

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

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HOUSE BILL 857
Committee Substitute Favorable 5/13/13
Committee Substitute #2 Favorable 5/15/13
Senate State and Local Government Committee Substitute Adopted 6/11/13
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Short Title: Public Contracts/Construction Methods/DB/P3.

(Public)

Sponsors:

Referred to:

April 15, 2013

A BILL TO BE ENTITLED

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

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

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

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

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

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

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

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

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

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

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



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1 Whereas, the legislation proposed in this act is not intended to affect the existing
2 statutes, regulations, or practices relevant to projects administered by the North Carolina
3 Department of Transportation 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 willfully fails to do so, the
2 public body shall be prohibited from utilizing subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8)
3 of G.S. 143-128 until such time as the public body completes the reporting requirement under
4 this section.

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

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

8 "**§ 143-64.32. Written exemption of particular contracts.**

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

11 (a) ~~Proposed of proposed~~ projects where an estimated professional fee is in an
12 amount less than ~~thirty thousand dollars (\$30,000), or fifty thousand dollars~~
13 (\$50,000).

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

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

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

21 (1) Separate-prime bidding.

22 (2) Single-prime bidding.

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

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

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

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

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

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

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

32 "**§ 143-128.1A. Design-build contracts.**

33 (a) Definitions for purposes of this section:

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

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

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

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

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

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

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

47 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
48 recruit and select small business entities. The governmental entity shall not
49 limit or otherwise preclude any respondent from submitting a response so
50 long as the respondent, itself or through its proposed team, is properly

1 licensed and qualified to perform the work defined by the public notice
2 issued under subsection (c) of this section.

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

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

9 (1) The project site.

10 (2) The project scope.

11 (3) The anticipated project budget.

12 (4) The project schedule.

13 (5) The criteria to be considered for selection and the weighting of the
14 qualifications criteria.

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

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

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

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

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

29 (d) Following evaluation of the qualifications of the design-builders, the three most
30 highly qualified design-builders shall be ranked. If after the solicitation for design-builders not
31 as many as three responses have been received from qualified design-builders, the
32 governmental entity shall again solicit for design-builders. If as a result of such second
33 solicitation not as many as three responses are received, the governmental entity may then
34 begin negotiations with the highest-ranked design-builder under G.S. 143-64.31 even though
35 fewer than three responses were received. If the governmental entity deems it appropriate, the
36 governmental entity may invite some or all responders to interview with the governmental
37 entity.

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

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

48 **"§ 143-128.1B. Design-build bridging contracts.**

49 (a) Definitions for purposes of this section:

50 (1) Design-build bridging. – A design and construction delivery process
51 whereby a governmental entity contracts for design criteria services under a

- 1 separate agreement from the construction phase services of the
2 design-builder.
- 3 (2) Design-builder. – An appropriately licensed person, corporation, or entity
4 that, under a single contract, offers to provide or provides design services
5 and general contracting services where services within the scope of the
6 practice of professional engineering or architecture are performed
7 respectively by a licensed engineer or licensed architect and where services
8 within the scope of the practice of general contracting are performed by a
9 licensed general contractor.
- 10 (3) Design criteria. – The requirements for a public project expressed in
11 drawings and specifications sufficient to allow the design-builder to make a
12 responsive bid proposal.
- 13 (4) Design professional. – Any professional licensed under Chapters 83A, 89A,
14 or 89C of the General Statutes.
- 15 (5) First-tier subcontractor. – A subcontractor who contracts directly with the
16 design-builder, excluding design professionals.
- 17 (6) Governmental entity. – Every officer, board, department, commission, or
18 commissions charged with responsibility of preparation of specifications or
19 awarding or entering into contracts for the erection, construction, alteration,
20 or repair of any buildings for the State or for any county, municipality, or
21 other public body.
- 22 (b) A governmental entity shall establish in writing the criteria used for determining the
23 circumstances under which engaging a design criteria design professional is appropriate for a
24 project, and such criteria shall, at a minimum, address all of the following:
- 25 (1) The extent to which the governmental entity can adequately and thoroughly
26 define the project requirements prior to the issuance of the request for
27 proposals for a design-builder.
- 28 (2) The time constraints for the delivery of the project.
- 29 (3) The ability to ensure that a quality project can be delivered.
- 30 (4) The capability of the governmental entity to manage and oversee the project,
31 including the availability of experienced staff or outside consultants who are
32 experienced with the design-build method of project delivery.
- 33 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
34 recruit and select small business entities. The governmental entity shall not
35 limit or otherwise preclude any respondent from submitting a response so
36 long as the respondent, itself or through its proposed team, is properly
37 licensed and qualified to perform the work defined by the public notice
38 issued under subsection (d) of this section.
- 39 (6) The criteria utilized by the governmental entity, including a comparison of
40 the cost and benefit of using the design-build delivery method for a given
41 project in lieu of the delivery methods identified in subdivisions (1), (2), and
42 (4) of G.S. 143-128(a1).
- 43 (c) On or before entering into a contract for design-build services under this section, the
44 governmental entity shall select or designate a staff design professional, or a design
45 professional who is independent of the design-builder, to act as its design criteria design
46 professional as its representative for the procurement process and for the duration of the design
47 and construction. If the design professional is not a full-time employee of the governmental
48 entity, the governmental entity shall select the design professional on the basis of demonstrated
49 competence and qualifications as provided by G.S. 143-64.31. The design criteria design
50 professional shall develop design criteria in consultation with the governmental entity. The
51 design criteria design professional shall not be eligible to submit a response to the request for

