

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, ~~Bidders~~bidders may not be prequalified for any  
10 public construction or repair work project.

11 (b) A governmental entity may prequalify bidders for a particular construction or repair  
12 work project when all of the following apply:

13 (1) The governmental entity is using one of the construction methods authorized  
14 in G.S. 143-128(a1)(1)-(3).

15 (2) The contract is subject to G.S. 143-129(a).

16 (3) The board or governing body of the governmental entity adopts a  
17 prequalification policy applicable to all construction or repair work prior to  
18 the advertisement of the contract for which the governmental entity intends  
19 to prequalify bidders.

20 (c) The prequalification policy adopted by a governmental entity pursuant to subsection  
21 (b)(3) of this section shall meet all of the following criteria:

22 (1) Must be uniform, consistent, and transparent in its application to all 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:

26 a. Be rationally related to construction or repair work;

27 b. Include prequalification scoring values and minimum required score  
28 for prequalification;

29 c. Not require that the bidder has previously been awarded a  
30 construction or repair project by the governmental entity; and

31 d. Permit bidders to submit history or experience with projects of  
32 similar size, scope or complexity.

33 (4) Clearly state the assessment process of the criteria to be used.

34 (5) Establish a process for a denied bidder to protest to the governmental entity  
35 denial of prequalification, which process shall be completed prior to the



opening of bids under G.S. 143-129(b) and which allows sufficient time for a bidder subsequently prequalified pursuant to a protest to submit a bid on the contract for which the bidder is subsequently prequalified.

(6) Outline a process by which the basis for denial of prequalification will be communicated in writing, upon request, to a bidder who is denied prequalification.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) The construction manager at risk shall contract directly with the public entity for all construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and accept bids from first-tier subcontractors for all construction work under this section. The construction manager at risk shall use the prequalification criteria process shall be determined by the public entity and the construction manager at risk to address quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the public entity in accordance with G.S. 143-135.8. The public entity shall require the construction manager at risk to submit its plan for compliance with G.S. 143-128.2 for approval by the public entity prior to soliciting bids for the project's first-tier subcontractors. A construction manager at risk and first-tier subcontractors shall make a good faith effort to comply with

1 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. A construction  
2 manager at risk may perform a portion of the work only if (i) bidding produces no responsible,  
3 responsive bidder for that portion of the work, the lowest responsible, responsive bidder will  
4 not execute a contract for the bid portion of the work, or the subcontractor defaults and a  
5 prequalified replacement cannot be obtained in a timely manner, and (ii) the public entity  
6 approves of the construction manager at risk's performance of the work. All bids shall be  
7 opened publicly, and once they are opened, shall be public records under Chapter 132 of the  
8 General Statutes. The construction manager at risk shall act as the fiduciary of the public entity  
9 in handling and opening bids. The construction manager at risk shall award the contract to the  
10 lowest responsible, responsive bidder, taking into consideration quality, performance, the time  
11 specified in the bids for performance of the contract, the cost of construction oversight, time for  
12 completion, compliance with G.S. 143-128.2, and other factors deemed appropriate by the  
13 public entity and advertised as part of the bid solicitation. The public entity may require the  
14 selection of a different first-tier subcontractor for any portion of the work, consistent with this  
15 section, provided that the construction manager at risk is compensated for any additional cost  
16 incurred.

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

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

22 (e) Construction management at risk services may be used by the public entity only  
23 after the public entity has concluded that construction management at risk services is in the best  
24 interest of the project, and the public entity has compared the cost and benefit of using the  
25 construction management at risk method for a given project in lieu of the delivery methods  
26 identified in G.S. 143-128(a1) (1)-(3). The public entity may not delegate this determination."

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

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

30 "(f) Except as provided in this subsection, no work product or design may be solicited,  
31 submitted, or considered as part of the selection process under this Article; and no costs or fees,  
32 other than unit price information, may be solicited, submitted, or considered as part of the  
33 selection process under this Article. Examples of prior completed work may be solicited,  
34 submitted and considered when determining demonstrated competence and qualification of  
35 professional services; and discussion of concepts or approaches to the project, including impact  
36 on project schedules, is encouraged."

37 **SECTION 5.** G.S. 143-133.1, as created by Section 3 of this act, reads as rewritten:  
38 **"§ 143-133.1. Reporting.**

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

- 44 (1) A detailed explanation of the reason why the particular construction manager  
45 at risk, design-builder, or private developer was selected.
- 46 (2) The terms of the contract with the construction manager at risk,  
47 design-builder, or private developer.
- 48 (3) A list of all other firms considered but not selected as the construction  
49 manager at risk, design-builder, or private ~~developer, and the amount of their~~  
50 ~~proposed fees for services.~~ developer.

- 1 (4) A report on the form of bidding utilized by the construction manager at risk,  
2 design-builder, or private developer on the project.
- 3 (5) A detailed explanation of why the particular delivery method was used in  
4 lieu of the delivery methods identified in G.S. 143-128(a1) subdivisions (1)  
5 through (3) and the anticipated benefits to the public entity from using the  
6 particular delivery method.
- 7 (b) The Secretary of Administration shall adopt rules to implement the provisions of  
8 this ~~subsection~~ section including the format and frequency of reporting.
- 9 (c) A ~~public body~~ governmental entity letting a contract pursuant to any of the delivery  
10 methods identified in subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128 shall  
11 submit the report required by ~~G.S. 143-64.31(b)~~ this section no later than 12 months from the  
12 date the ~~public body~~ governmental entity takes beneficial occupancy of the project. In the event  
13 that the ~~public body~~ governmental entity fails to do so, the ~~public body~~ governmental entity shall  
14 be prohibited from utilizing subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128  
15 until such time as the ~~public body~~ governmental entity completes the reporting requirement  
16 under this this section. Contracts entered into in violation of this prohibition shall not be  
17 deemed ultra vires and shall remain valid and fully enforceable. Any person, corporation or  
18 entity, however, which has submitted a bid or response to a request for proposals on any  
19 construction project previously advertised by the ~~public body~~ governmental entity shall be  
20 entitled to obtain an injunction against the ~~public body~~ governmental entity compelling the  
21 ~~public body~~ governmental entity to comply with the reporting requirements of this section and  
22 from commencing or continuing a project let in violation of this subdivision until such time as  
23 the ~~public body~~ governmental entity has complied with the reporting requirements of this  
24 section. The plaintiff in such cases shall not be entitled to recover monetary damages caused by  
25 the ~~public body's~~ governmental entity failure to comply with this reporting requirements section,  
26 and neither the plaintiff nor the defendant shall be allowed to recover attorneys fees except as  
27 otherwise allowed by G.S. 1A-11 or G.S. 6-21.5. An action seeking the injunctive relief  
28 allowed by this subdivision must be filed within four years from the date that the ~~owner~~  
29 governmental entity took beneficial occupancy of the project for which the report remains due.
- 30 (d) For purposes of this section, the governmental entity shall have the same meaning as  
31 in G.S. 143-128.1B(a)(6)."

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