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SENATE DRS35501-STz-63A* (02/18)

Short Title: Prequalification Update.

(Public)

Sponsors: Senator Hunt (Primary Sponsor).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY THE STATUTES RELATED TO THE USE OF
3 PREQUALIFICATION IN PUBLIC CONSTRUCTION CONTRACTING, AS
4 RECOMMENDED BY THE JOINT PURCHASE AND CONTRACT STUDY
5 COMMITTEE.

6 The General Assembly of North Carolina enacts:

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

8 **"§ 143-135.8. Prequalification.**

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

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

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

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

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

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

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

24 (3) Clearly state prequalification criteria, which must:

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

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

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

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

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

33 (5) Establish a process for a denied bidder to protest to the governmental entity
34 denial of prequalification, which process shall be completed prior to the
35 opening of bids under G.S. 143-129(b) and which allows sufficient time for



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1 a bidder subsequently prequalified pursuant to a protest to submit a bid on
2 the contract for which the bidder is subsequently prequalified.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 (c) The construction manager at risk shall contract directly with the public entity for all
41 construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and
42 accept bids from first-tier subcontractors for all construction work under this section. The
43 ~~construction manager at risk shall use the prequalification criteria process shall be determined~~
44 ~~by the public entity and the construction manager at risk to address quality, performance, the~~
45 ~~time specified in the bids for performance of the contract, the cost of construction oversight,~~
46 ~~time for completion, capacity to perform, and other factors deemed appropriate by the public~~
47 ~~entity in accordance with G.S. 143-135.8.~~ The public entity shall require the construction
48 manager at risk to submit its plan for compliance with G.S. 143-128.2 for approval by the
49 public entity prior to soliciting bids for the project's first-tier subcontractors. A construction
50 manager at risk and first-tier subcontractors shall make a good faith effort to comply with
51 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. A construction

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

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

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

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

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

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

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

38 **SECTION 5.** G.S. 143-133.1, as created by Section 3 of this act, reads as rewritten:
39 **§ 143-133.1. Reporting.**

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

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

- 1 (4) A report on the form of bidding utilized by the construction manager at risk,
2 design-builder, or private developer on the project.
- 3 (5) A detailed explanation of why the particular delivery method was used in
4 lieu of the delivery methods identified in G.S. 143-128(a1) subdivisions (1)
5 through (3) and the anticipated benefits to the public entity from using the
6 particular delivery method.

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

9 (c) A ~~public body~~ governmental entity letting a contract pursuant to any of the delivery
10 methods identified in subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128 shall
11 submit the report required by ~~G.S. 143-64.31(b)~~ this section no later than 12 months from the
12 date the ~~public body~~ governmental entity takes beneficial occupancy of the project. In the event
13 that the ~~public body~~ governmental entity fails to do so, the ~~public body~~ governmental entity shall
14 be prohibited from utilizing subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128
15 until such time as the ~~public body~~ governmental entity completes the reporting requirement
16 under this this section. Contracts entered into in violation of this prohibition shall not be
17 deemed ultra vires and shall remain valid and fully enforceable. Any person, corporation or
18 entity, however, which has submitted a bid or response to a request for proposals on any
19 construction project previously advertised by the ~~public body~~ governmental entity shall be
20 entitled to obtain an injunction against the ~~public body~~ governmental entity compelling the
21 ~~public body~~ governmental entity to comply with the reporting requirements of this section and
22 from commencing or continuing a project let in violation of this subdivision until such time as
23 the ~~public body~~ governmental entity has complied with the reporting requirements of this
24 section. The plaintiff in such cases shall not be entitled to recover monetary damages caused by
25 the ~~public body's~~ governmental entity's failure to comply with this reporting requirements
26 section, and neither the plaintiff nor the defendant shall be allowed to recover attorneys fees
27 except as otherwise allowed by G.S. 1A-11 or G.S. 6-21.5. An action seeking the injunctive
28 relief allowed by this subdivision must be filed within four years from the date that the ~~owner~~
29 ~~governmental entity~~ took beneficial occupancy of the project for which the report remains due.

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

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