

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013**

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HOUSE BILL 857

Short Title: Public Contracts/Construction Methods/DB/P3. (Public)

Sponsors: Representatives Arp, Bryan, Moffitt, and Hager (Primary Sponsors).
For a complete list of Sponsors, refer to the North Carolina General Assembly Web Site.

Referred to: Government.

April 15, 2013

A BILL TO BE ENTITLED

1
2 AN ACT PROVIDING THAT GOVERNMENTAL ENTITIES MAY USE THE
3 DESIGN-BUILD DELIVERY METHOD TO ERECT, CONSTRUCT, ALTER, OR
4 REPAIR PUBLIC BUILDINGS AND MAY ENTER INTO PUBLIC-PRIVATE
5 PARTNERSHIP CONSTRUCTION CONTRACTS.

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

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

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

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

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

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

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

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

31 Whereas, the legislature realizes that open competition delivers the best value for
32 tax payers and public owners; and

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



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; Now, therefore,
4 The General Assembly of North Carolina enacts:

5 **SECTION 1.** G.S. 143-64.31 reads as rewritten:

6 "**§ 143-64.31. Declaration of public policy.**

7 (a) It is the public policy of this State and all public subdivisions and Local
8 Governmental Units thereof, except in cases of special emergency involving the health and
9 safety of the people or their property, to announce all requirements for architectural,
10 engineering, ~~surveying and surveying~~, construction management at risk ~~services, services,~~
11 design-build services, and public-private partnership construction services to select firms
12 qualified to provide such services on the basis of demonstrated competence and qualification
13 for the type of professional services required without regard to fee other than unit price
14 information at this stage, and thereafter to negotiate a contract for those services at a fair and
15 reasonable fee with the best qualified firm. If a contract cannot be negotiated with the best
16 qualified firm, negotiations with that firm shall be terminated and initiated with the next best
17 qualified firm. Selection of a firm under this Article shall include the use of good faith efforts
18 by the public entity to notify minority firms of the opportunity to submit qualifications for
19 consideration by the public entity.

20 (a1) A resident firm providing architectural, engineering, surveying, ~~or~~ construction
21 management at risk ~~services~~ services, design-build services, or public-private partnership
22 construction services shall be granted a preference over a nonresident firm, in the same manner,
23 on the same basis, and to the extent that a preference is granted in awarding contracts for these
24 services by the other state to its resident firms over firms resident in the State of North
25 Carolina. For purposes of this section, a resident firm is a firm that has paid unemployment
26 taxes or income taxes in North Carolina and whose principal place of business is located in this
27 State.

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

- 33 (1) A detailed explanation of the reason why the particular construction manager
34 at ~~risk-risk, design-builder, or private developer~~ was selected.
- 35 (2) The terms of the contract with the construction manager at ~~risk-risk,~~
36 design-builder, or private developer.
- 37 (3) A list of all other firms considered but not selected as the construction
38 manager at ~~risk-risk, design-builder, or private developer~~, and the amount of
39 their proposed fees for services.
- 40 (4) A report on the form of bidding utilized by the construction manager at ~~risk~~
41 risk, design-builder, or private developer on the project.

42 The Secretary of Administration shall adopt rules to implement the provisions of this
43 subsection including the format and frequency of reporting."

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

45 "**§ 143-64.32. Written exemption of particular contracts.**

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

- 48 (a) ~~Proposed of proposed~~ projects where an estimated professional fee is in an
49 amount less than thirty thousand dollars (~~\$30,000~~), ~~or~~ (\$30,000).

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

4 **SECTION 3.** G.S. 143-128 reads as rewritten:

5 "**§ 143-128. Requirements for certain building contracts.**

6 ...

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

10 (1) Separate-prime bidding.

11 (2) Single-prime bidding.

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

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

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

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

16 (7) Public-private partnership construction contracts pursuant to
17 G.S. 143-128.1B.

18 "

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

21 "**§ 143-128.1A. Design-build contracts.**

22 (a) Definitions for purposes of this section and G.S. 143-64.31:

23 (1) Design-builder. – A partnership, corporation, joint venture, or other legal
24 entity that offers to provide or provides design and construction services
25 under a single contract.

