

# NORTH CAROLINA GENERAL ASSEMBLY



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## PURCHASE AND CONTRACT STUDY COMMITTEE

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### REPORT TO THE 2014 SESSION of the 2013 GENERAL ASSEMBLY OF NORTH CAROLINA

APRIL, 2014

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## TRANSMITTAL LETTER

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April 16, 2014

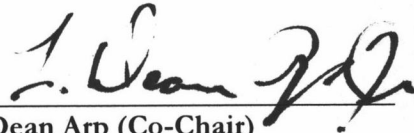
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TO THE MEMBERS OF THE 2014 REGULAR SESSION  
OF THE 2013 GENERAL ASSEMBLY

The PURCHASE AND CONTRACT STUDY COMMITTEE respectfully submits  
the following report to the 2014 Regular Session of the 2013 General Assembly.



Sen. Neal Hunt (Co-Chair)



Rep. Dean Arp (Co-Chair)

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## COMMITTEE PROCEEDINGS

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The Purchase and Contract Study Committee met three times after the 2013 Regular Session. The following is a brief summary of the Committee's proceedings. Detailed minutes and information from each Committee meeting are available in the Legislative Library.

### **January 15, 2014**

The Purchase and Contract Study Committee met on January 15, 2014, at 1:00 p.m. in Room 544 of the Legislative Office Building. Representative Dean Arp presided.

Chairman Arp recognized Co-Chairman Hunt for opening remarks. Chairman Hunt began by thanking everyone for attending and stated that he believes the purpose of this study committee is to study the use of prequalification with respect to construction manager at-risk construction contracts as they are awarded by public bodies. Senator Hunt further stated that the committee's assignment is to determine if the prequalification process and construction manager at-risk process is objective and consistent among all public bodies and if the committee finds improvements need to be made to these delivery methods it should make these recommendations to the legislature for consideration. Chairman Hunt ended his statements by thanking members for participating.

Chairman Arp stated that he would like to begin the meeting by giving an overview as to how he envisions the committee working, the process that the committee will follow, where we are, and where we are going.

Chairman Arp recognized Erika Churchill, Staff Attorney, to read the committee charge. Ms. Churchill stated that the committee has to report its findings together with any recommendations on or before the convening of the 2014 Session of the General Assembly, which is May 14, 2014, at 12:00 noon.

Ms. Churchill next gave an overview of the current law. Next, Ms. Lou Jurkowski, a Fellow American Institute of Architects, a Leed AP BD+C, a Sector Leader, EYP/BJAC, and former Chairwoman of the State Building Commission, gave an overview of the current State Construction prequalification process.

After discussion from the Committee, the meeting was adjourned.

### **February 18, 2014**

The Purchase and Contract Study Committee met on February 18, 2014, at 1:00 p.m. in Room 415 of the Legislative Office Building. Senator Neal Hunt presided.

Ms. Norma Houston, UNC School of Government gave an overview of local government construction contracting. Dave Simpson, NC Government Relations, Building Director, Carolinas Association of General Contractors (AGC), was then recognized for a presentation on prequalification for construction services.

Next, Joanne Brooks, Vice President and Counsel, Surety and Fidelity Association of America, gave a presentation on the fundamentals of surety bonding. Brad Gibson, Rutherford, A March & McLennan Agency, also presented on bonding.

David Crawford, Executive Vice President, North Carolina Chapter of The American Institute of Architects gave the final presentation on an issue related to House Bill 857.

Following Committee discussion, the meeting was adjourned.

#### **March 19, 2014**

The Purchase and Contract Study Committee met on March 19, 2014, at 1:00 p.m. in Room 544 of the Legislative Office Building. Senator Neal Hunt presided.

The Committee discussed draft legislation.

#### **April 16, 2014**

The Purchase and Contract Study Committee met on April 16, 2014, at 1:00 p.m. in Room 544 of the Legislative Office Building. Representative Arp presided.

The Committee approved its final report.