1 proposals nor provide design input to a design-build response to the request for proposals. The
2 design criteria design professional shall prepare a design criteria package equal to thirty-five
3 percent (35%) of the completed design documentation for the entire construction project. The
4 design criteria package shall include all of the following:

- 5 (1) Programmatic needs, interior space requirements, intended space utilization,
6 and other capacity requirements.
- 7 (2) Information on the physical characteristics of the site, such as a topographic
8 survey.
- 9 (3) Material quality standards or performance criteria.
- 10 (4) Special material requirements.
- 11 (5) Provisions for utilities.
- 12 (6) Parking requirements.
- 13 (7) The type, size, and location of adjacent structures.
- 14 (8) Preliminary or conceptual drawings and specifications sufficient in detail to
15 allow the design-builder to make a proposal which is responsive to the
16 request for proposals.
- 17 (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.

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

- 20 (1) The project site.
- 21 (2) The project scope.
- 22 (3) The anticipated project budget.
- 23 (4) The project schedule.
- 24 (5) The criteria to be considered for selection and the weighting of the selection
25 criteria.
- 26 (6) Notice of any rules, ordinances, or goals established by the governmental
27 entity, including goals for minority- and women-owned business
28 participation and small business entities.
- 29 (7) The thirty-five percent (35%) design criteria package prepared by the design
30 criteria design professional.
- 31 (8) Other information provided by the owner to design-builders in submitting
32 responses to the request for proposals for the project.
- 33 (9) A statement providing that each design-builder shall submit in its request for
34 proposal response an explanation of its project team selection, which shall
35 consist of a list of the licensed contractor and licensed design professionals
36 whom the design-builder proposes to use for the project's design and
37 construction.
- 38 (10) A statement providing that each design-builder shall submit in its request for
39 proposal a sealed envelope with all of the following:
 - 40 a. The design-builder's price for providing the general conditions of the
41 contract.
 - 42 b. The design-builder's proposed fee for general construction services.
 - 43 c. The design-builder's fee for design services.

44 (e) Following evaluation of the qualifications of the design-builders, the governmental
45 entity shall rank the design-builders who have provided responses, grouping the top three
46 without ordinal ranking. If after the solicitation for design-builders not as many as three
47 responses have been received from qualified design-builders, the governmental entity shall
48 again solicit for design-builders. If as a result of such second solicitation not as many as three
49 responses are received, the governmental entity may then make its selection. From the grouping
50 of the top three design-builders, the governmental entity shall select the design-builder who is
51 the lowest responsive, responsible bidder based on the cumulative amount of fees provided in

1 accordance with subdivision (d)(10) of this section and taking into consideration quality,
2 performance, and the time specified in the proposals for the performance of the contract. Each
3 design-builder shall certify 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 accept bids based upon the provisions of this Article from
7 first-tier subcontractors for all construction work under this section.