26 (2) Governmental entity. – For purpose of this section, the term means the State
27 and all political subdivisions of the State, and all employees, officers,
28 boards, or commissions thereof authorized by law to award contracts for the
29 construction of public improvements.

30 (b) A governmental entity shall, at a minimum, use the following criteria for
31 determining the circumstances under which the design-build method is appropriate for a
32 project: (i) the extent to which the governmental entity can adequately and thoroughly define
33 the project requirements prior to the issuance of the request for qualifications for a
34 design-builder, (ii) the time constraints for the delivery of the project, (iii) the ability to ensure
35 that a quality project can be delivered, and (iv) the capability of the governmental entity to
36 manage and oversee the project, including the availability of experienced staff or outside
37 consultants who are experienced with the design-build method of project delivery. The
38 governmental entity shall make a finding as to the criteria provided in this subsection before
39 preparing a request for qualifications.

40 (c) A governmental entity shall issue, for the purpose of fair and open competition, a
41 public notice of the request for qualifications that includes, but is not limited to, general
42 information on (i) the project site, (ii) the project scope, (iii) the project budget, (iv) the project
43 schedule, (v) the criteria for selection and the weighting of the qualifications criteria, (vi)
44 notice of any rules, ordinances, or goals established by the governmental entity, including goals
45 for minority and women-owned business participation, and (vii) other information that may
46 assist potential design-builders in submitting qualifications for the project. The notice shall also
47 contain a statement providing that each design-builder shall submit in its response to the
48 request for qualifications an explanation of its project team selection, which shall consist of
49 either of the following: (i) a list of the licensed contractors, licensed subcontractors, and
50 licensed design professionals whom the design-builder proposes to use for the project's design

1 and construction or (ii) an outline of the strategy the design-builder plans to use for open
2 contractor and subcontractor selection based upon the provisions of Article 8 of Chapter 143 of
3 the General Statutes. The governmental entity shall, in advance of or contemporaneously with
4 issuing the public notice, provide the State Construction Office a copy of the public notice, and
5 the State Construction Office shall promptly make the public notice available on its Web site.

6 (d) The governmental entity shall endeavor to solicit a minimum of five respondents to
7 its request for qualifications and shall evaluate each responsive design-builder based upon
8 appropriate information submitted in response to the request for qualifications. If the
9 governmental entity deems it appropriate, the entity may invite some or all responders to
10 interview with the governmental entity. Each design-builder shall certify to the governmental
11 entity that each licensed design professional who is a member of the design-build team,
12 including subconsultants, was selected based upon demonstrated competence and qualifications
13 in the manner provided by G.S. 143-64.31.

14 (e) Following evaluation of the qualifications of the design-builders, the governmental
15 entity shall rank, based upon the published criteria, the three most highly qualified
16 design-builders in the order of best qualified first. The design-builder shall be selected in
17 accordance with Article 3D of this Chapter. The design-builder shall obtain written approval
18 from the governmental entity prior to changing key personnel after the contract has been
19 awarded.

20 (f) The design-builder shall provide a performance and payment bond to the
21 governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the
22 General Statutes.

23 **"§ 143-128.1B. Public-private partnership construction contracts.**

24 (a) Definitions for purposes of this section and G.S. 143-64.31:

- 25 (1) Construction contract. – Any contract entered into between a private
26 developer and a contractor for the design, construction, reconstruction,
27 alteration, or repair of any building or other work or improvement required
28 for a private developer to satisfy its obligations under a development
29 contract.
- 30 (2) Contractor. – Any person who has entered into a construction contract with a
31 private developer under this section.
- 32 (3) Design-builder. – Defined in G.S. 143-128.1A(a)(1).
- 33 (4) Development contract. – Any contract between a governmental entity and a
34 private developer under this section and, as part of the contract, the private
35 developer is required to provide at least fifty percent (50%) of the financing
36 necessary to construct the capital improvement project, whether through
37 lease or ownership, for the governmental entity.
- 38 (5) Governmental entity. – Defined in G.S. 143-128.1A(a)(2).
- 39 (6) Labor or materials. – Includes all materials furnished or labor performed in
40 the performance of the work required by a construction contract whether or
41 not the labor or materials enter into or become a component part of the
42 improvement, and shall include gas, power, light, heat, oil, gasoline,
43 telephone services, and rental of equipment or the reasonable value of the
44 use of equipment directly utilized in the performance of the work required
45 by a construction contract.
- 46 (7) Private developer. – Any person who has entered into a development
47 contract with a governmental entity under this section.
- 48 (8) Public-private project. – A capital improvement project undertaken by a
49 governmental entity and a private developer pursuant to a development
50 contract that includes construction of a public facility or other improvements

