

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013**

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

(Public)

Sponsors:

Referred to:

April 15, 2013

A BILL TO BE ENTITLED

1 AN ACT AUTHORIZING PUBLIC CONTRACTS TO UTILIZE THE DESIGN-BUILD
2 METHOD OR PUBLIC-PRIVATE PARTNERSHIP CONSTRUCTION CONTRACTS.

3
4 Whereas, the legislature recognizes that there is a public need for the design,
5 construction, improvement, renovation, and expansion of high-performing public buildings
6 within the State of North Carolina; and

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

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

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

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

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

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

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

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

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



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 nor licensing requirements of designers or contractors; Now,
4 therefore,

5 The General Assembly of North Carolina enacts:

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

7 "**§ 143-64.31. Declaration of public policy.**

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

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

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

- 34 (1) A detailed explanation of the reason why the particular construction manager
35 at ~~risk-risk, design-builder, or private developer~~ was selected.
- 36 (2) The terms of the contract with the construction manager at ~~risk-risk,~~
37 design-builder, or private developer.
- 38 (3) A list of all other firms considered but not selected as the construction
39 manager at ~~risk-risk, design-builder, or private developer,~~ and the amount of
40 their proposed fees for services.
- 41 (4) A report on the form of bidding utilized by the construction manager at ~~risk~~
42 risk, design-builder, or private developer on the project.
- 43 (5) A detailed explanation of why the particular delivery method was used in
44 lieu of the delivery methods identified in G.S. 143-128(a1) subdivisions (1)
45 through (3) and the anticipated benefits to the public entity from using the
46 particular delivery method.

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

49 (d) A public body letting a contract pursuant to any of the delivery methods identified
50 in subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128 shall submit the report
51 required by G.S. 143-64.31(b) no later than 12 months from the date the public body takes

1 beneficial occupancy of the project. In the event that the public body fails to do so, the public
2 body shall be prohibited from utilizing subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of
3 G.S. 143-128 until such time as the public body completes the reporting requirement under this
4 this section. Contracts entered into in violation of this prohibition shall not be deemed ultra
5 vires and shall remain valid and fully enforceable. Any person, corporation or entity, however,
6 which has submitted a bid or response to a request for proposals on any construction project
7 previously advertised by the public body shall be entitled to obtain an injunction against the
8 public body compelling the public body to comply with the reporting requirements of this
9 section and from commencing or continuing a project let in violation of this subdivision until
10 such time as the public body has complied with the reporting requirements of this section. The
11 plaintiff in such cases shall not be entitled to recover monetary damages caused by the public
12 body's failure to comply with this reporting requirements section, and neither the plaintiff nor
13 the defendant shall be allowed to recover attorneys fees except as otherwise allowed by
14 G.S. 1A-11 or G.S. 6-21.5. An action seeking the injunctive relief allowed by this subdivision
15 must be filed within four years from the date that the owner took beneficial occupancy of the
16 project for which the report remains due.

17 (e) For purposes of this Article, the definition in G.S. 143-128.1B and G.S. 143-128.1C
18 shall apply."

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

20 "**§ 143-64.32. Written exemption of particular contracts.**

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

23 (a) ~~Proposed of proposed~~ projects where an estimated professional fee is in an
24 amount less than ~~thirty thousand dollars (\$30,000), or fifty thousand dollars~~
25 (\$50,000).

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

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

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

33 (1) Separate-prime bidding.

34 (2) Single-prime bidding.

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

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

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

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

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

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

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

44 "**§ 143-128.1A. Design-build contracts.**

45 (a) Definitions for purposes of this section:

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

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

48 (b) A governmental entity shall establish in writing the criteria used for determining the
49 circumstances under which the design-build method is appropriate for a project, and such
50 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 qualifications 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 (c) of this section.
- 15 (6) The criteria utilized by the governmental entity, including a comparison of
16 the costs and benefits of using the design-build delivery method for a given
17 project in lieu of the delivery methods identified in subdivisions (1), (2), and
18 (4) of G.S. 143-128(a1).
- 19 (c) A governmental entity shall issue a public notice of the request for qualifications
20 that includes, at a minimum, general information on each of the following:
- 21 (1) The project site.
- 22 (2) The project scope.
- 23 (3) The anticipated project budget.
- 24 (4) The project schedule.
- 25 (5) The criteria to be considered for selection and the weighting of the
26 qualifications criteria.
- 27 (6) Notice of any rules, ordinances, or goals established by the governmental
28 entity, including goals for minority- and women-owned business
29 participation and small business participation.
- 30 (7) Other information provided by the owner to potential design-builders in
31 submitting qualifications for the project.
- 32 (8) A statement providing that each design-builder shall submit in its response
33 to the request for qualifications an explanation of its project team selection,
34 which shall consist of either of the following:
- 35 a. A list of the licensed contractors, licensed subcontractors, and
36 licensed design professionals whom the design-builder proposes to
37 use for the project's design and construction.
- 38 b. An outline of the strategy the design-builder plans to use for open
39 contractor and subcontractor selection based upon the provisions of
40 Article 8 of Chapter 143 of the General Statutes.
- 41 (d) Following evaluation of the qualifications of the design-builders, the three most
42 highly qualified design-builders shall be ranked. If after the solicitation for design-builders not
43 as many as three responses have been received from qualified design-builders, the
44 governmental entity shall again solicit for design-builders. If as a result of such second
45 solicitation not as many as three responses are received, the governmental entity may then
46 begin negotiations with the highest-ranked design-builder under G.S. 143-64.31 even though
47 fewer than three responses were received. If the governmental entity deems it appropriate, the
48 governmental entity may invite some or all responders to interview with the governmental
49 entity.
- 50 (e) The design-builder shall be selected in accordance with Article 3D of this Chapter.
51 Each design-builder shall certify to the governmental entity that each licensed design

1 professional who is a member of the design-build team, including subconsultants, was selected
2 based upon demonstrated competence and qualifications in the manner provided by
3 G.S. 143-64.31.

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

9 **"§ 143-128.1B. Design-build bridging contracts.**

10 (a) Definitions for purposes of this section:

11 (1) Design-build bridging. – A design and construction delivery process
12 whereby a governmental entity contracts for design criteria services under a
13 separate agreement from the construction phase services of the
14 design-builder.

15 (2) Design-builder. – An appropriately licensed person, corporation, or entity
16 that, under a single contract, offers to provide or provides design services
17 and general contracting services where services within the scope of the
18 practice of professional engineering or architecture are performed
19 respectively by a licensed engineer or licensed architect and where services
20 within the scope of the practice of general contracting are performed by a
21 licensed general contractor.

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

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

27 (5) First-tier subcontractor. – A subcontractor who contracts directly with the
28 design-builder, excluding design professionals.

29 (6) Governmental entity. – Every officer, board, department, commission, or
30 commissions charged with responsibility of preparation of specifications or
31 awarding or entering into contracts for the erection, construction, alteration,
32 or repair of any buildings for the State or for any county, municipality, or
33 other public body.

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

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

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

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

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

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

1 (6) The criteria utilized by the governmental entity, including a comparison of
2 the cost and benefit of using the design-build delivery method for a given
3 project in lieu of the delivery methods identified in subdivisions (1), (2), and
4 (4) of G.S. 143-128(a1).

5 (c) On or before entering into a contract for design-build services under this section, the
6 governmental entity shall select or designate a staff design professional, or a design
7 professional who is independent of the design-builder, to act as its design criteria design
8 professional as its representative for the procurement process and for the duration of the design
9 and construction. If the design professional is not a full-time employee of the governmental
10 entity, the governmental entity shall select the design professional on the basis of demonstrated
11 competence and qualifications as provided by G.S. 143-64.31. The design criteria design
12 professional shall develop design criteria in consultation with the governmental entity. The
13 design criteria design professional shall not be eligible to submit a response to the request for
14 proposals nor provide design input to a design-build response to the request for proposals. The
15 design criteria design professional shall prepare a design criteria package equal to thirty-five
16 percent (35%) of the completed design documentation for the entire construction project. The
17 design criteria package shall include all of the following:

- 18 (1) Programmatic needs, interior space requirements, intended space utilization,
19 and other capacity requirements.
- 20 (2) Information on the physical characteristics of the site, such as a topographic
21 survey.
- 22 (3) Material quality standards or performance criteria.
- 23 (4) Special material requirements.
- 24 (5) Provisions for utilities.
- 25 (6) Parking requirements.
- 26 (7) The type, size, and location of adjacent structures.
- 27 (8) Preliminary or conceptual drawings and specifications sufficient in detail to
28 allow the design-builder to make a proposal which is responsive to the
29 request for proposals.
- 30 (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.