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

13 **"§ 143-128.1C. Public-private partnership construction contracts.**

14 (a) Definitions for purposes of this section:

15 (1) Construction contract. – Any contract entered into between a private
16 developer and a contractor for the design, construction, reconstruction,
17 alteration, or repair of any building or other work or improvement required
18 for a private developer to satisfy its obligations under a development
19 contract.

20 (2) Contractor. – Any person who has entered into a construction contract with a
21 private developer under this section.

22 (3) Design-builder. – Defined in G.S. 143-128.1B.

23 (4) Development contract. – Any contract between a governmental entity and a
24 private developer under this section and, as part of the contract, the private
25 developer is required to provide at least fifty percent (50%) of the financing
26 for the total cost necessary to deliver the capital improvement project,
27 whether through lease or ownership, for the governmental entity.

28 (5) Governmental entity. – Defined in G.S. 143-128.1B.

29 (6) Labor or materials. – Includes all materials furnished or labor performed in
30 the performance of the work required by a construction contract whether or
31 not the labor or materials enter into or become a component part of the
32 improvement and shall include gas, power, light, heat, oil, gasoline,
33 telephone services, and rental of equipment or the reasonable value of the
34 use of equipment directly utilized in the performance of the work required
35 by a construction contract.

36 (7) Private developer. – Any person who has entered into a development
37 contract with a governmental entity under this section.

38 (8) Public-private project. – A capital improvement project undertaken for the
39 benefit of a governmental entity and a private developer pursuant to a
40 development contract that includes construction of a public facility or other
41 improvements, including paving, grading, utilities, infrastructure,
42 reconstruction, or repair, and may include both public and private facilities.

43 (9) State entity. – The State and every agency, authority, institution, board,
44 commission, bureau, council, department, division, officer, or employee of
45 the State. The term does not include a unit of local government as defined in
46 G.S. 159-7.

47 (10) State-supported financing arrangement. – Any installment financing
48 arrangement, lease-purchase arrangement, arrangement under which funds
49 are to be paid in the future based upon the availability of an asset or funds
50 for payment, or any similar arrangement in the nature of a financing, under
51 which a State entity agrees to make payments to acquire or obtain a capital

1 asset for the State entity or any other State entity for a term, including
2 renewal options, of greater than one year. Any arrangement that results in
3 the identification of a portion of a lease payment, installment payment, or
4 similar scheduled payment thereunder by a State entity as "interest" for
5 purposes of federal income taxation shall automatically be a State-supported
6 financing arrangement for purposes of this section.

7 (11) Subcontractor. – Any person who has contracted to furnish labor, services,
8 or materials to, or who has performed labor or services for, a contractor or
9 another subcontractor in connection with a development contract.

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

20 (1) The property interest of the governmental entity and all other participants in
21 the development of the project.

22 (2) The responsibilities of the governmental entity and all other participants in
23 the development of the project.

24 (3) The responsibilities of the governmental entity and all other participants with
25 respect to financing of the project.

26 (4) The responsibilities to put forth a good-faith effort to comply with
27 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business
28 entities.

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

31 (1) Construction of the entire public-private project.

32 (2) Reconstruction or repair of the public-private project or any part thereof
33 subsequent to construction of the project.

34 (3) Construction of any addition to the public-private project.

35 (4) Renovation of the public-private project or any part thereof.

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

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

41 (d) The development contract may also provide that the governmental entity and private
42 developer shall use the same contractor or contractors in constructing a portion of or the entire
43 public-private project. If the development contract provides that the governmental entity and
44 private developer shall use the same contractor, the development contract shall include
45 provisions deemed appropriate by the governmental entity to assure that the public facility or
46 facilities included in or added to the public-private project are constructed, reconstructed,
47 repaired, or renovated at a reasonable price and that the apparatus, supplies, materials, and
48 equipment purchased for the public facility or facilities included in the public-private project
49 are purchased at a reasonable price. For public-private partnerships using the design-build
50 project delivery method, the provisions of G.S. 143-128.1A shall apply.

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

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

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

8 (2) The governmental entity approves the private developer to perform the
9 work.

