

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)-(3).

15 (2) The board or governing body of the governmental entity adopts a
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 (3) The contract is subject to G.S. 143-129(a).

20 (c) The prequalification policy adopted by a governmental entity shall comply with all
21 of the following:

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

24 (2) Be uniform, consistent, transparent, and objective to all parties.

25 (3) Clearly state the prequalification criteria and the assessment process of the
26 criteria.

27 (4) Provide a process to protest to the governmental entity denial of
28 prequalification, which process shall be completed prior to the opening of
29 bids under G.S. 143-129(b) and which allows sufficient time for a bidder
30 subsequently prequalified pursuant to a protest to submit a bid on the
31 contract for which the bidder is subsequently prequalified.

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



1 (d) If the governmental entity opts to prequalify bidders under this section, bids
2 submitted by any bidder not prequalified shall be deemed non-responsive. This subsection shall
3 not apply to bidders initially denied prequalification that are subsequently prequalified pursuant
4 to a protest under the governmental entity's prequalification policy.

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

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

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

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

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

15 **"§ 143-128.1. Construction management at risk contracts.**

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

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

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

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

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

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

35 (c) The construction manager at risk shall contract directly with the public entity for all
36 construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and
37 accept bids from first-tier subcontractors for all construction work under this section. The
38 construction manager at risk shall use the prequalification criteria-process shall be
39 by the public entity and the construction manager at risk to address quality, performance, the
40 time specified in the bids for performance of the contract, the cost of construction oversight,
41 time for completion, capacity to perform, and other factors deemed appropriate by the public
42 entity in accordance with G.S. 143-135.8. The public entity shall require the construction
43 manager at risk to submit its plan for compliance with G.S. 143-128.2 for approval by the
44 public entity prior to soliciting bids for the project's first-tier subcontractors. A construction
45 manager at risk and first-tier subcontractors shall make a good faith effort to comply with
46 G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. A construction
47 manager at risk may perform a portion of the work only if (i) bidding produces no responsible,
48 responsive bidder for that portion of the work, the lowest responsible, responsive bidder will
49 not execute a contract for the bid portion of the work, or the subcontractor defaults and a
50 prequalified replacement cannot be obtained in a timely manner, and (ii) the public entity
51 approves of the construction manager at risk's performance of the work. All bids shall be

1 opened publicly, and once they are opened, shall be public records under Chapter 132 of the
2 General Statutes. The construction manager at risk shall act as the fiduciary of the public entity
3 in handling and opening bids. The construction manager at risk shall award the contract to the
4 lowest responsible, responsive bidder, taking into consideration quality, performance, the time
5 specified in the bids for performance of the contract, the cost of construction oversight, time for
6 completion, compliance with G.S. 143-128.2, and other factors deemed appropriate by the
7 public entity and advertised as part of the bid solicitation. The public entity may require the
8 selection of a different first-tier subcontractor for any portion of the work, consistent with this
9 section, provided that the construction manager at risk is compensated for any additional cost
10 incurred.

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

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

16 (e) Construction management at risk services may be used by the public entity only
17 after the public entity has concluded that construction management at risk services is in the best
18 interest of the project, and the public entity has compared the cost and benefit of using the
19 construction management at risk method for a given project in lieu of the delivery methods
20 identified in G.S. 143-128(a1) (1)-(3)."

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

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

24 "(f) No work product or design may be solicited, submitted, or considered as part of the
25 selection process under this Article. No costs or fees, other than unit price information, may be
26 solicited, submitted, or considered as part of the selection process under this Article."

27 **SECTION 5.** G.S. 143-133.1, as created by Section 3 of this act, reads as rewritten:
28 "**§ 143-133.1. Reporting.**

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

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

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

49 (c) A ~~public body~~ governmental entity letting a contract pursuant to any of the delivery
50 methods identified in subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128 shall
51 submit the report required by ~~G.S. 143-64.31(b)~~ this section no later than 12 months from the

1 date the public-bodygovernmental entity takes beneficial occupancy of the project. In the event
2 that the public-bodygovernmental entity fails to do so, the public-bodygovernmental entity shall
3 be prohibited from utilizing subdivisions (a1)(4), (a1)(6), (a1)(7), or (a1)(8) of G.S. 143-128
4 until such time as the public-bodygovernmental entity completes the reporting requirement
5 under this this section. Contracts entered into in violation of this prohibition shall not be
6 deemed ultra vires and shall remain valid and fully enforceable. Any person, corporation or
7 entity, however, which has submitted a bid or response to a request for proposals on any
8 construction project previously advertised by the public-bodygovernmental entity shall be
9 entitled to obtain an injunction against the public-bodygovernmental entity compelling the
10 public-bodygovernmental entity to comply with the reporting requirements of this section and
11 from commencing or continuing a project let in violation of this subdivision until such time as
12 the public-bodygovernmental entity has complied with the reporting requirements of this
13 section. The plaintiff in such cases shall not be entitled to recover monetary damages caused by
14 the public-body'sgovernmental entity failure to comply with this reporting requirements section,
15 and neither the plaintiff nor the defendant shall be allowed to recover attorneys fees except as
16 otherwise allowed by G.S. 1A-11 or G.S. 6-21.5. An action seeking the injunctive relief
17 allowed by this subdivision must be filed within four years from the date that the owner
18 governmental entity took beneficial occupancy of the project for which the report remains due.

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

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