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## FINDINGS AND RECOMMENDATIONS

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The Committee finds that:

1. The existing statutory authorization for prequalification is broad and can be open to subjective interpretation.
2. After passage of the existing statutory authorization of prequalification, the State Construction Office engaged in a lengthy process to develop a prequalification process, which has been voluntarily used by State agencies for many different types of public building construction.
3. Use of the State Construction Office developed prequalification process is not mandatory for any State agency, county, city, or other unit of government.
4. The intent of public bidding is to award the contract to the lowest responsible qualified bidder, thereby using the revenues available to the public body to the best benefit of the State's citizens.

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## COMMITTEE MEMBERSHIP

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2013-2014

**President Pro Tempore of the Senate**  
**Appointments:**

Sen. Neal Hunt (Co-Chair)

Sen. Rick Gunn  
Hon. Paul Coble (Public Member)  
Mr. Marshall Gurley, Sr. (Public Member)  
Mr. Keith Harrod (Public Member)  
Mrs. Susan B. Lewis (Public Member)

**Speaker of the House of Representatives**  
**Appointments:**

Rep. Dean Arp (Co-Chair)

Rep. Mike Hager  
Mr. Louis T. Bailey (Public Member)  
Mr. Paul Davis Boney (Public Member)  
Mr. Gregory Driver (Public Member)  
Mr. Richard Rohrbaugh (Public Member)

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## COMMITTEE CHARGE/STATUTORY AUTHORITY

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The Committee was established by Section 8 of Session Law 2013-401.

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

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

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

- (1) Two Senators, appointed by the President Pro Tempore of the Senate.
- (2) Two Representatives, appointed by the Speaker of the House of Representatives.
- (3) Three licensed general contractors, appointed by the President Pro Tempore of the Senate.
- (4) One professional engineer, appointed by the Speaker of the House of Representatives.
- (5) One registered architect, appointed by the Speaker of the House of Representatives.
- (6) One person upon recommendation of the North Carolina League of Municipalities, appointed by the Speaker of the House of Representatives.
- (7) One person upon recommendation of the North Carolina County Commissioners Association, appointed by the President Pro Tempore of the Senate.
- (8) A representative from the State Construction Office.

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

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## LEGISLATIVE PROPOSAL

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GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2013

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BILL DRAFT 2013-STz-63 [v.13] (02/18)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
4/17/2014 11:05:36 AM

Short Title: Prequalification Update.

(Public)

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Sponsors: (Primary Sponsor).

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Referred to:

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- 1 A BILL TO BE ENTITLED  
2 AN ACT TO CLARIFY THE STATUTES RELATED TO THE USE OF  
3 PREQUALIFICATION IN PUBLIC CONSTRUCTION CONTRACTING, AS  
4 RECOMMENDED BY THE JOINT PURCHASE AND CONTRACT STUDY  
5 COMMITTEE.  
6 The General Assembly of North Carolina enacts:  
7 **SECTION 1.** G.S. 143-135.8 reads as rewritten:  
8 **"§ 143-135.8. Prequalification.**  
9 (a) Except as provided in this section, Biddersbidders may not be prequalified for  
10 any public-construction or repair work project.  
11 (b) A governmental entity may prequalify bidders for a particular construction or  
12 repair work project when all of the following apply:  
13 (1) The governmental entity is using one of the construction methods  
14 authorized in G.S. 143-128(a1)(1)-(3).  
15 (2) The board or governing body of the governmental entity adopts an  
16 objective prequalification policy applicable to all construction or repair  
17 work prior to the advertisement of the contract for which the  
18 governmental entity intends to prequalify bidders.  
19 (c) The objective prequalification policy adopted by a governmental entity  
20 pursuant to subsection (b)(3) of this section shall meet all of the following criteria:  
21 (1) Must be uniform, consistent, and transparent in its application to all  
22 bidders.  
23 (2) Must allow all bidders who meet the prequalification criteria to be  
24 prequalified to bid on the construction or repair work project.  
25 (3) Clearly state prequalification criteria, which must:

- 1 a. Be rationally related to construction or repair work;  
2 b. Include prequalification scoring values and minimum required  
3 score for prequalification;  
4 c. Not require that the bidder has previously been awarded a  
5 construction or repair project by the governmental entity; and  
6 d. Permit bidders to submit history or experience with projects of  
7 similar size, scope or complexity.  
8 (4) Clearly state the assessment process of the criteria to be used.  
9 (5) Establish a process for a denied bidder to protest to the governmental  
10 entity denial of prequalification, which process shall be completed  
11 prior to the opening of bids under G.S. 143-129(b) and which allows  
12 sufficient time for a bidder subsequently prequalified pursuant to a  
13 protest to submit a bid on the contract for which the bidder is  
14 subsequently prequalified.  
15 (6) Outline a process by which the basis for denial of prequalification will  
16 be communicated in writing, upon request, to a bidder who is denied  
17 prequalification.

18 (d) If the governmental entity opts to prequalify bidders, bids submitted by any  
19 bidder not prequalified shall be deemed non-responsive. This subsection shall not apply  
20 to bidders initially denied prequalification that are subsequently prequalified pursuant to  
21 a protest under the governmental entity's prequalification policy.

22 (e) Prequalification may not be used for the selection of any qualification based  
23 services under Article 3D of this Chapter, G.S. 143-128.1A, G.S. 143-128.1B,  
24 G.S. 143-128.1C, or the selection of the construction manager at risk under  
25 G.S. 143-128.1.

26 (f) For purposes of this section, the following definitions shall apply:

27 (1) Governmental entity – As defined in G.S. 143-128.1B(a)(6).

28 (2) Prequalification – A process of evaluating and determining whether  
29 potential bidders have the skill, judgment, integrity, sufficient financial  
30 resources, and ability necessary to the faithful performance of a  
31 contract for construction or repair work."

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

33 **"§ 143-128.1. Construction management at risk contracts.**

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

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

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

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

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

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

9 (c) The construction manager at risk shall contract directly with the public entity  
10 for all construction; shall publicly advertise as prescribed in G.S. 143-129; and shall  
11 prequalify and accept bids from first-tier subcontractors for all construction work under  
12 this section. The construction manager at risk shall use the prequalification criteria  
13 process shall be determined by the public entity and the construction manager at risk to  
14 address quality, performance, the time specified in the bids for performance of the  
15 contract, the cost of construction oversight, time for completion, capacity to perform,  
16 and other factors deemed appropriate by the public entity in accordance with  
17 G.S. 143-135.8. The public entity shall require the construction manager at risk to  
18 submit its plan for compliance with G.S. 143-128.2 for approval by the public entity  
19 prior to soliciting bids for the project's first-tier subcontractors. A construction manager  
20 at risk and first-tier subcontractors shall make a good faith effort to comply with  
21 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. A  
22 construction manager at risk may perform a portion of the work only if (i) bidding  
23 produces no responsible, responsive bidder for that portion of the work, the lowest  
24 responsible, responsive bidder will not execute a contract for the bid portion of the  
25 work, or the subcontractor defaults and a prequalified replacement cannot be obtained in  
26 a timely manner, and (ii) the public entity approves of the construction manager at risk's  
27 performance of the work. All bids shall be opened publicly, and once they are opened,  
28 shall be public records under Chapter 132 of the General Statutes. The construction  
29 manager at risk shall act as the fiduciary of the public entity in handling and opening  
30 bids. The construction manager at risk shall award the contract to the lowest  
31 responsible, responsive bidder, taking into consideration quality, performance, the time  
32 specified in the bids for performance of the contract, the cost of construction oversight,  
33 time for completion, compliance with G.S. 143-128.2, and other factors deemed  
34 appropriate by the public entity and advertised as part of the bid solicitation. The public  
35 entity may require the selection of a different first-tier subcontractor for any portion of  
36 the work, consistent with this section, provided that the construction manager at risk is  
37 compensated for any additional cost incurred.

