

**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**

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

(Public)

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Sponsors:

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Referred to:

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April 15, 2013

A BILL TO BE ENTITLED

1 AN ACT AUTHORIZING PUBLIC CONTRACTS TO UTILIZE THE DESIGN-BUILD  
2 METHOD OR PUBLIC-PRIVATE PARTNERSHIP CONSTRUCTION CONTRACTS.  
3

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

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

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

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

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

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

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

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

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

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

33       Whereas, the legislation proposed in this act is not intended to affect the existing  
34 statutes, regulations, or practices relevant to projects administered by the North Carolina  
35 Department of Transportation; Now, therefore,



1 The General Assembly of North Carolina enacts:

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

3 **"§ 143-64.31. Declaration of public policy.**

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

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

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

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

39 (c) The Secretary of Administration shall adopt rules to implement the provisions of  
40 this subsection including the format and frequency of reporting.

41 (d) For purposes of this Article, the definition in G.S. 143-128.1B and G.S. 143-128.1C  
42 shall apply."

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

44 **"§ 143-64.32. Written exemption of particular contracts.**

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

- 47 (a) ~~Proposed of proposed~~ projects where an estimated professional fee is in an  
48 amount less than ~~thirty thousand dollars (\$30,000), or fifty thousand dollars~~  
49 (\$50,000.00).

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(a1) reads as rewritten:

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

- 8           (1) Separate-prime bidding.
- 9           (2) Single-prime bidding.
- 10          (3) Dual bidding pursuant to subsection (d1) of this section.
- 11          (4) Construction management at risk contracts pursuant to G.S. 143-128.1.
- 12          (5) Alternative contracting methods authorized pursuant to G.S. 143-135.26(9).
- 13          (6) Design-build contracts pursuant to G.S. 143-128.1A.
- 14          (7) Design-build bridging contracts pursuant to G.S. 143-128.1B.
- 15          (8) Public-private partnership construction contracts pursuant to  
16          G.S. 143-128.1C."

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

19          "**§ 143-128.1A. Design-build contracts.**

20          (a) Definitions for purposes of this section:

- 21          (1) Design-builder. – As defined in G.S. 143-128.1B.
- 22          (2) Governmental entity. – As defined in G.S. 143-128.1B.

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

- 26          (1) The extent to which the governmental entity can adequately and thoroughly  
27 define the project requirements prior to the issuance of the request for  
28 qualifications for a design-builder.
- 29          (2) The time constraints for the delivery of the project.
- 30          (3) The ability to ensure that a quality project can be delivered.
- 31          (4) The capability of the governmental entity to manage and oversee the project,  
32 including the availability of experienced staff or outside consultants who are  
33 experienced with the design-build method of project delivery.
- 34          (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to  
35 recruit and select small business entities. The governmental entity shall not  
36 limit or otherwise preclude any respondent from submitting a response so  
37 long as the respondent, itself or through its proposed team, is properly  
38 licensed and qualified to perform the work defined by the public notice  
39 issued under subsection (c) of this section.

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

- 42          (1) The project site.
- 43          (2) The project scope.
- 44          (3) The anticipated project budget.
- 45          (4) The project schedule.
- 46          (5) The criteria to be considered for selection, and the weighting of the  
47 qualifications criteria.
- 48          (6) Notice of any rules, ordinances, or goals established by the governmental  
49 entity, including goals for minority- and women-owned business  
50 participation and small business participation.

- 1           (7) Other information provided by the owner to potential design-builders in  
2           submitting qualifications for the project.
- 3           (8) A statement providing that each design-builder shall submit in its response  
4           to the request for qualifications an explanation of its project team selection,  
5           which shall consist of either of the following:
- 6           a. A list of the licensed contractors, licensed subcontractors, and  
7           licensed design professionals whom the design-builder proposes to  
8           use for the project's design and construction.
- 9           b. An outline of the strategy the design-builder plans to use for open  
10           contractor and subcontractor selection based upon the provisions of  
11           Article 8 of Chapter 143 of the General Statutes.

