any installment financing
29 arrangement, lease-purchase arrangement, arrangement under which funds
30 are to be paid in the future based upon the availability of an asset or funds
31 for payment, or any similar arrangement in the nature of a financing, under
32 which a State entity agrees to make payments to acquire or obtain a capital
33 asset for the State entity or any other State entity for a term, including
34 renewal options, of greater than one year. Any arrangement that results in
35 the identification of a portion of a lease payment, installment payment, or
36 similar scheduled payment thereunder by a State entity as "interest" for
37 purposes of federal income taxation shall automatically be a State-supported
38 financing arrangement for purposes of this section.
- 39 (11) Subcontractor. – Any person who has contracted to furnish labor, services,
40 or materials to, or who has performed labor or services for, a contractor or
41 another subcontractor in connection with a development contract.
- 42 (b) If the governmental entity determines in writing that it has a critical need for a
43 capital improvement project, the governmental entity may acquire, construct, own, lease as
44 lessor or lessee, and operate or participate in the acquisition, construction, ownership, leasing,
45 and operation of a public-private project, or of specific facilities within such a project,
46 including the making of loans and grants from funds available to the governmental entity for
47 these purposes. If the governmental entity is a public body under Article 33C of this Chapter,
48 the determination shall occur during an open meeting of that public body. The governmental
49 entity may enter into development contracts with private developers with respect to acquiring,
50 constructing, owning, leasing, or operating a project under this section. The development
51 contract shall specify the following:

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

1 services for which the private developer or its contractors or subcontractors
2 are liable. The total anticipated amount of the construction contracts shall be
3 stated in the development contract and certified by the private developer as
4 being a good-faith projection of its total costs for designing and constructing
5 the improvements required by the development contract. The payment bond
6 shall be executed by one or more surety companies legally authorized to do
7 business in the State of North Carolina and shall become effective upon the
8 awarding of the development contract. The development contract may
9 provide for the requirement of a performance bond.

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

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

29 b. The notice required by sub-subdivision a. of this subdivision shall be
30 served by certified mail or by signature confirmation as provided by
31 the United States Postal Service, postage prepaid, in an envelope
32 addressed to the private developer at any place where that private
33 developer's office is regularly maintained for the transaction of
34 business or in any manner provided by law for the service of
35 summons. The claimants' service of a claim of lien on real property
36 or a claim of lien on funds as funds as allowed by Article 2 of
37 Chapter 44A of the General Statutes on the private developer shall be
38 deemed, nonexclusively, as adequate notice under this section.

39 (3) Every action on a payment bond as provided in this subsection shall be
40 brought in a court of appropriate jurisdiction in a county where the
41 development contract or any part thereof is to be or has been performed.
42 Except as provided in G.S. 44A-16(c), no action on a payment bond shall be
43 commenced after one year from the day on which the last of the labor was
44 performed or material was furnished by the claimant.

45 (4) No surety shall be liable under a payment bond for a total amount greater
46 than the face amount of the payment bond. A judgment against any surety
47 may be reduced or set aside upon motion by the surety and a showing that
48 the total amount of claims paid and judgments previously rendered under the
49 payment bond, together with the amount of the judgment to be reduced or set
50 aside, exceeds the face amount of the bond.

- 1 (5) No act of or agreement between the governmental entity, a private
2 developer, or a surety shall reduce the period of time for giving notice under
3 sub-subdivision (2)a. of this subsection or commencing action under
4 subdivision (3) of this subsection or otherwise reduce or limit the liability of
5 the private developer or surety as prescribed in this subsection. Every bond
6 given by a private developer pursuant to this subsection shall be
7 conclusively presumed to have been given in accordance with the provisions
8 of this subsection, whether or not the bond is drawn as to conform to this
9 subsection. The provisions of this subsection shall be conclusively presumed
10 to have been written into every bond given pursuant to this subsection.
- 11 (6) Any person entitled to bring an action or any defendant in an action on a
12 payment bond shall have a right to require the governmental entity or the
13 private developer to certify and furnish a copy of the payment bond, the
14 development contract, and any construction contracts covered by the bond. It
15 shall be the duty of the private developer or the governmental entity to give
16 any such person a certified copy of the payment bond and the construction
17 contract upon not less than 10 days' notice and request. The governmental
18 entity or private developer may require a reasonable payment for the actual
19 cost of furnishing the certified copy. A copy of any payment bond,
20 development contract, and any construction contracts covered by the bond
21 certified by the governmental entity or private developer shall constitute
22 prima facie evidence of the contents, execution, and delivery of the bond,
23 development contract, and construction contracts.
- 24 (7) A payment bond form containing the following provisions shall comply with
25 this subsection:
- 26 a. The date the bond is executed.
27 b. The name of the principal.
28 c. The name of the surety.
29 d. The governmental entity.
30 e. The development contract number.
31 f. All of the following:
- 32 1. "KNOW ALL MEN BY THESE PRESENTS, That we, the
33 PRINCIPAL and SURETY above named, are held and firmly
34 bound unto the above named [governmental entity],
35 hereinafter called [governmental entity], in the penal sum of
36 the amount stated above, for the payment of which sum well
37 and truly to be made, we bind ourselves, our heirs, executors,
38 administrators, and successors, jointly and severally, firmly
39 by these presents."
- 40 2. "THE CONDITION OF THIS OBLIGATION IS SUCH, that
41 whereas the Principal entered into a certain development
42 contract with [governmental entity], numbered as shown
43 above and hereto attached."
- 44 3. "NOW THEREFORE, if the Principal shall promptly make
45 payment to all persons supplying labor and material in the
46 prosecution of the construction or design work provided for
47 in the development contract, and any and all duly authorized
48 modifications of the contract that may hereafter be made,
49 notice of which modifications to the surety being hereby
50 waived, then this obligation to be void; otherwise to remain in
51 full force and virtue."

