

The Supplement Presentation as of August, 2015

Mini-Brooks

Qualifications Based Selection

Supplement of Design/Build Statutes

**(the full Statutes for Design/Build approaches
with an analysis of each)**

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Additional Materials

The full body of the Statutes that were abbreviated in the basic presentation are in this presentation for further study and application to specific Requests for Proposals that involve creative combinations with construction services.

The Other Presentation

- History of Qualifications Based Selection
- NC Statute – GS 143-64.31 et seq.
 - Law and Exemptions
 - With the 2014 Legislative Changes
- NC Administrative Code (Board Rules)
- Board Newsletter Q&A + AG Opinion

The Statutes in Detail

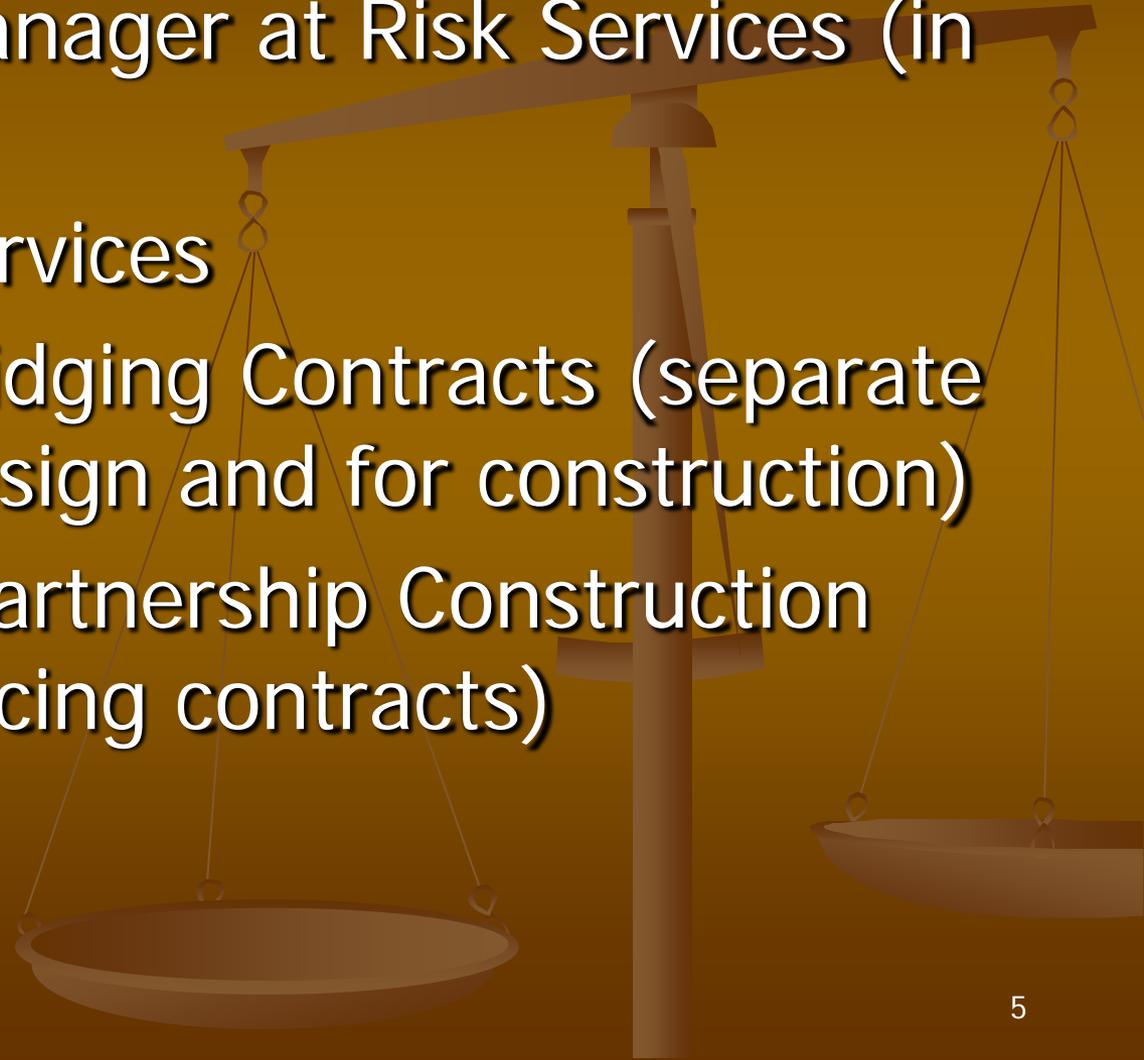
- Construction Manager at Risk
- 2013 Legislative Changes