12           (d) Following evaluation of the qualifications of the design-builders, the three most  
13           highly qualified design-builders shall be ranked. If after the solicitation for design-builders, not  
14           as many as three responses have been received from qualified design-builders, the  
15           governmental entity shall again solicit for design-builders. If as a result of such second  
16           solicitation, not as many as three responses are received, the governmental entity may then  
17           begin negotiations with the highest ranked design-builder under G.S. 143-64.31 even though  
18           fewer than three responses were received. If the governmental entity deems it appropriate, the  
19           governmental entity may invite some or all responders to interview with the governmental  
20           entity.

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

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

31 **"§ 143-128.1B. Design-build bridging contracts.**

32           (a) Definitions for purposes of this section:

- 33           (1) Design-build bridging. – A design and construction delivery process  
34           whereby a governmental entity contracts for design criteria services under a  
35           separate agreement from the construction phase services of the  
36           design-builder.
- 37           (2) Design-builder. – A person, partnership, corporation, joint venture, or other  
38           legally eligible entity that offers to provide or provides, directly or indirectly  
39           through properly licensed subcontractors, design and construction services  
40           under a single contract.
- 41           (3) Design criteria. – The requirements for a public project, expressed in  
42           drawings and specifications sufficient to allow the design-builder to make a  
43           responsive bid proposal.
- 44           (4) Design professional. – Any professional licensed under Chapter 83A,  
45           Chapter 89A, or Chapter 89C of the General Statutes.
- 46           (5) First-tier subcontractor. – A subcontractor who contracts directly with the  
47           design-builder or general contractor, excluding design professionals.
- 48           (6) Governmental entity. – Every officer, board, department, commission, or  
49           commissions charged with responsibility of preparation of specifications or  
50           awarding or entering into contracts for the erection, construction, alteration,

1 or repair of any buildings for the State, or for any county, municipality, or  
2 other public body.

3 (b) A governmental entity shall establish in writing the criteria used for determining the  
4 circumstances under which engaging a design criteria design professional is appropriate for a  
5 project, and such criteria shall, at a minimum, address all of the following:

6 (1) The extent to which the governmental entity can adequately and thoroughly  
7 define the project requirements prior to the issuance of the request for  
8 proposals for a design-builder.

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

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

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

14 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to  
15 recruit and select small business entities. The governmental entity shall not  
16 limit or otherwise preclude any respondent from submitting a response so  
17 long as the respondent, itself or through its proposed team, is properly  
18 licensed and qualified to perform the work defined by the public notice  
19 issued under subsection (d) of this section.

20 (c) On or before entering into a contract for design-build services, the governmental  
21 entity shall select or designate a staff design professional, or a design professional who is  
22 independent of the design-builder, to act as its design criteria design professional as its  
23 representative for the procurement process and for the duration of the design and construction.  
24 If the design professional is not a full-time employee of the governmental entity, the  
25 governmental entity shall select the design professional on the basis of demonstrated  
26 competence and qualifications as provided by G.S. 143-64.31. The design criteria design  
27 professional shall develop design criteria in consultation with the governmental entity. The  
28 design criteria design professional shall not be eligible to submit a response to the request for  
29 proposals nor provide design input to a design-bid response to the request for proposals. The  
30 design criteria design professional shall prepare a design criteria package equal to thirty-five  
31 percent (35%) of the completed design documentation for the entire construction project. The  
32 design criteria package shall include all of the following:

33 (1) Programmatic needs, interior space requirements, intended space utilization,  
34 and other capacity requirements.

35 (2) Information on the physical characteristics of the site, such as a topographic  
36 survey.

37 (3) Material quality standards or performance criteria.

38 (4) Special material requirements.

39 (5) Provisions for utilities.

40 (6) Parking requirements.