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

- 33 (1) The project site.
- 34 (2) The project scope.
- 35 (3) The anticipated project budget.
- 36 (4) The project schedule.
- 37 (5) The criteria to be considered for selection and the weighting of the selection
38 criteria.
- 39 (6) Notice of any rules, ordinances, or goals established by the governmental
40 entity, including goals for minority- and women-owned business
41 participation and small business entities.
- 42 (7) The thirty-five percent (35%) design criteria package prepared by the design
43 criteria design professional.
- 44 (8) Other information provided by the owner to design-builders in submitting
45 responses to the request for proposals for the project.
- 46 (9) A statement providing that each design-builder shall submit in its request for
47 proposal response an explanation of its project team selection, which shall
48 consist of a list of the licensed contractor and licensed design professionals
49 whom the design-builder proposes to use for the project's design and
50 construction.

- 1 (10) A statement providing that each design-builder shall submit in its request for
2 proposal a sealed envelope with all of the following:
3 a. The design-builder's price for providing the general conditions of the
4 contract.
5 b. The design-builder's proposed fee for general construction services.
6 c. The design-builder's fee for design services.

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

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

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

27 **"§ 143-128.1C. Public-private partnership construction contracts.**

28 (a) Definitions for purposes of this section:

- 29 (1) Construction contract. – Any contract entered into between a private
30 developer and a contractor for the design, construction, reconstruction,
31 alteration, or repair of any building or other work or improvement required
32 for a private developer to satisfy its obligations under a development
33 contract.
34 (2) Contractor. – Any person who has entered into a construction contract with a
35 private developer under this section.
36 (3) Design-builder. – Defined in G.S. 143-128.1B.
37 (4) Development contract. – Any contract between a governmental entity and a
38 private developer under this section and, as part of the contract, the private
39 developer is required to provide at least fifty percent (50%) of the financing
40 for the total cost necessary to deliver the capital improvement project,
41 whether through lease or ownership, for the governmental entity.
42 (5) Governmental entity. – Defined in G.S. 143-128.1B.
43 (6) Labor or materials. – Includes all materials furnished or labor performed in
44 the performance of the work required by a construction contract whether or
45 not the labor or materials enter into or become a component part of the
46 improvement and shall include gas, power, light, heat, oil, gasoline,
47 telephone services, and rental of equipment or the reasonable value of the
48 use of equipment directly utilized in the performance of the work required
49 by a construction contract.
50 (7) Private developer. – Any person who has entered into a development
51 contract with a governmental entity under this section.

- 1 (8) Public-private project. – A capital improvement project undertaken for the
2 benefit of a governmental entity and a private developer pursuant to a
3 development contract that includes construction of a public facility or other
4 improvements, including paving, grading, utilities, infrastructure,
5 reconstruction, or repair, and may include both public and private facilities.
6 (9) State entity. – The State and every agency, authority, institution, board,
7 commission, bureau, council, department, division, officer, or employee of
8 the State. The term does not include a unit of local government as defined in
9 G.S. 159-7.
10 (10) State-supported financing arrangement. – Any installment financing
11 arrangement, lease-purchase arrangement, arrangement under which funds
12 are to be paid in the future based upon the availability of an asset or funds
13 for payment, or any similar arrangement in the nature of a financing, under
14 which a State entity agrees to make payments to acquire or obtain a capital
15 asset for the State entity or any other State entity for a term, including
16 renewal options, of greater than one year. Any arrangement that results in
17 the identification of a portion of a lease payment, installment payment, or
18 similar scheduled payment thereunder by a State entity as "interest" for
19 purposes of federal income taxation shall automatically be a State-supported
20 financing arrangement for purposes of this section.
21 (11) Subcontractor. – Any person who has contracted to furnish labor, services,
22 or materials to, or who has performed labor or services for, a contractor or
23 another subcontractor in connection with a development contract.

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

- 34 (1) The property interest of the governmental entity and all other participants in
35 the development of the project.
36 (2) The responsibilities of the governmental entity and all other participants in
37 the development of the project.
38 (3) The responsibilities of the governmental entity and all other participants with
39 respect to financing of the project.
40 (4) The responsibilities to put forth a good-faith effort to comply with
41 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business
42 entities.