HB 857 – SL 2013-401 Sec. 1

- Design-Build Services & Public-Private Partnership Construction contracts
- Design-Build Bridging Contracts
- G.S. 128.1 A, B & C
 - 1A. Design-build contracts
 - 1B. Design-build bridging contracts
 - 1C. Public-private partnerships
- Application of Mini-Brooks to Design/Build⁴

Now Addressed by Mini-Brooks Act

- Construction Manager at Risk Services (in more detail)
- Design-Build Services
- Design-Build Bridging Contracts (separate contracts for design and for construction)
- Public-Private Partnership Construction contracts (financing contracts)



Construction Manager at Risk Services

Construction Manager at Risk services were added to the Mini-Brooks Act as Session Law 2001 – 496. The language was revised by House Bill 857 that was ratified and became law effective August 23, 2013, as Session Law 2013, Chapter 401, Section 5.

Construction Manager at Risk services are defined in G.S. 143-128.1.

Construction Manager at Risk Services

§ 143-128.1. Construction management at risk contracts.

- (a) For purposes of this section and G.S. 143-64.31:
- (1) "Construction management services" means services provided by a construction manager, which may include preparation and coordination of bid packages, scheduling, cost control, value engineering, evaluation, preconstruction services, and construction administration.
 - (2) "Construction management at risk services" means services provided by a person, corporation, or entity that (i) provides construction management services for a project throughout the preconstruction and construction phases, (ii) who is licensed as a general contractor, and (iii) who guarantees the cost of the project.
 - (3) "Construction manager at risk" means a person, corporation, or entity that provides construction management at risk services.
 - (4) "First-tier subcontractor" means a subcontractor who contracts directly with the construction manager at risk.

Construction Manager at Risk Services (cont'd)

§ 143-128.1. Construction management at risk contracts. (cont'd)

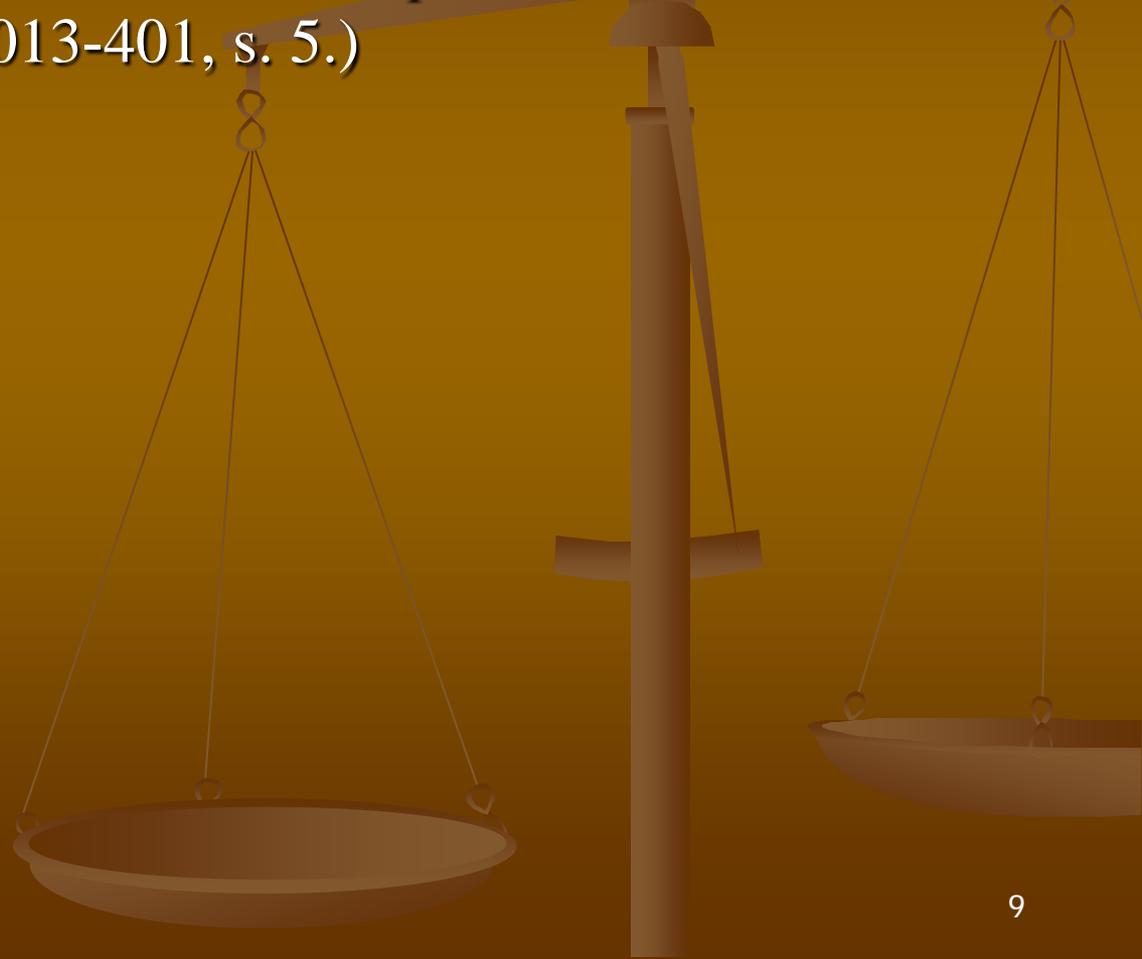
(b) The construction manager at risk shall be selected in accordance with Article 3D of this Chapter. Design services for a project shall be performed by a licensed architect or engineer. The public owner shall contract directly with the architect or engineer. The public owner shall make a good-faith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