1 including paving, grading, utilities, infrastructure, reconstruction, or repair
2 and may include both public and private facilities.

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

6 (b) If the governmental entity in a regularly scheduled public meeting determines that it
7 has a critical need for a capital improvement project for which it lacks the financial resources to
8 procure, the governmental entity may acquire, construct, own, lease as lessor or lessee, and
9 operate or participate in the acquisition, construction, ownership, leasing, and operation of a
10 public-private project, or of specific facilities within such a project, including the making of
11 loans and grants from funds available to the governmental entity for these purposes. The
12 governmental entity may enter into binding contracts with private developers with respect to
13 acquiring, constructing, owning, leasing, or operating a project under this section. The contract
14 shall specify the following: (i) the property interest of the governmental entity and all other
15 participants in the development of the project, (ii) the responsibilities of the governmental
16 entity and all other participants in the development of the project, and (iii) the responsibilities
17 of the governmental entity and all other participants with respect to financing of the project.

18 (c) The contract may provide that the private developer shall be responsible for any or
19 all of the following: (i) construction of the entire public-private project, (ii) reconstruction or
20 repair of the public-private project or any part thereof subsequent to construction of the project,
21 (iii) construction of any addition to the public-private project, (iv) renovation of the
22 public-private project or any part thereof, and (v) purchase of apparatus, supplies, materials, or
23 equipment for the public-private project whether during or subsequent to the initial equipping
24 of the project. The contract may also provide that the governmental entity and private
25 developer shall use the same contractor or contractors in constructing a portion of or the entire
26 public-private project. If the contract provides that the governmental entity and private
27 developer shall use the same contractor, the contract shall include provisions deemed
28 appropriate by the governmental entity to assure that the public facility or facilities included in
29 or added to the public-private project are constructed, reconstructed, repaired, or renovated at a
30 reasonable price, and that the apparatus, supplies, materials, and equipment purchased for the
31 public facility or facilities included in the public-private project are purchased at a reasonable
32 price. For public-private partnerships using the design-build project delivery method, the
33 provisions of G.S. 143-128.1A shall apply.

34 (d) A private developer and its contractors shall make a good faith effort to recruit and
35 select minority businesses for participation in contracts as provided in G.S. 143-128.2. A
36 private developer may perform a portion of the construction or design work only if (i) a
37 previously engaged contractor defaults and a qualified replacement cannot be obtained after a
38 good faith effort has been made in a timely manner or (ii) the governmental entity approves of
39 the private developer's performance of the work.

40 (e) The following bonding provisions apply in this section:

41 (1) A payment bond shall be required for any development contract as follows:
42 A payment bond in the amount of one hundred twenty-five percent (125%)
43 of the total anticipated amount of the construction contracts to be entered
44 into between the private developer and the contractors to construct the
45 improvements required by the development contract. The payment bond
46 shall be conditioned upon the prompt payment for all labor or materials for
47 which the private developer or one or more of its contractors or their
48 subcontractors are liable. The payment bond shall be solely for the
49 protection of the persons furnishing materials or performing labor for which
50 the private developer or its contractors or subcontractors are liable. The total
51 anticipated amount of the construction contracts shall be stated in the

1 development contract and certified by the private developer as being a good
2 faith projection of its total costs for constructing the improvements required
3 by the development contract. The payment bond shall be executed by one or
4 more surety companies legally authorized to do business in the State of
5 North Carolina and shall become effective upon the awarding of the
6 development contract. The governmental entity, in its discretion, may
7 require a private developer to provide a performance bond.

