

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2019

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HOUSE BILL 869  
PROPOSED COMMITTEE SUBSTITUTE H869-PCS10613-ST-24

Short Title: Design-Build Clarifications.

(Public)

Sponsors:

Referred to:

April 22, 2019

1 A BILL TO BE ENTITLED  
2 AN ACT TO CLARIFY THE DESIGN BUILD AND DESIGN BUILD BRIDGING  
3 STATUTES.

4 The General Assembly of North Carolina enacts:

5 **SECTION 1.** G.S. 143-128.1A reads as rewritten:

6 "**§ 143-128.1A. Design-build contracts.**

7 (a) Definitions for purposes of this section:

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

9 (1g) Design professional. – As defined in G.S. 143-128.1B.

10 (1p) First-tier subcontractor. – As defined in G.S. 143-128.1B.

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

12 (3) Licensed contractor. – As defined in G.S. 143-128.1B.

13 (4) Licensed subcontractor. – A person or entity, not including design  
14 professionals or employees of the design-builder, that will be performing work  
15 under the design-builder and whose scope of work proposed for the project  
16 requires that it be licensed in accordance with Article 2 or Article 4 of Chapter  
17 87 of the General Statutes.

18 (5) Unlicensed subcontractor. – A person or entity, not including design  
19 professionals or employees of the design-builder, that will be performing work  
20 under the design-builder and whose scope of work proposed for the project  
21 does not require that it be licensed in accordance with Article 2 or Article 4 of  
22 Chapter 87 of the General Statutes.

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

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

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

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

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

34 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to  
35 recruit and select small business entities. The governmental entity shall not  
36 limit or otherwise preclude any respondent from submitting a response so long



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- 1 as the respondent, itself or through its proposed team, is properly licensed and  
2 qualified to perform the work defined by the public notice issued under  
3 subsection (c) of this section.
- 4 (6) The criteria utilized by the governmental entity, including a comparison of the  
5 advantages and disadvantages of using the design-build delivery method for a  
6 given project in lieu of the delivery methods identified in subdivisions (1), (2),  
7 and (4) of G.S. 143-128(a1).
- 8 (c) A governmental entity shall issue a public notice of the request for qualifications that  
9 includes, at a minimum, general information on each of the following:
- 10 (1) The project site.  
11 (2) The project scope.  
12 (3) The anticipated project budget.  
13 (4) The project schedule.  
14 (5) The criteria to be considered for selection and the weighting of the  
15 qualifications criteria.  
16 (6) Notice of any rules, ordinances, or goals established by the governmental  
17 entity, including goals for minority- and women-owned business participation  
18 and small business participation.  
19 (7) Other information provided by the owner to potential design-builders in  
20 submitting qualifications for the project.  
21 (8) A statement ~~providing directing~~ that each design-builder ~~shall to~~ submit in its  
22 response to the request for qualifications an explanation of its project team  
23 selection, which selection. The governmental entity may specify which of the  
24 following the statement is to include, or if not specified, the statement shall  
25 consist of either of the following:
- 26 a. A list of the licensed contractors, licensed subcontractors, and ~~licensed~~  
27 design professionals whom the design-builder proposes to use for the  
28 project's design and construction. If this option, the design-builder  
29 may self-perform some or all of the work with employees of the  
30 design-builder and, without bidding, also enter into negotiated  
31 subcontracts to perform some or all of the work with licensed  
32 subcontractors, including, but not exclusively with, those identified in  
33 the list. In submitting its list, the design-builder may, but is not  
34 required to, include one or more unlicensed subcontractors the  
35 design-builder proposes to use.
- 36 b. ~~An~~ A list of the licensed contractors and design professionals whom  
37 the design-builder proposes to use for the project's design and  
38 construction and an outline of the strategy the design-builder plans to  
39 use for open contractor and subcontractor selection based upon the  
40 provisions of Article 8 of Chapter 143 of the General Statutes. If this  
41 option, the design-builder may also self-perform some or all of the  
42 work with employees of the design-builder but shall not enter into  
43 negotiated contracts with first-tier subcontractors.
- 44 (d) Following evaluation of the qualifications of the design-builders, the three most  
45 highly qualified design-builders shall be ranked. If after the solicitation for design-builders not  
46 as many as three responses have been received from qualified design-builders, the governmental  
47 entity shall again solicit for design-builders. If as a result of such second solicitation not as many  
48 as three responses are received, the governmental entity may then begin negotiations with the  
49 highest-ranked design-builder under G.S. 143-64.31 even though fewer than three responses  
50 were received. If the governmental entity deems it appropriate, the governmental entity may  
51 invite some or all responders to interview with the governmental entity.

1 (e) The design-builder shall be selected in accordance with Article 3D of this Chapter.  
2 Each design-builder shall ~~certify~~ certify, in the response to the request for qualifications in  
3 subsection (c) of this section, to the governmental entity that each ~~licensed~~ design professional  
4 who is a member of the design-build team, including subconsultants, was selected based upon  
5 demonstrated competence and qualifications in the manner provided by G.S. 143-64.31.

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

11 **SECTION 2.** G.S. 143-128.1B reads as rewritten:

12 **"§ 143-128.1B. Design-build bridging contracts.**

13 (a) Definitions for purposes of this section:

14 (1a) Costs of the subcontractor work. – The sum total amount of all first-tier  
15 subcontract packages bid or proposed to be bid under subsection (f) of this  
16 section.