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

- 45 (1) Construction of the entire public-private project.
46 (2) Reconstruction or repair of the public-private project or any part thereof
47 subsequent to construction of the project.
48 (3) Construction of any addition to the public-private project.
49 (4) Renovation of the public-private project or any part thereof.

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

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

6 (d) The development contract may also provide that the governmental entity and private
7 developer shall use the same contractor or contractors in constructing a portion of or the entire
8 public-private project. If the development contract provides that the governmental entity and
9 private developer shall use the same contractor, the development contract shall include
10 provisions deemed appropriate by the governmental entity to assure that the public facility or
11 facilities included in or added to the public-private project are constructed, reconstructed,
12 repaired, or renovated at a reasonable price and that the apparatus, supplies, materials, and
13 equipment purchased for the public facility or facilities included in the public-private project
14 are purchased at a reasonable price. For public-private partnerships using the design-build
15 project delivery method, the provisions of G.S. 143-128.1A shall apply.

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

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

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

23 (2) The governmental entity approves the private developer to perform the
24 work.

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

27 (1) A payment bond shall be required for any development contract as follows:
28 A payment bond in the amount of one hundred percent (100%) of the total
29 anticipated amount of the construction contracts to be entered into between
30 the private developer and the contractors to design or construct the
31 improvements required by the development contract. The payment bond
32 shall be conditioned upon the prompt payment for all labor or materials for
33 which the private developer or one or more of its contractors or those
34 contractors' subcontractors are liable. The payment bond shall be solely for
35 the protection of the persons furnishing materials or performing labor or
36 services for which the private developer or its contractors or subcontractors
37 are liable. The total anticipated amount of the construction contracts shall be
38 stated in the development contract and certified by the private developer as
39 being a good-faith projection of its total costs for designing and constructing
40 the improvements required by the development contract. The payment bond
41 shall be executed by one or more surety companies legally authorized to do
42 business in the State of North Carolina and shall become effective upon the
43 awarding of the development contract. The development contract may
44 provide for the requirement of a performance bond.

45 (2) Subject to the provisions of this subsection, any claimant who has performed
46 labor or furnished materials in the prosecution of the work required by any
47 contract for which a payment bond has been given pursuant to the provisions
48 of this subsection, and who has not been paid in full therefor before the
49 expiration of 90 days after the day on which the claimant performed the last
50 labor or furnished the last materials for which that claimant claims payment,
51 may bring an action on the payment bond in that claimant's own name to

1 recover any amount due to that claimant for the labor or materials and may
2 prosecute the action to final judgment and have execution on the judgment.

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

13 b. The notice required by sub-subdivision a. of this subdivision shall be
14 served by certified mail or by signature confirmation as provided by
15 the United States Postal Service, postage prepaid, in an envelope
16 addressed to the private developer at any place where that private
17 developer's office is regularly maintained for the transaction of
18 business or in any manner provided by law for the service of
19 summons. The claimants' service of a claim of lien on real property
20 or a claim of lien on funds as funds as allowed by Article 2 of
21 Chapter 44A of the General Statutes on the private developer shall be
22 deemed, nonexclusively, as adequate notice under this section.

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

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

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

45 (6) Any person entitled to bring an action or any defendant in an action on a
46 payment bond shall have a right to require the governmental entity or the
47 private developer to certify and furnish a copy of the payment bond, the
48 development contract, and any construction contracts covered by the bond. It
49 shall be the duty of the private developer or the governmental entity to give
50 any such person a certified copy of the payment bond and the construction
51 contract upon not less than 10 days' notice and request. The governmental

1 entity or private developer may require a reasonable payment for the actual
2 cost of furnishing the certified copy. A copy of any payment bond,
3 development contract, and any construction contracts covered by the bond
4 certified by the governmental entity or private developer shall constitute
5 prima facie evidence of the contents, execution, and delivery of the bond,
6 development contract, and construction contracts.

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

9 a. The date the bond is executed.

10 b. The name of the principal.

11 c. The name of the surety.

12 d. The governmental entity.

13 e. The development contract number.