(c) The construction manager at risk shall contract directly with the public entity for all construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and accept bids from first-tier subcontractors for all construction work under this section. The prequalification criteria shall be determined by the public entity and the construction manager at risk to address quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the public entity. [...]

Construction Manager at Risk Services (cont'd)

§ 143-128.1. Construction management at risk contracts. (cont'd)

(d) The construction manager at risk shall provide a performance and payment bond to the public entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. (2001-496, s. 2; 2013-401, s. 5.)



Design-Build Services and Public-Private Partnership Financing Contracts

Design-build services and public-private partnership construction contracts were added to the Mini-Brooks Act by House Bill 857 that was ratified and became law effective August 23, 2013, as Session Law 2013, Chapter 401, Section 2.

Design-build services and public-private partnership construction contracts (financing contracts) are defined in G.S. 143-128.2.

Design-Build Services and Public-Private Partnership Construction contracts

What must the public entity do?

How are design-build services and public-private partnership construction contracts defined?

Defined by House Bill 857 or the Session Law 2013, Chapter 401, Section 2 by reference to GS 143-128.1A, 1B & 1C.

What must the construction contractor do?

What are the penalties for non-compliance?

NCGS 143-64.31

(a) It is the public policy of this State and all public subdivisions and Local Governmental Units thereof, except in cases of special emergency involving the health and safety of the people or their property, to announce all requirements for architectural, engineering, surveying, construction management at risk services, [design-build services, and public-private partnership construction contracts]

The Statutes in full

G.S. 128.1 A, B & C

- 1A. Design-build contracts
- 1B. Design-build bridging contracts
- 1C. Public-private partnership construction contracts
- Followed by an abbreviated version of the Statutes and an analysis

§ 143-128.1A. Design-build contracts.

(a) Definitions for purposes of this section:

(1) Design-builder. - As defined in G.S. 143-128.1B.

(2) Governmental entity. - As defined in G.S. 143-128.1B.

