

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

HOUSE BILL 1043
RATIFIED BILL

AN ACT TO CLARIFY THE STATUTES RELATED TO THE USE OF PREQUALIFICATION IN PUBLIC CONSTRUCTION CONTRACTING, AS STUDIED BY THE JOINT PURCHASE AND CONTRACT STUDY COMMITTEE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-135.8 reads as rewritten:

"§ 143-135.8. Prequalification.

(a) Except as provided in this section, Bidders~~bidders~~ may not be prequalified for any public construction or repair work project.

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

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

(2) The board or governing body of the governmental entity adopts an objective prequalification policy applicable to all construction or repair work prior to the advertisement of the contract for which the governmental entity intends to prequalify bidders.

(3) The governmental entity has adopted the assessment tool and criteria for that specific project, which must include the prequalification scoring values and minimum required score for prequalification on that project.

(c) The objective prequalification policy adopted by a governmental entity pursuant to subdivision (2) of subsection (b) of this section shall meet all of the following criteria:

(1) Must be uniform, consistent, and transparent in its application to all bidders.

(2) Must allow all bidders who meet the prequalification criteria to be prequalified to bid on the construction or repair work project.

(3) Clearly state the prequalification criteria, which must comply with all of the following:

a. Be rationally related to construction or repair work.

b. Not require that the bidder has previously been awarded a construction or repair project by the governmental entity.

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

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

(5) Establish a process for a denied bidder to protest to the governmental entity 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 nonresponsive. 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, provided that public entity and the construction manager at risk shall jointly develop the assessment tool and criteria for that specific project, which must include the prequalification scoring values and minimum required score for prequalification on that project.~~ 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 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. A construction manager at risk may perform a portion of the work only if (i) bidding produces no responsible, responsive bidder for that portion of the work, the lowest responsible, responsive bidder will not execute a contract for the bid portion of the work, or the subcontractor defaults and a prequalified replacement cannot be obtained in a timely manner, and (ii) the public entity approves of the construction manager at risk's performance of the work. All bids shall be opened publicly, and once they are opened, shall be public records under Chapter 132 of the General Statutes. The construction manager at risk shall act as the fiduciary of the public entity in handling and opening bids. The construction manager at risk shall award the contract to the lowest responsible, responsive bidder, taking into consideration quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, compliance with G.S. 143-128.2, and other factors deemed appropriate by the public entity and advertised as part of the bid solicitation. The public entity may require the selection of a different first-tier subcontractor for any portion of the work, consistent with this

section, provided that the construction manager at risk is compensated for any additional cost incurred.

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

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

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

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

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

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

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

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

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

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

(c) A ~~public-body~~ public-body governmental entity letting a contract pursuant to any of the delivery methods identified in subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128 shall submit the report required by ~~G.S. 143-64.31(b)~~ this section no later than 12 months from the date the ~~public-body~~ public-body governmental entity takes beneficial occupancy of the project. In the event that the ~~public-body~~ public-body governmental entity fails to do so, the ~~public-body~~ public-body governmental entity shall be prohibited from utilizing subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128 until such time as the ~~public-body~~ public-body governmental entity completes the reporting requirement under this this section. Contracts entered into in violation of this prohibition shall not be deemed ultra vires and shall remain valid and fully enforceable. Any person, corporation or entity, however, which has submitted a bid or response to a request for proposals on any construction project previously advertised by the ~~public-body~~ public-body governmental entity shall be entitled to obtain an injunction against the ~~public-body~~ public-body governmental entity compelling the ~~public-body~~ public-body governmental entity to comply with the reporting requirements of this section and

from commencing or continuing a project let in violation of this subdivision until such time as the ~~public body~~governmental entity has complied with the reporting requirements of this section. The plaintiff in such cases shall not be entitled to recover monetary damages caused by the ~~public body's~~governmental entity's failure to comply with this reporting requirements section, and neither the plaintiff nor the defendant shall be allowed to recover attorneys fees except as otherwise allowed by G.S. 1A-11 or G.S. 6-21.5. An action seeking the injunctive relief allowed by this subdivision must be filed within four years from the date that the ~~owner~~ governmental entity took beneficial occupancy of the project for which the report remains due.