41 (7) The type, size, and location of adjacent structures.

42 (8) Preliminary or conceptual drawings and specifications sufficient in detail to  
43 allow the design-builder to make a proposal which is responsive to the  
44 request for proposals.

45 (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.

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

48 (1) The project site.

49 (2) The project scope.

50 (3) The anticipated project budget.

51 (4) The project schedule.

- 1           (5)    The criteria to be considered for selection, and the weighting of the selection  
2           criteria.
- 3           (6)    Notice of any rules, ordinances, or goals established by the governmental  
4           entity, including goals for minority- and women-owned business  
5           participation and small business entities.
- 6           (7)    The thirty-five percent (35%) design criteria package prepared by the design  
7           criteria design professional.
- 8           (8)    Other information provided by the owner to design-builders in submitting  
9           responses to the request for proposals for the project.
- 10          (9)    A statement providing that each design-builder shall submit in its request for  
11          proposal response an explanation of its project team selection, which shall  
12          consist of a list of the licensed contractor and licensed design professionals  
13          whom the design-builder proposes to use for the project's design and  
14          construction.
- 15          (10)   A statement providing that each design-builder shall submit in its request for  
16          proposal a sealed envelope with all of the following:
- 17               a.    The design-builder's price for providing the general conditions of the  
18               contract.
- 19               b.    The design-builder's proposed fee for general construction services.
- 20               c.    The design-builder's fee for design services.
- 21          (e)    Following evaluation of the qualifications of the design-builders, the three most  
22          highly qualified design-builders shall be ranked. If after the solicitation for design-builders, not  
23          as many as three responses have been received from qualified design-builders, the  
24          governmental entity shall again solicit for design-builders. If as a result of such second  
25          solicitation, not as many as three responses are received, the governmental entity may then  
26          make its selection. The governmental entity shall select the winning design-builder proposal  
27          from the three most highly qualified design-builders using the information supplied to the  
28          governmental entity under subdivision (d)(10) of this section. Each design-builder shall certify  
29          to the governmental entity that each licensed design professional who is a member of the  
30          design-build team, including subconsultants, was selected based upon demonstrated  
31          competence and qualifications in the manner provided by G.S. 143-64.31.
- 32          (f)    The design-builder shall accept bids based upon the provisions of this Article from  
33          first-tier subcontractors for all construction work under this section.
- 34          (g)    The design-builder shall provide a performance and payment bond to the  
35          governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the  
36          General Statutes. The design-builder shall obtain written approval from the governmental entity  
37          prior to changing key personnel, as listed under (d)(9) of this section, after the contract has  
38          been awarded.

39          **"§ 143-128.1C. Public-private partnership construction contracts.**

40               (a)    Definitions for purposes of this section:

- 41                   (1)    Construction contract. – Any contract entered into between a private  
42                   developer and a contractor for the design, construction, reconstruction,  
43                   alteration, or repair of any building or other work or improvement required  
44                   for a private developer to satisfy its obligations under a development  
45                   contract.
- 46                   (2)    Contractor. – Any person who has entered into a construction contract with a  
47                   private developer under this section.
- 48                   (3)    Design-builder. – Defined in G.S. 143-128.1B.
- 49                   (4)    Development contract. – Any contract between a governmental entity and a  
50                   private developer under this section and, as part of the contract, the private  
51                   developer is required to provide at least fifty percent (50%) of the financing

1 for the total cost necessary to deliver the capital improvement project,  
2 whether through lease or ownership, for the governmental entity.

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

4 (6) Labor or materials. – Includes all materials furnished or labor performed in  
5 the performance of the work required by a construction contract whether or  
6 not the labor or materials enter into or become a component part of the  
7 improvement and shall include gas, power, light, heat, oil, gasoline,  
8 telephone services, and rental of equipment or the reasonable value of the  
9 use of equipment directly utilized in the performance of the work required  
10 by a construction contract.