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

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

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

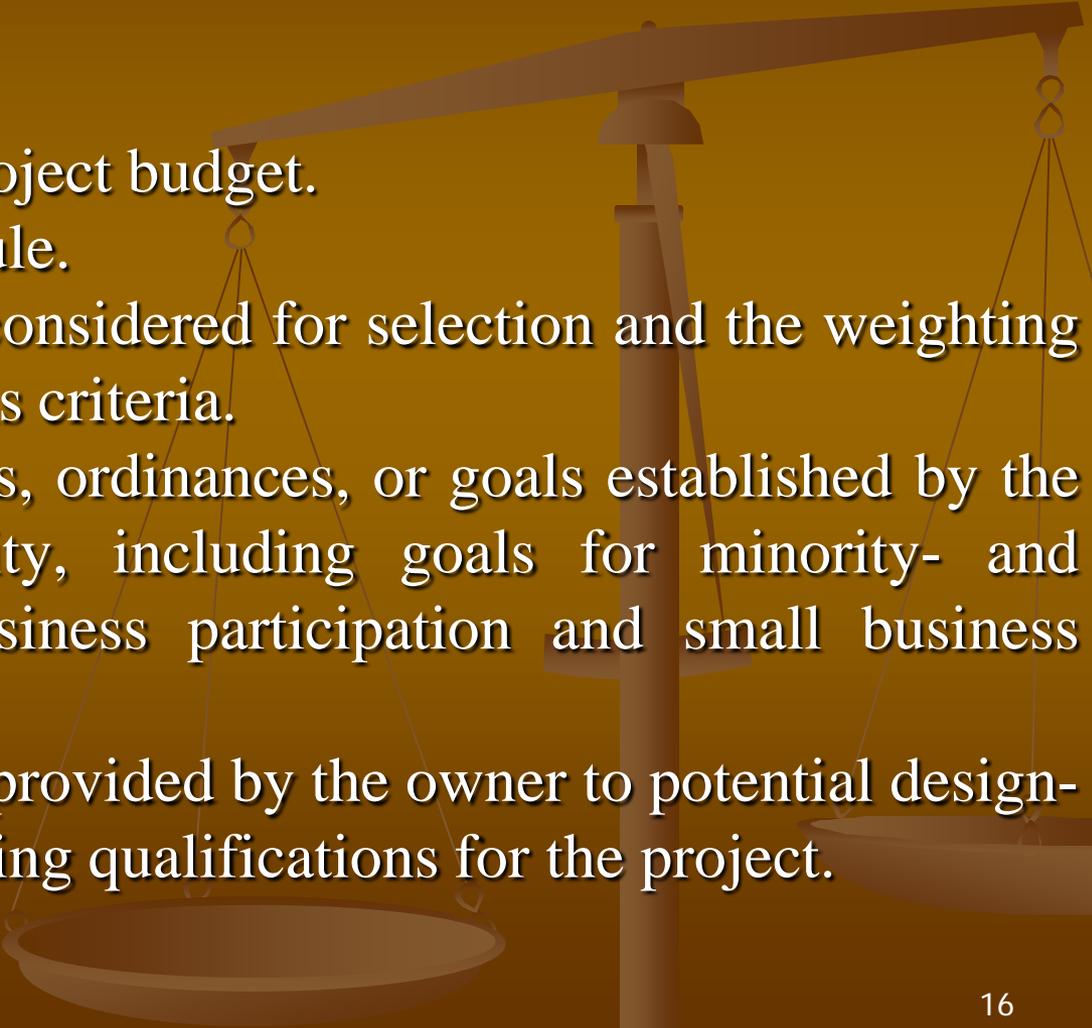
(3) The ability to ensure that a quality project can be delivered.

Design Build Contracts (cont'd)

- (4) The capability of the governmental entity to manage and oversee the project, including the availability of experienced staff or outside consultants who are experienced with the design-build method of project delivery.
- (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. The governmental entity shall not limit or otherwise preclude any respondent from submitting a response so long as the respondent, itself or through its proposed team, is properly licensed and qualified to perform the work defined by the public notice issued under subsection (c) of this section.
- (6) The criteria utilized by the governmental entity, including a comparison of the costs and benefits of using the design-build delivery method for a given project in lieu of the delivery methods identified in subdivisions (1), (2), and (4) of G.S. 143-128(a1).