8 (2) Subject to the provisions of this subsection, any claimant who has performed
9 labor or furnished materials in the prosecution of the work required by any
10 contract for which a payment bond has been given pursuant to the provisions
11 of this subsection, and who has not been paid in full therefor before the
12 expiration of 90 days after the day on which the claimant performed the last
13 labor or furnished the last materials for which he claims payment, may bring
14 an action on the payment bond in his own name to recover any amount due
15 him for the labor or materials and may prosecute the action to final judgment
16 and have execution on the judgment.

17 a. Any claimant who has a direct contractual relationship with any
18 contractor or any subcontractor but has no contractual relationship,
19 express or implied, with the private developer may bring an action on
20 the payment bond only if he has given written notice of claim on the
21 payment bond to the private developer within 120 days from the date
22 on which the claimant performed the last of the labor or furnished the
23 last of the materials for which he claims payment in which he states
24 with substantial accuracy the amount claimed and the name of the
25 person for whom the work was performed or to whom the material
26 was furnished.

27 b. The notice required by sub-subdivision a. of this subdivision shall be
28 served by certified mail or by signature confirmation as provided by
29 the United States Postal Service, postage prepaid, in an envelope
30 addressed to the private developer at any place where his office is
31 regularly maintained for the transaction of business or in any manner
32 provided by law for the service of summons.

33 (3) Every action on a payment bond as provided in this subsection shall be
34 brought in a court of appropriate jurisdiction in a county where the
35 development contract or any part thereof is to be or has been performed. No
36 action on a payment bond shall be commenced after one year from the day
37 on which the last of the labor was performed or material was furnished by
38 the claimant.

39 (4) No surety shall be liable under a payment bond for a total amount greater
40 than the face amount of the payment bond. A judgment against any surety
41 may be reduced or set aside upon motion by the surety and a showing that
42 the total amount of claims paid and judgments previously rendered under the
43 payment bond, together with the amount of the judgment to be reduced or set
44 aside, exceeds the face amount of the bond.

45 (5) No act of or agreement between the governmental entity, a private
46 developer, or a surety shall reduce the period of time for giving notice under
47 subdivision (2)a. of this subsection or commencing action under subdivision
48 (3) of this subsection or otherwise reduce or limit the liability of the private
49 developer or surety as prescribed in this subsection. Every bond given by a
50 private developer pursuant to this subsection shall be conclusively presumed
51 to have been given in accordance with the provisions of this subsection,

1 whether or not the bond is drawn as to conform to this subsection. The
2 provisions of this subsection shall be conclusively presumed to have been
3 written into every bond given pursuant to this subsection.

4 (6) Any person entitled to bring an action or any defendant in an action on a
5 payment bond shall have a right to require the governmental entity or the
6 private developer to certify and furnish a copy of the payment bond, the
7 development contract, and any construction contracts covered by the bond. It
8 shall be the duty of the private developer or the governmental entity to give
9 any such person a certified copy of the payment bond and the construction
10 contract upon not less than 10 days' notice and request. The governmental
11 entity or private developer may require a reasonable payment for the actual
12 cost of furnishing the certified copy. A copy of any payment bond,
13 development contract, and any construction contracts covered by the bond
14 certified by the governmental entity or private developer shall constitute
15 prima facie evidence of the contents, execution, and delivery of the bond,
16 development contract, and construction contracts.

17 (7) A payment bond form containing the following provisions shall comply with
18 this subsection: (i) the date the bond is executed, (ii) the name of the
19 principal, (iii) the name of the surety, (iv) the governmental entity, (v) the
20 development contract number, and (vi) the following:

21 a. "KNOW ALL MEN BY THESE PRESENTS, That we, the
22 PRINCIPAL and SURETY above named, are held and firmly bound
23 unto the above named [governmental entity], hereinafter called
24 [governmental entity], in the penal sum of the amount stated above,
25 for the payment of which sum well and truly to be made, we bind
26 ourselves, our heirs, executors, administrators, and successors, jointly
27 and severally, firmly by these presents."