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

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

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

22 (10) State-supported financing arrangement. – Any installment financing  
23 arrangement, lease-purchase arrangement, arrangement under which funds  
24 are to be paid in the future based upon the availability of an asset or funds  
25 for payment, or any similar arrangement in the nature of a financing, under  
26 which a State entity agrees to make payments to acquire or obtain a capital  
27 asset for the State entity or any other State entity for a term, including  
28 renewal options, of greater than one year. Any arrangement that results in  
29 the identification of a portion of a lease payment, installment payment, or  
30 similar scheduled payment thereunder by a State entity as "interest" for  
31 purposes of federal income taxation shall automatically be a State-supported  
32 financing arrangement for purposes of this section.

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

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

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

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

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

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

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

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

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

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

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

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

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

16          (d)   The development contract may also provide that the governmental entity and private  
17          developer shall use the same contractor or contractors in constructing a portion of or the entire  
18          public-private project. If the development contract provides that the governmental entity and  
19          private developer shall use the same contractor, the development contract shall include  
20          provisions deemed appropriate by the governmental entity to assure that the public facility or  
21          facilities included in or added to the public-private project are constructed, reconstructed,  
22          repaired, or renovated at a reasonable price and that the apparatus, supplies, materials, and  
23          equipment purchased for the public facility or facilities included in the public-private project  
24          are purchased at a reasonable price. For public-private partnerships using the design-build  
25          project delivery method, the provisions of G.S. 143-128.1A shall apply.

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

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

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

33          (2)   The governmental entity approves the private developer to perform the  
34          work.

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

37          (1)   A payment bond shall be required for any development contract as follows:  
38          A payment bond in the amount of one hundred percent (100%) of the total  
39          anticipated amount of the construction contracts to be entered into between  
40          the private developer and the contractors to design or construct the  
41          improvements required by the development contract. The payment bond  
42          shall be conditioned upon the prompt payment for all labor or materials for  
43          which the private developer or one or more of its contractors or those  
44          contractors' subcontractors are liable. The payment bond shall be solely for  
45          the protection of the persons furnishing materials or performing labor or  
46          services for which the private developer or its contractors or subcontractors  
47          are liable. The total anticipated amount of the construction contracts shall be  
48          stated in the development contract and certified by the private developer as  
49          being a good-faith projection of its total costs for constructing the  
50          improvements required by the development contract. The payment bond  
51          shall be executed by one or more surety companies legally authorized to do



1 business in the State of North Carolina and shall become effective upon the  
2 awarding of the development contract. The development contract may  
3 provide for the requirement of a performance bond.

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

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

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

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

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

42 (5) No act of or agreement between the governmental entity, a private  
43 developer, or a surety shall reduce the period of time for giving notice under  
44 sub-subdivision (2)a. of this subsection or commencing action under  
45 subdivision (3) of this subsection or otherwise reduce or limit the liability of  
46 the private developer or surety as prescribed in this subsection. Every bond  
47 given by a private developer pursuant to this subsection shall be  
48 conclusively presumed to have been given in accordance with the provisions  
49 of this subsection, whether or not the bond is drawn as to conform to this  
50 subsection. The provisions of this subsection shall be conclusively presumed  
51 to have been written into every bond given pursuant to this subsection.

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

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

16                  a.    The date the bond is executed.

17                  b.    The name of the principal.

18                  c.    The name of the surety.

19                  d.    The governmental entity.

20                  e.    The development contract number.