38 When contracts are awarded pursuant to this section, the public entity shall provide  
39 for a dispute resolution procedure as provided in G.S. 143-128(f1).

40 (d) The construction manager at risk shall provide a performance and payment  
41 bond to the public entity in accordance with the provisions of Article 3 of Chapter 44A  
42 of the General Statutes.

43 (e) Construction management at risk services may be used by the public entity  
44 only after the public entity has concluded that construction management at risk services  
45 is in the best interest of the project, and the public entity has compared the cost and  
46 benefit of using the construction management at risk method for a given project in lieu

1 of the delivery methods identified in G.S. 143-128(a1) (1)-(3). The public entity may  
2 not delegate this determination."

3 **SECTION 3.** G.S. 143-64.31(b), (c), and (d) are recodified as  
4 G.S. 143-133.1.

5 **SECTION 4.** G.S. 143-64.31, as amended by Section 3 of this act, is  
6 amended to add a new subsection to read:

7 "(f) Except as provided in this subsection, no work product or design may be  
8 solicited, submitted, or considered as part of the selection process under this Article;  
9 and no costs or fees, other than unit price information, may be solicited, submitted, or  
10 considered as part of the selection process under this Article. Examples of prior  
11 completed work may be solicited, submitted and considered when determining  
12 demonstrated competence and qualification of professional services; and discussion of  
13 concepts or approaches to the project, including impact on project schedules, is  
14 encouraged."

15 **SECTION 5.** G.S. 143-133.1, as created by Section 3 of this act, reads as  
16 rewritten:

17 **"§ 143-133.1. Reporting.**

18 (a) ~~Public-Governmental~~ entities that contract with a construction manager at  
19 risk, design-builder, or private developer under a public-private partnership ~~under this~~  
20 ~~section~~ shall report to the Secretary of Administration the following information on all  
21 projects where a construction manager at risk, design-builder, or private developer  
22 under a public-private partnership is utilized:

- 23 (1) A detailed explanation of the reason why the particular construction  
24 manager at risk, design-builder, or private developer was selected.
- 25 (2) The terms of the contract with the construction manager at risk,  
26 design-builder, or private developer.
- 27 (3) A list of all other firms considered but not selected as the construction  
28 manager at risk, design-builder, or private developer, ~~and the amount~~  
29 ~~of their proposed fees for services developer.~~
- 30 (4) A report on the form of bidding utilized by the construction manager at  
31 risk, design-builder, or private developer on the project.
- 32 (5) A detailed explanation of why the particular delivery method was used  
33 in lieu of the delivery methods identified in G.S. 143-128(a1)  
34 subdivisions (1) through (3) and the anticipated benefits to the public  
35 entity from using the particular delivery method.

36 (b) The Secretary of Administration shall adopt rules to implement the provisions  
37 of this ~~subsection~~ section including the format and frequency of reporting.

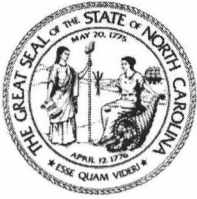
38 (c) A ~~public body~~ governmental entity letting a contract pursuant to any of the  
39 delivery methods identified in subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of  
40 G.S. 143-128 shall submit the report required by ~~G.S. 143-64.31(b)~~ this section no later  
41 than 12 months from the date the ~~public body~~ governmental entity takes beneficial  
42 occupancy of the project. In the event that the ~~public body~~ governmental entity fails to  
43 do so, the ~~public body~~ governmental entity shall be prohibited from utilizing  
44 subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128 until such time as the  
45 ~~public body~~ governmental entity completes the reporting requirement under this this  
46 section. Contracts entered into in violation of this prohibition shall not be deemed ultra



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

16 (d) For purposes of this section, the governmental entity shall have the same  
17 meaning as in G.S. 143-128.1B(a)(6)."