14 f. All of the following:

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

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

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

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

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

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

7 (9) The obligations and lien rights set forth in Article 2 of Chapter 44A of the
8 General Statutes shall apply to a project awarded under this section to the
9 extent of any property interests held by the private developer in the project.
10 For purposes of applying the provisions of Article 2 of Chapter 44A of the
11 General Statutes, the private developer shall be deemed the owner to the
12 extent of that private developer's ownership interest. This subdivision shall
13 not be construed as making the provisions of Article 2 of Chapter 44A of the
14 General Statutes apply to governmental entities or public buildings to the
15 extent of any property interest held by the governmental entity in the
16 building.

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

25 (1) Evidence of financial stability. However, "trade secrets" as that term is
26 defined in G.S. 66-152(3) shall be exempt from disclosure under Chapter
27 132 of the General Statutes.

28 (2) Experience with similar projects.

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

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

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

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

48 (j) The governmental entity shall make available a summary of the development
49 contract terms which shall include a statement of how to obtain a copy of the complete
50 development contract.

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

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

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

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

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

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

34 **"§ 143-128.1. Construction management at risk contracts.**

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

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

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

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

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

49 (b) The construction manager at risk shall be selected in accordance with Article 3D of
50 this Chapter. Design services for a project shall be performed by a licensed architect or
51 engineer. The public owner shall contract directly with the architect or engineer. The public

1 owner shall make a good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
2 recruit and select small business entities when selecting a construction manager at risk.

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

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

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

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

49 **SECTION 7.** G.S. 115C-521 is amended by adding a new subsection to read:

50 "(f) A local board of education may use prototype designs from the clearinghouse
51 established under subsection (e) of this section that is a previously approved and constructed

1 project by the School Planning Division of the State Board of Education, and other appropriate
2 review agencies. The local board of education may contract with the architect of record to make
3 changes and upgrades as necessary for regulatory approval.

4 (g) For prototype schools under this section, local boards of education shall be exempt
5 from the designer selection procedure in Article 3D of Chapter 143 of the General Statutes and
6 may enter into an agreement with the original design professional of the prototype to supply
7 design services for future construction of the prototype school."

8 **SECTION 8.(a)** There shall be established a Purchase and Contract Study
9 Committee to study the issue of prequalification on public nontransportation construction work
10 for both local and State government projects. The Committee may study any of the following:

- 11 (1) An analysis of existing prequalification requirements and consider whether
12 or not current State construction voluntary standards should be required for
13 all public projects.
- 14 (2) An analysis of whether and/or how prequalification standards may have
15 effectively disqualified licensed North Carolina general contractors who are
16 able to satisfy all applicable bonding requirements under Chapter 44A of the
17 North Carolina General Statutes.
- 18 (3) Development of one or more objective and nondiscriminatory systems for
19 prequalification to permit all appropriately licensed North Carolina general
20 contractors to have the opportunity to bid in open competition for public
21 construction projects in the State.
- 22 (4) Any other matter relevant to the implementation of House Bill 857, 2013
23 Regular Session.

24 **SECTION 8.(b)** Appointments to the committee established by subsection (a) of
25 this section shall be as follows:

- 26 (1) Two Senators, appointed by the President Pro Tempore of the Senate.
- 27 (2) Two Representatives, appointed by the Speaker of the House of
28 Representatives.
- 29 (3) Three licensed general contractors, appointed by the President Pro Tempore
30 of the Senate.
- 31 (4) One professional engineer, appointed by the Speaker of the House of
32 Representatives.
- 33 (5) One registered architect, appointed by the Speaker of the House of
34 Representatives.
- 35 (6) One person upon recommendation of the North Carolina League of
36 Municipalities, appointed by the Speaker of the House of Representatives.
- 37 (7) One person upon recommendation of the North Carolina County
38 Commissioners Association, appointed by the President Pro Tempore of the
39 Senate.
- 40 (8) A representative from the State Construction Office.

41 **SECTION 8.(c)** The Committee shall report its findings, together with any
42 recommendations, to the General Assembly on or before the convening of the 2014 Session of
43 the 2013 General Assembly.

44 **SECTION 9.** This act becomes effective 30 days after it becomes law and applies
45 to projects bid on or after that date and public-private development contracts entered into on or
46 after that date, and does not supersede any prior enacted local act of the General Assembly
47 enacted on or before July 1, 2013.