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

12 (1) A payment bond shall be required for any development contract as follows:
13 A payment bond in the amount of one hundred percent (100%) of the total
14 anticipated amount of the construction contracts to be entered into between
15 the private developer and the contractors to design or construct the
16 improvements required by the development contract. The payment bond
17 shall be conditioned upon the prompt payment for all labor or materials for
18 which the private developer or one or more of its contractors or those
19 contractors' subcontractors are liable. The payment bond shall be solely for
20 the protection of the persons furnishing materials or performing labor or
21 services for which the private developer or its contractors or subcontractors
22 are liable. The total anticipated amount of the construction contracts shall be
23 stated in the development contract and certified by the private developer as
24 being a good-faith projection of its total costs for designing and constructing
25 the improvements required by the development contract. The payment bond
26 shall be executed by one or more surety companies legally authorized to do
27 business in the State of North Carolina and shall become effective upon the
28 awarding of the development contract. The development contract may
29 provide for the requirement of a performance bond.

30 (2) Subject to the provisions of this subsection, any claimant who has performed
31 labor or furnished materials in the prosecution of the work required by any
32 contract for which a payment bond has been given pursuant to the provisions
33 of this subsection, and who has not been paid in full therefor before the
34 expiration of 90 days after the day on which the claimant performed the last
35 labor or furnished the last materials for which that claimant claims payment,
36 may bring an action on the payment bond in that claimant's own name to
37 recover any amount due to that claimant for the labor or materials and may
38 prosecute the action to final judgment and have execution on the judgment.

39 a. Any claimant who has a direct contractual relationship with any
40 contractor or any subcontractor but has no contractual relationship,
41 express or implied, with the private developer may bring an action on
42 the payment bond only if that claimant has given written notice of
43 claim on the payment bond to the private developer within 120 days
44 from the date on which the claimant performed the last of the labor
45 or furnished the last of the materials for which that claimant claims
46 payment, in which that claimant states with substantial accuracy the
47 amount claimed and the name of the person for whom the work was
48 performed or to whom the material was furnished.

49 b. The notice required by sub-subdivision a. of this subdivision shall be
50 served by certified mail or by signature confirmation as provided by
51 the United States Postal Service, postage prepaid, in an envelope

1 addressed to the private developer at any place where that private
2 developer's office is regularly maintained for the transaction of
3 business or in any manner provided by law for the service of
4 summons. The claimants' service of a claim of lien on real property
5 or a claim of lien on funds as funds as allowed by Article 2 of
6 Chapter 44A of the General Statutes on the private developer shall be
7 deemed, nonexclusively, as adequate notice under this section.

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

14 (4) No surety shall be liable under a payment bond for a total amount greater
15 than the face amount of the payment bond. A judgment against any surety
16 may be reduced or set aside upon motion by the surety and a showing that
17 the total amount of claims paid and judgments previously rendered under the
18 payment bond, together with the amount of the judgment to be reduced or set
19 aside, exceeds the face amount of the bond.

20 (5) No act of or agreement between the governmental entity, a private
21 developer, or a surety shall reduce the period of time for giving notice under
22 sub-subdivision (2)a. of this subsection or commencing action under
23 subdivision (3) of this subsection or otherwise reduce or limit the liability of
24 the private developer or surety as prescribed in this subsection. Every bond
25 given by a private developer pursuant to this subsection shall be
26 conclusively presumed to have been given in accordance with the provisions
27 of this subsection, whether or not the bond is drawn as to conform to this
28 subsection. The provisions of this subsection shall be conclusively presumed
29 to have been written into every bond given pursuant to this subsection.

30 (6) Any person entitled to bring an action or any defendant in an action on a
31 payment bond shall have a right to require the governmental entity or the
32 private developer to certify and furnish a copy of the payment bond, the
33 development contract, and any construction contracts covered by the bond. It
34 shall be the duty of the private developer or the governmental entity to give
35 any such person a certified copy of the payment bond and the construction
36 contract upon not less than 10 days' notice and request. The governmental
37 entity or private developer may require a reasonable payment for the actual
38 cost of furnishing the certified copy. A copy of any payment bond,
39 development contract, and any construction contracts covered by the bond
40 certified by the governmental entity or private developer shall constitute
41 prima facie evidence of the contents, execution, and delivery of the bond,
42 development contract, and construction contracts.