28 b. "THE CONDITION OF THIS OBLIGATION IS SUCH, that
29 whereas the Principal entered into a certain development contract
30 with [governmental entity], numbered as shown above and hereto
31 attached."

32 c. "NOW THEREFORE, if the Principal shall promptly make payment
33 to all persons supplying labor and material in the prosecution of the
34 construction or design work provided for in the development
35 contract, and any and all duly authorized modifications of the
36 contract that may hereafter be made, notice of which modifications to
37 the surety being hereby waived, then this obligation to be void;
38 otherwise to remain in full force and virtue."

39 d. "IN WITNESS WHEREOF, the above bounden parties have
40 executed this instrument under their several seals on the date
41 indicated above, the name and corporate seal of each corporate party
42 being hereto affixed and these presents duly signed by its
43 undersigned representative, pursuant to authority of its governing
44 body." Appropriate places for execution by the surety and principal
45 shall be provided.

46 (8) In any suit brought or defended under the provisions of this subsection, the
47 presiding judge may allow reasonable attorneys' fees to the attorney
48 representing the prevailing party. Attorneys' fees under this subdivision are
49 to be taxed as part of the court costs and shall be payable by the losing party
50 upon a finding that there was an unreasonable refusal by the losing party to
51 fully resolve the matter which constituted the basis of the suit or the basis of

1 the defense. For purposes of this subdivision, the term "prevailing party"
2 means a party plaintiff or third-party plaintiff who obtains a judgment of at
3 least fifty percent (50%) of the monetary amount sought in a claim or a party
4 defendant or third-party defendant against whom a claim is asserted which
5 results in a judgment of less than fifty percent (50%) of the amount sought in
6 the claim defended. Notwithstanding the provisions of this subdivision, if an
7 offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a
8 "prevailing party" is an offeree who obtains judgment in an amount more
9 favorable than the last offer or is an offeror against whom judgment is
10 rendered in an amount less favorable than the last offer.

11 (9) The rights afforded claimants by the provisions of this subsection shall be in
12 addition to and not in lieu of any other rights which claimants may have by
13 law or contract, and the provisions of this subsection shall not be construed
14 so as to limit such rights.

15 (f) The governmental entity shall determine its programming requirements for facilities
16 to be constructed under this section and shall determine the form in which private developers
17 may submit their qualifications. The governmental entity shall advertise a notice for interested
18 private developers to submit qualifications in a newspaper having general circulation within the
19 county in which the governmental entity is located. Prior to the submission of qualifications,
20 the governmental entity shall make available, in whatever form it deems appropriate, the
21 programming requirements for facilities included in the public-private project. Any private
22 developer submitting qualifications shall include the following:

23 (1) Evidence of financial stability. However, "trade secrets" as that term is
24 defined in G.S. 66-152(3) shall be exempt from disclosure under Chapter
25 132 of the General Statutes.

26 (2) Experience with construction of similar projects.

27 (3) Licensure to undertake the actions necessary to accomplish the goals of the
28 public-private project.

29 (4) Explanation of project team selection by either listing of licensed
30 contractors, licensed subcontractors, and licensed design professionals
31 whom the private developer proposes to use for the project's design and
32 construction or a statement outlining a strategy for open contractor and
33 subcontractor selection based upon the provisions of Article 8 of Chapter
34 143 of the General Statutes.

35 (5) Statement of availability to undertake the public-private project and
36 projected time line for project completion.

37 (6) Any other information required by the governmental entity.

38 (g) Based upon the qualifications package submitted by the private developers and any
39 other information required by the governmental entity, the governmental entity may select one
40 or more private developers with whom to negotiate the terms and conditions of a contract to
41 perform the public-private project. The governmental entity shall advertise the terms of the
42 proposed contract to be entered into by the governmental entity in a newspaper having general
43 circulation within the county in which the governmental entity is located at least 30 days prior
44 to a regularly scheduled meeting of the board or governing body of the governmental entity at
45 which the contract is to be considered. The contract for the public-private partnership may only
46 be considered at a regular meeting of the governmental entity."

47 **SECTION 5.** This act is effective when it becomes law, and expires on July 1,
48 2019.