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

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

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

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

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

34 (5g) General conditions. – A specific list compiled by the government entity that  
35 identifies the tools, resources, and equipment not directly related to the actual  
36 construction activities, but that are required to complete the project and for  
37 which the design-builder is to be compensated. As examples, this term shall  
38 include: on-site construction office and storage trailers; electrical and other  
39 utility services during construction; on-site construction superintendent,  
40 construction supervisors, and clerical staff; trash collection; security; and  
41 other temporary measures. This term shall not include any of the following:

42 a. Construction work to be bid pursuant to subsection (f) of this section.

43 b. Design services of a design professional.

44 c. The cost of subcontractor work.

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

1           (7) Licensed contractor. – A person or entity whose scope of work proposed for  
2           the project requires that it be licensed in accordance with the provisions of  
3           Article 1 of Chapter 87 of the General Statutes.

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

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

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

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

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

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

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

25          **(b1) The governmental entity, as a criterion in subsection (b) of this section, shall not**  
26          **require the design-builder to provide the costs of the subcontractor work in the design criteria**  
27          **package. The design-builder may be required to disclose such cost after the contract has been**  
28          **executed.**

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

42          (1) Programmatic needs, interior space requirements, intended space utilization,  
43          and other capacity requirements.

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

46          (3) Material quality standards or performance criteria.

47          (4) Special material requirements.

48          (5) Provisions for utilities.

49          (6) Parking requirements.

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

- 1 (8) Preliminary or conceptual drawings and specifications sufficient in detail to  
 2 allow the design-builder to make a proposal which is responsive to the request  
 3 for proposals.
- 4 (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.
- 5 (10) The list of general conditions prepared by the governmental entity for which  
 6 the design-builder is to provide a fixed fee in accordance with sub-subdivision  
 7 (10)a. of subsection (d) of this section.
- 8 (11) The form of the contract to be entered into by the successful design-builder to  
 9 whom the project is awarded pursuant to subsection (e) of this section. The  
 10 form of the contract may, upon discretion of the governmental entity, allow  
 11 for multiple phases, termination for convenience and rights arising therefrom,  
 12 and the subsequent setting of guaranteed maximum prices.
- 13 (d) A governmental entity shall issue a public notice of the request for proposals that  
 14 includes, at a minimum, general information on each of the following:
- 15 (1) The project site.
- 16 (2) The project scope.
- 17 (3) The anticipated project budget.
- 18 (4) The project schedule.
- 19 (5) The criteria to be considered for selection and the weighting of the selection  
 20 criteria.
- 21 (6) Notice of any rules, ordinances, or goals established by the governmental  
 22 entity, including goals for minority- and women-owned business participation  
 23 and small business entities.
- 24 (7) The thirty-five percent (35%) design criteria package prepared by the design  
 25 criteria design professional.
- 26 (8) Other information provided by the owner to design-builders in submitting  
 27 responses to the request for proposals for the project.
- 28 (9) A statement providing that each design-builder shall submit in its request for  
 29 proposal response an explanation of its project team selection, which shall  
 30 consist of a list of the licensed contractor and ~~licensed~~ design professionals  
 31 whom the design-builder proposes to use for the project's design and  
 32 construction.
- 33 (10) A statement providing that each design-builder shall submit in ~~its request for~~  
 34 ~~proposal~~ a separate sealed envelope with all envelope, contemporaneously  
 35 with the response to the request for proposals, the design-builder's fixed fees,  
 36 excluding the costs of the subcontractor work, for designing and constructing  
 37 the project in accordance with requirements set forth the government entity's  
 38 criteria and the terms and conditions set forth in the form of the contract under  
 39 sub-subdivision (11) of subsection (c) of this section for each of the  
 40 following: following, listed separately by item:
- 41 a. ~~The design-builder's price for providing the general conditions of the~~  
 42 ~~contract identified in the request for proposal.~~
- 43 b. ~~The design-builder's proposed fee for general construction~~  
 44 ~~services.~~ services not otherwise provided for in this subdivision.
- 45 c. ~~The design-builder's fee for design services.~~ services necessary to  
 46 complete the project.
- 47 (e) Following evaluation of the qualifications of the design-builders, the governmental  
 48 entity shall rank the design-builders who have provided responses, grouping the top three without  
 49 ordinal ranking. If after the solicitation for design-builders not as many as three responses have  
 50 been received from qualified design-builders, the governmental entity shall again solicit for  
 51 design-builders. If as a result of such second solicitation not as many as three responses are

1 received, the governmental entity may then make its selection. From the grouping of the top three  
2 design-builders, the governmental entity shall select the design-builder who is the lowest  
3 responsive, responsible bidder based on the cumulative amount of fees provided in accordance  
4 with subdivision (d)(10) of this section and taking into consideration quality, performance, and  
5 the time specified in the proposals for the performance of the contract. Each design-builder shall  
6 certify to the governmental entity that each ~~licensed~~ design professional who is a member of the  
7 design-build team, including subconsultants, was selected based upon demonstrated competence  
8 and qualifications in the manner provided by G.S. 143-64.31.

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

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

16 **SECTION 3.** G.S. 143-129(e)(11) reads as rewritten:

17 "(11) Contracts by a public entity with any of the following:

- 18 a. ~~a~~A construction manager at risk executed pursuant to G.S. 143-128.1.  
19 b. A design-builder executed pursuant to G.S. 143-128.1A.  
20 c. A design-builder executed pursuant to G.S. 143-128.1B.  
21 d. A private developer executed pursuant to G.S. 143-128.1C."

22 **SECTION 4.** This act becomes effective October 1, 2019, and applies to contracts  
23 entered into, amended, or renewed on or after that date.