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

- 45 a. The date the bond is executed.
- 46 b. The name of the principal.
- 47 c. The name of the surety.
- 48 d. The governmental entity.
- 49 e. The development contract number.
- 50 f. All of the following:

- 1 1. "KNOW ALL MEN BY THESE PRESENTS, That we, the
2 PRINCIPAL and SURETY above named, are held and firmly
3 bound unto the above named [governmental entity],
4 hereinafter called [governmental entity], in the penal sum of
5 the amount stated above, for the payment of which sum well
6 and truly to be made, we bind ourselves, our heirs, executors,
7 administrators, and successors, jointly and severally, firmly
8 by these presents."
 - 9 2. "THE CONDITION OF THIS OBLIGATION IS SUCH, that
10 whereas the Principal entered into a certain development
11 contract with [governmental entity], numbered as shown
12 above and hereto attached."
 - 13 3. "NOW THEREFORE, if the Principal shall promptly make
14 payment to all persons supplying labor and material in the
15 prosecution of the construction or design work provided for
16 in the development contract, and any and all duly authorized
17 modifications of the contract that may hereafter be made,
18 notice of which modifications to the surety being hereby
19 waived, then this obligation to be void; otherwise to remain in
20 full force and virtue."
 - 21 4. "IN WITNESS WHEREOF, the above bounden parties have
22 executed this instrument under their several seals on the date
23 indicated above, the name and corporate seal of each
24 corporate party being hereto affixed and these presents duly
25 signed by its undersigned representative, pursuant to authority
26 of its governing body." Appropriate places for execution by
27 the surety and principal shall be provided.
- 28 (8) In any suit brought or defended under the provisions of this subsection, the
29 presiding judge may allow reasonable attorneys' fees to the attorney
30 representing the prevailing party. Attorneys' fees under this subdivision are
31 to be taxed as part of the court costs and shall be payable by the losing party
32 upon a finding that there was an unreasonable refusal by the losing party to
33 fully resolve the matter which constituted the basis of the suit or the basis of
34 the defense. For purposes of this subdivision, the term "prevailing party"
35 means a party plaintiff or third-party plaintiff who obtains a judgment of at
36 least fifty percent (50%) of the monetary amount sought in a claim or a party
37 defendant or third-party defendant against whom a claim is asserted which
38 results in a judgment of less than fifty percent (50%) of the amount sought in
39 the claim defended. Notwithstanding the provisions of this subdivision, if an
40 offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a
41 "prevailing party" is an offeree who obtains judgment in an amount more
42 favorable than the last offer or is an offeror against whom judgment is
43 rendered in an amount less favorable than the last offer.
- 44 (9) The obligations and lien rights set forth in Article 2 of Chapter 44A of the
45 General Statutes shall apply to a project awarded under this section to the
46 extent of any property interests held by the private developer in the project.
47 For purposes of applying the provisions of Article 2 of Chapter 44A of the
48 General Statutes, the private developer shall be deemed the owner to the
49 extent of that private developer's ownership interest. This subdivision shall
50 not be construed as making the provisions of Article 2 of Chapter 44A of the
51 General Statutes apply to governmental entities or public buildings to the

1 extent of any property interest held by the governmental entity in the
2 building.

3 (h) The governmental entity shall determine its programming requirements for facilities
4 to be constructed under this section and shall determine the form in which private developers
5 may submit their qualifications. The governmental entity shall advertise a notice for interested
6 private developers to submit qualifications in a newspaper having general circulation within the
7 county in which the governmental entity is located. Prior to the submission of qualifications,
8 the governmental entity shall make available, in whatever form it deems appropriate, the
9 programming requirements for facilities included in the public-private project. Any private
10 developer submitting qualifications shall include the following:

11 (1) Evidence of financial stability. However, "trade secrets" as that term is
12 defined in G.S. 66-152(3) shall be exempt from disclosure under Chapter
13 132 of the General Statutes.

14 (2) Experience with similar projects.