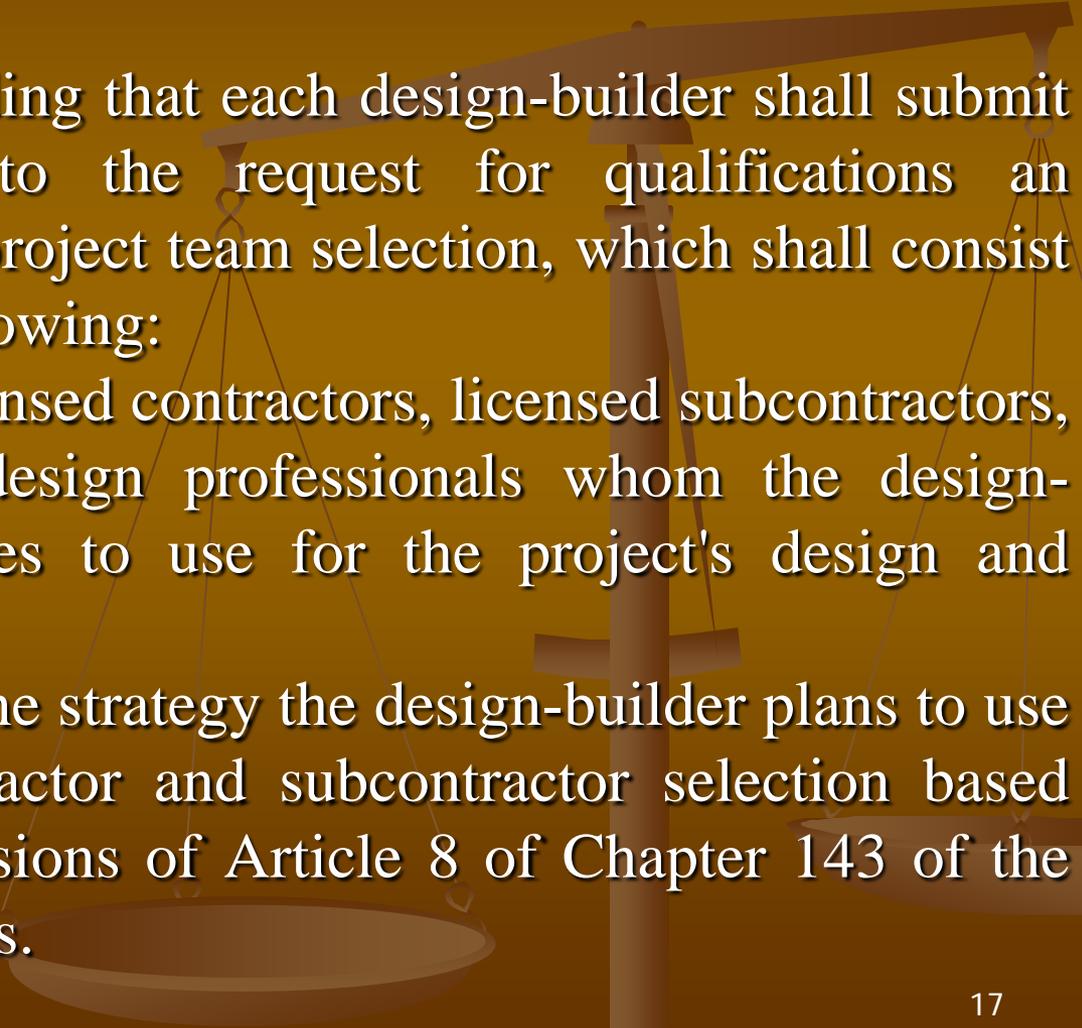
Design Build Contracts (cont'd)

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

- (1) The project site.
 - (2) The project scope.
 - (3) The anticipated project budget.
 - (4) The project schedule.
 - (5) The criteria to be considered for selection and the weighting of the qualifications criteria.
 - (6) Notice of any rules, ordinances, or goals established by the governmental entity, including goals for minority- and women-owned business participation and small business participation.
 - (7) Other information provided by the owner to potential design-builders in submitting qualifications for the project.
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Design Build Contracts (cont'd)

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

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- (8) A statement providing that each design-builder shall submit in its response to the request for qualifications an explanation of its project team selection, which shall consist of either of the following:
- a. A list of the licensed contractors, licensed subcontractors, and licensed design professionals whom the design-builder proposes to use for the project's design and construction.
 - b. An outline of the strategy the design-builder plans to use for open contractor and subcontractor selection based upon the provisions of Article 8 of Chapter 143 of the General Statutes.

Design Build Contracts (cont'd)

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

Design Build Contracts (cont'd)

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

(f) The design-builder shall provide a performance and payment bond to the governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. The design-builder shall obtain written approval from the governmental entity prior to changing key personnel as listed in sub-subdivision (c)(8)a. of this section after the contract has been awarded. (2013-401, s. 4.)