18 **SECTION 6.** This act becomes effective October 1, 2014, and applies to  
19 contracts awarded on or after that date.  
20



## Bill Draft 2013-STz-63: Prequalification Update.

2013-2014 General Assembly

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<b>Committee:</b>	<b>Date:</b>	April 14, 2014
<b>Introduced by:</b>	<b>Prepared by:</b>	Erika Churchill
<b>Analysis of:</b>		Kelly Quick
		Committee Staff

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**SUMMARY:** *The bill clarifies the statutes related to the use of prequalification in public construction contracting, as recommended by the Joint Purchase and Contract Study Committee.*

**CURRENT LAW:** With respect to public contracting, Article 8 of Chapter 143 sets out the current general law for public building contracts awarded by the State, any county, municipality, or other public body. G.S. 143-135.8, enacted in 1995, allows bidders to be prequalified for any public construction project. The State Construction Office has since developed a standard format of prequalification criteria and scoring of those criteria, which is optional for State agencies to use in their building construction.

### **BILL ANALYSIS:**

#### **Section 1**

Section 1 of the bill amends G.S. 143-135.8 to provide that bidders may not be prequalified for any public or private construction or repair work project except as provided by this statute.

The bill authorizes the State, or for any county, municipality, or other public body, when awarding contracts for the erection, construction, alteration, or repair of any building to prequalify bidders for a particular construction or repair work project when all of the following apply:

- The governmental entity is using separate-prime bidding, single-prime bidding, or dual bidding construction methods; and
- The governmental entity adopts an objective prequalification policy applicable to all construction or repair work.

The objective prequalification policy adopted by the governmental entity must meet all of the following criteria:

- Be uniform, consistent, and transparent in its application to all bidders;
- Allow all bidders who meet the prequalification criteria to be prequalified to bid on the construction or repair work project;
- Clearly state prequalification criteria, which must be rationally related to the construction and repair work, include scoring values and the minimum required score; not require that the bidder has previously been awarded a construction or repair project by that governmental entity; and permit bidders to submit related history or experience with similar projects;
- Clearly state the assessment process of the criteria to be used;

- Establish a process for a denied bidder to protest the governmental entity's denial of prequalification; and
- Outline a process by which the basis for denial of prequalification will be communicated in writing to a bidder who is denied prequalification.

If a governmental entity opts to prequalify bidders, bids submitted by any bidder who was not prequalified will be deemed non-responsive, except for those who were subsequently prequalified after protesting an initial denial.

Prequalification cannot be used for the selection of any qualification-based services under the following:

- Article 3D of Chapter 143 (public procurement of architectural, engineering, and surveying services);
- G.S. 143-128.1A (design-build contracts);
- G.S. 143-128.1B (design-build bridging contracts);
- G.S. 143-128.1C (public-private partnership construction contracts); and
- Construction manager at risk under G.S. 143-128.1.

## **Section 2**

Section 2 makes conforming changes to the prequalification of construction management at risk projects. The construction manager at risk must use the prequalification process determined by the public entity in accordance with G.S. 143-135.8. Additionally, the bill requires that construction management at risk can be used by a public entity only after the public entity has determined that construction management at risk services is in the best interest of the project, and the public entity has compared the cost and benefit of using the construction management at risk method in lieu of separate-prime bidding, single-prime bidding, or dual bidding construction methods.

## **Sections 3**

Section 3 clarifies that in the selection of qualification based services, the State, any county, municipality, or other public body may not solicit or consider work product or design, or costs or fees. Examples of prior completed work may be solicited and considered, as well as unit price information and discussion of concepts and approaches to the project.

## **Sections 4 and 5**

Sections 4 and 5 make conforming changes.

**EFFECTIVE DATE:** This act becomes effective October 1, 2014, and applies to contracts awarded on or after that date.

**BACKGROUND:** S.L. 2013-401 (HB 857) authorized three new methods of bidding for construction of public buildings: the design build method, the design build bridging method, and the Public Private Partnership method. The law also established a Purchase and Contract Study Committee to study the issue of prequalification on public non-transportation construction work for both local and State government projects.