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

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

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

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

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

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

38 (1) If a capital lease or operating lease is entered into by a unit of local
39 government as defined in G.S. 159-7, that capital lease or operating lease is
40 subject to approval by the local government commission under Article 8 of
41 Chapter 159 of the General Statutes if it meets the standards set out in
42 G.S. 159-148(a)(1), 159-148(a)(2), and 159-148(a)(3), 159-148(a)(4) or
43 159-153. For purposes of determining whether the standards set out in
44 G.S. 159-148(a)(3) have been met, only the five hundred thousand dollar
45 (\$500,000) threshold applies.

46 (2) If a capital lease is entered into by a State entity that constitutes a
47 State-supported financing arrangement and requires payments thereunder
48 that are payable, whether directly or indirectly, and whether or not subject to
49 the appropriation of funds for such payment, by payments from the General
50 Fund of the State or other funds and accounts of the State that are funded
51 from the general revenues and other taxes and fees of the State or State

1 entities, not including taxes and fees that are required to be deposited to the
2 Highway Fund or Highway Trust Fund, that capital lease shall be subject to
3 the approval procedures required for special indebtedness by G.S. 142-83
4 and G.S. 142-84. This requirement shall not apply to any arrangement where
5 bonds or other obligations are issued or incurred by a State entity to carry
6 out a financing program authorized by the General Assembly under which
7 such bonds or other obligations are payable from monies derived from
8 specified, limited, nontax sources, so long as the payments under that
9 arrangement by a State entity are limited to the sources authorized by the
10 General Assembly.

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

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

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

20 **"§ 143-128.1. Construction management at risk contracts.**

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

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

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

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

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

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

40 (c) The construction manager at risk shall contract directly with the public entity for all
41 construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and
42 accept bids from first-tier subcontractors for all construction work under this section. The
43 prequalification criteria shall be determined by the public entity and the construction manager
44 at risk to address quality, performance, the time specified in the bids for performance of the
45 contract, the cost of construction oversight, time for completion, capacity to perform, and other
46 factors deemed appropriate by the public entity. The public entity shall require the construction
47 manager at risk to submit its plan for compliance with G.S. 143-128.2 for approval by the
48 public entity prior to soliciting bids for the project's first-tier subcontractors. A construction
49 manager at risk and first-tier subcontractors shall make a good faith effort ~~to recruit and select~~
50 ~~minority businesses for participation in contracts pursuant to G.S. 143-128.2.~~ to comply with
51 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. A construction

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

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

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

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

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

36 "(f) A local board of education may use prototype designs from the clearinghouse
37 established under subsection (e) of this section that is a previously approved and constructed
38 project by the School Planning Division of the State Board of Education, and other appropriate
39 review agencies. The local board of education may contract with the architect of record to make
40 changes and upgrades as necessary for regulatory approval.

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

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

- 48 (1) An analysis of existing prequalification requirements and consider whether
49 or not current State construction voluntary standards should be required for
50 all public projects.

- 1 (2) An analysis of whether and/or how prequalification standards may have
2 effectively disqualified licensed North Carolina general contractors who are
3 able to satisfy all applicable bonding requirements under Chapter 44A of the
4 North Carolina General Statutes.
- 5 (3) Development of one or more objective and nondiscriminatory systems for
6 prequalification to permit all appropriately licensed North Carolina general
7 contractors to have the opportunity to bid in open competition for public
8 construction projects in the State.
- 9 (4) Any other matter relevant to the implementation of House Bill 857, 2013
10 Regular Session.

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

- 13 (1) Two Senators, appointed by the President Pro Tempore of the Senate.
14 (2) Two Representatives, appointed by the Speaker of the House of
15 Representatives.
16 (3) Three licensed general contractors, appointed by the President Pro Tempore
17 of the Senate.
18 (4) One professional engineer, appointed by the Speaker of the House of
19 Representatives.
20 (5) One registered architect, appointed by the Speaker of the House of
21 Representatives.
22 (6) One person upon recommendation of the North Carolina League of
23 Municipalities, appointed by the Speaker of the House of Representatives.
24 (7) One person upon recommendation of the North Carolina County
25 Commissioners Association, appointed by the President Pro Tempore of the
26 Senate.
27 (8) A representative from the State Construction Office.

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

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