21                  f.    All of the following:

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

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

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

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

49           (8)    In any suit brought or defended under the provisions of this subsection, the  
50                  presiding judge may allow reasonable attorneys' fees to the attorney  
51                  representing the prevailing party. Attorneys' fees under this subdivision are

1 to be taxed as part of the court costs and shall be payable by the losing party  
2 upon a finding that there was an unreasonable refusal by the losing party to  
3 fully resolve the matter which constituted the basis of the suit or the basis of  
4 the defense. For purposes of this subdivision, the term "prevailing party"  
5 means a party plaintiff or third-party plaintiff who obtains a judgment of at  
6 least fifty percent (50%) of the monetary amount sought in a claim or a party  
7 defendant or third-party defendant against whom a claim is asserted which  
8 results in a judgment of less than fifty percent (50%) of the amount sought in  
9 the claim defended. Notwithstanding the provisions of this subdivision, if an  
10 offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a  
11 "prevailing party" is an offeree who obtains judgment in an amount more  
12 favorable than the last offer or is an offeror against whom judgment is  
13 rendered in an amount less favorable than the last offer.

14 (9) The rights afforded claimants by the provisions of this subsection shall be in  
15 addition to and not in lieu of any other rights which claimants may have by  
16 law or contract, and the provisions of this subsection shall not be construed  
17 so as to limit such rights. Provided, however, if a payment bond is obtained  
18 for a development contract and maintained throughout the public-private  
19 project pursuant to this section, the provisions of Article 2 of Chapter 44A of  
20 the General Statutes shall not apply to that public-private project.

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

- 29 (1) Evidence of financial stability. However, "trade secrets" as that term is  
30 defined in G.S. 66-152(3) shall be exempt from disclosure under Chapter  
31 132 of the General Statutes.  
32 (2) Experience with construction of similar projects.  
33 (3) Explanation of project team selection by either listing of licensed  
34 contractors, licensed subcontractors, and licensed design professionals  
35 whom the private developer proposes to use for the project's design and  
36 construction or a statement outlining a strategy for open contractor and  
37 subcontractor selection based upon the provisions of this Article.  
38 (4) Statement of availability to undertake the public-private project and  
39 projected time line for project completion.  
40 (5) Any other information required by the governmental entity.

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

1       (j) The governmental entity shall make available a summary of the development  
2 contract terms, which shall include a statement of how to obtain a copy of the complete  
3 development contract.

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

5           (1) If a capital lease or operating lease is entered into by a unit of local  
6 government as defined in G.S. 159-7, that capital lease or operating lease is  
7 subject to approval by the Local Government Commission under Article 8 of  
8 Chapter 159 of the General Statutes if they meet the standards set out in  
9 G.S. 159-148(a)(1), 159-148(a)(2), and 159-148(a)(3), 159-148(a)(4) or  
10 159-153. For purposes of determining whether the standards set out in  
11 G.S.159-148(a)(3) have been met, only the five hundred thousand dollar  
12 (\$500,000) threshold applies.

13           (2) If a capital lease is entered into by a State entity that constitutes a  
14 State-supported financing arrangement and requires payments thereunder  
15 that are payable, whether directly or indirectly, and whether or not subject to  
16 the appropriation of funds for such payment, by payments from the General  
17 Fund of the State or other funds and accounts of the State that are funded  
18 from the general revenues and other taxes and fees of the State or State  
19 entities, not including taxes and fees that are required to be deposited to the  
20 Highway Fund or Highway Trust Fund, that capital lease shall be subject to  
21 the approval procedures required for special indebtedness by G.S. 142-83  
22 and G.S. 142-84. This requirement shall not apply to any arrangement where  
23 bonds or other obligations are issued or incurred by a State entity to carry  
24 out a financing program authorized by the General Assembly under which  
25 such bonds or other obligations are payable from moneys derived from  
26 specified, limited, nontax sources, so long as the payments under that  
27 arrangement by a State entity are limited to the sources authorized by the  
28 General Assembly.

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

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

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

38       **"§ 143-128.1. Construction management at risk contracts.**

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

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

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

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

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

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

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

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

39 **SECTION 6.** This act becomes effective October 1, 2013, and applies to projects  
40 bid on or after that date and public-private development contracts entered into on or after that  
41 date. This act expires on July 1, 2019.