- 1 (4) Statement of availability to undertake the public-private project and
2 projected time line for project completion.
- 3 (5) Any other information required by the governmental entity.
- 4 (i) Based upon the qualifications package submitted by the private developers and any
5 other information required by the governmental entity, the governmental entity may select one
6 or more private developers with whom to negotiate the terms and conditions of a contract to
7 perform the public-private project. The governmental entity shall advertise the terms of the
8 proposed contract to be entered into by the governmental entity in a newspaper having general
9 circulation within the county in which the governmental entity is located at least 30 days prior
10 to entering into the development contract. If the governmental entity is a public body under
11 Article 33C of this Chapter, the development contract shall be considered in an open meeting of
12 that public body following a public hearing on the proposed development contract. Notice of
13 the public hearing shall be published in the same notice as the advertisement of the terms under
14 this subsection.
- 15 (j) The governmental entity shall make available a summary of the development
16 contract terms which shall include a statement of how to obtain a copy of the complete
17 development contract.
- 18 (k) Leases entered into under this section are subject to approval as follows:
- 19 (1) If a capital lease or operating lease is entered into by a unit of local
20 government as defined in G.S. 159-7, that capital lease or operating lease is
21 subject to approval by the local government commission under Article 8 of
22 Chapter 159 of the General Statutes if it meets the standards set out in
23 G.S. 159-148(a)(1), 159-148(a)(2), and 159-148(a)(3), 159-148(a)(4) or
24 159-153. For purposes of determining whether the standards set out in
25 G.S.159-148(a)(3) have been met, only the five hundred thousand dollar
26 (\$500,000) threshold applies.
- 27 (2) If a capital lease is entered into by a State entity that constitutes a
28 State-supported financing arrangement and requires payments thereunder
29 that are payable, whether directly or indirectly, and whether or not subject to
30 the appropriation of funds for such payment, by payments from the General
31 Fund of the State or other funds and accounts of the State that are funded
32 from the general revenues and other taxes and fees of the State or State
33 entities, not including taxes and fees that are required to be deposited to the
34 Highway Fund or Highway Trust Fund, that capital lease shall be subject to
35 the approval procedures required for special indebtedness by G.S. 142-83
36 and G.S. 142-84. This requirement shall not apply to any arrangement where
37 bonds or other obligations are issued or incurred by a State entity to carry
38 out a financing program authorized by the General Assembly under which
39 such bonds or other obligations are payable from monies derived from
40 specified, limited, nontax sources, so long as the payments under that
41 arrangement by a State entity are limited to the sources authorized by the
42 General Assembly.
- 43 (l) A capital lease or operating lease entered into under this section may not contain
44 any provision with respect to the assignment of specific students or students from a specific
45 area to any specific school.
- 46 (m) This section shall not apply to any contract or other agreement between or among
47 The University of North Carolina or one of its constituent institutions, a private, nonprofit
48 corporation established under Part 2B of Article 1 of Chapter 116 of the General Statutes, or
49 any private foundation, private association, or private club created for the primary purpose of
50 financial support to The University of North Carolina or one of its constituent institutions."

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

1 **"§ 143-128.1. Construction management at risk contracts.**

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

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

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

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

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

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

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

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

1 **SECTION 6.** G.S. 44A-16 is amended by adding a new subsection to read:

2 "(c) For improvements performed in conjunction with a development contract under
3 G.S. 143-128.1C, a claim of lien on real property or a claim of lien on funds served on a private
4 developer may also be discharged by the private developer and the surety on a payment bond
5 issued under G.S. 143-128.1C(g)(1) in accordance with this subsection. The claim of lien may
6 be discharged by the private developer and surety jointly filing with the clerk of superior court
7 of the county where the project is located a copy of the payment bond together with an affidavit
8 executed by the surety stating that, as of the date of the filing of the payment bond with the
9 clerk of superior court, the amount of the penal sum of the payment bond minus any amounts
10 paid in good faith to other claimants on the project and minus the amount of all other claims of
11 lien on real property filed against the property improved by the project exceeds the amount
12 claimed by the lien claim being discharged by at least one hundred twenty-five percent (125%).
13 Notwithstanding any other contractual provision or law, where a claimant's lien claim has been
14 discharged under this subsection, the claimant shall have no less than one year from the date of
15 being served with the payment bond and affidavit to file suit on the payment bond."

16 **SECTION 7.** This act becomes effective October 1, 2013, and applies to projects
17 bid on or after that date and public-private development contracts entered into on or after that
18 date. This act expires on July 1, 2019.