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

SECTION 6. G.S. 143-128.1B(b)(6) reads as rewritten:

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

SECTION 7. G.S. 143-128.1A(b)(6) reads as rewritten:

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

SECTION 8.(a) There is established a Blue Ribbon Commission to Study the Building and Infrastructure Needs of the State (Commission).

SECTION 8.(b) The Commission shall be composed of 20 members as follows:

- (1) Seven members appointed by the Speaker of the House of Representatives, as follows:
 - a. Three members of the House of Representatives.
 - b. One person upon recommendation of the North Carolina League of Municipalities.
 - c. One member of the public, licensed as an architect in this State.
 - d. One member of the public, licensed as a professional engineer in this State.
 - e. One person upon recommendation of the North Carolina Chamber.
- (2) Seven members appointed by the President Pro Tempore of the Senate, as follows:
 - a. Three members of the Senate.
 - b. One person upon recommendation of the North Carolina County Commissioners Association.
 - c. One person upon recommendation of the North Carolina School Boards Association.
 - d. One member of the public, licensed as a general contractor in this State.
 - e. One member of the public, licensed as an attorney in this State, with experience in infrastructure financing or infrastructure bonds.
- (3) Six members appointed by the Governor, as follows:
 - a. The State Treasurer, or the Treasurer's designee.
 - b. The Secretary of Administration, or the Secretary's designee.
 - c. The President of The University of North Carolina, or the President's designee.
 - d. The President of the North Carolina System of Community Colleges, or the President's designee.
 - e. A member of the State Water Infrastructure Authority.
 - f. The Secretary of the Department of Commerce, or the Secretary's designee.

SECTION 8.(c) The Commission shall study the following matters related to building and infrastructure needs, including new repairs, renovations, expansion, and new construction, in North Carolina:

- (1) The anticipated building construction needs of State agencies, The University of North Carolina, and North Carolina System of Community Colleges until 2025.

- (2) The anticipated water and sewer infrastructure construction needs of counties and cities until 2025.
- (3) The anticipated building needs of the local school boards until 2025.
- (4) The anticipated costs of such building and infrastructure needs.
- (5) A process that would prioritize needs within each infrastructure category and among all categories, with an emphasis on developing criteria that focus on public safety and economic development.
- (6) The feasibility of establishing a building and infrastructure fund, which would be a dedicated source of revenue for capital funding for counties, cities, local school boards, The University of North Carolina, the North Carolina System of Community Colleges, and State agencies.
- (7) Funding options for meeting the anticipated capital needs until 2025.
- (8) Other matters the Commission deems relevant and related.

SECTION 8.(d) The Speaker of the House of Representatives shall designate one Representative as cochair, and the President Pro Tempore of the Senate shall designate one Senator as cochair. The Commission shall meet upon the call of the cochairs. A quorum of the Commission shall be 10 members. Any vacancy on the Commission shall be filled by the appointing authority.

SECTION 8.(e) Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, G.S. 138-5, or G.S. 138-6, as appropriate. The Commission, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.4. The Commission may meet upon the call of the cochairs. The Commission may meet in the Legislative Building or the Legislative Office Building. With approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to assist the Commission in its work. The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign clerical staff to the Commission, and the expenses relating to the clerical employees shall be borne by the Commission.

All State departments and agencies and local governments and their subdivisions shall furnish the Commission with any information in their possession or available to them.

SECTION 8.(f) The Commission may make an interim report of its findings and recommendations to the 2015 General Assembly and shall make a final report of its findings and recommendations to the 2016 Regular Session of the 2015 General Assembly. The Commission shall terminate on December 31, 2016, or upon the filing of its final report, whichever occurs first.

SECTION 10. Section 8 of this act is effective when it becomes law. The remainder of this act becomes effective October 1, 2014, and applies to contracts awarded on or after that date.

In the General Assembly read three times and ratified this the 26th day of June, 2014.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

Pat McCrory
Governor

Approved _____m. this _____ day of _____, 2014