§ 143-128.1B. Design-build bridging contracts.

(a) Definitions for purposes of this section:

- (1) Design-build bridging. - A design and construction delivery process whereby a governmental entity contracts for design criteria services under a separate agreement from the construction phase services of the design-builder.
- (2) Design-builder. - An appropriately licensed person, corporation, or entity that, under a single contract, offers to provide or provides design services and general contracting services where services within the scope of the practice of professional engineering or architecture are performed respectively by a licensed engineer or licensed architect and where services within the scope of the practice of general contracting are performed by a licensed general contractor.
- (3) Design criteria. - The requirements for a public project expressed in drawings and specifications sufficient to allow the design-builder to make a responsive bid proposal.

Design–Build Bridging Contracts (cont'd)

- (4) Design professional. - Any professional licensed under Chapters 83A, 89A, or 89C of the General Statutes.
- (5) First-tier subcontractor. - A subcontractor who contracts directly with the design-builder, excluding design professionals.
- (6) Governmental entity. - Every officer, board, department, commission, or commissions charged with responsibility of preparation of specifications or awarding or entering into contracts for the erection, construction, alteration, or repair of any buildings for the State or for any county, municipality, or other public body.

Design–Build Bridging Contracts (cont'd)

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

- (1) The extent to which the governmental entity can adequately and thoroughly define the project requirements prior to the issuance of the request for proposals for a design-builder.
- (2) The time constraints for the delivery of the project.
- (3) The ability to ensure that a quality project can be delivered.
- (4) The capability of the governmental entity to manage and oversee the project, including the availability of experienced staff or outside consultants who are experienced with the design-build method of project delivery.

Design–Build Bridging Contracts (cont'd)

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

- (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. The governmental entity shall not limit or otherwise preclude any respondent from submitting a response so long as the respondent, itself or through its proposed team, is properly licensed and qualified to perform the work defined by the public notice issued under subsection (d) of this section.
- (6) The criteria utilized by the governmental entity, including a comparison of the cost and benefit of using the design-build delivery method for a given project in lieu of the delivery methods identified in subdivisions (1), (2), and (4) of G.S. 143-128(a1).

Design–Build Bridging Contracts (cont'd)

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

Design–Build Bridging Contracts (cont'd)

(c)

The design criteria package shall include all of the following:

- (1) Programmatic needs, interior space requirements, intended space utilization, and other capacity requirements.
- (2) Information on the physical characteristics of the site, such as a topographic survey.
- (3) Material quality standards or performance criteria.
- (4) Special material requirements.
- (5) Provisions for utilities.
- (6) Parking requirements.
- (7) The type, size, and location of adjacent structures.
- (8) Preliminary or conceptual drawings and specifications sufficient in detail to allow the design-builder to make a proposal which is responsive to the request for proposals.
- (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.

Design–Build Bridging Contracts (cont'd)

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

- (1) The project site.
- (2) The project scope.
- (3) The anticipated project budget.
- (4) The project schedule.
- (5) The criteria to be considered for selection and the weighting of the selection criteria.
- (6) Notice of any rules, ordinances, or goals established by the governmental entity, including goals for minority- and women-owned business participation and small business entities.
- (7) The thirty-five percent (35%) design criteria package prepared by the design criteria design professional.
- (8) Other information provided by the owner to design-builders in submitting responses to the request for proposals for the project.

Design–Build Bridging Contracts (cont'd)

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

(9) A statement providing that each design-builder shall submit in its request for proposal response an explanation of its project team selection, which shall consist of a list of the licensed contractor and licensed design professionals whom the design-builder proposes to use for the project's design and construction.

(10) A statement providing that each design-builder shall submit in its request for proposal a sealed envelope with all of the following:

- a. The design-builder's price for providing the general conditions of the contract.
- b. The design-builder's proposed fee for general construction services.
- c. The design-builder's fee for design services.

Design–Build Bridging Contracts (cont'd)

(e) Following evaluation of the qualifications of the design-builders, the governmental entity shall rank the design-builders who have provided responses, grouping the top three without ordinal ranking. If after the solicitation for design-builders not as many as three responses have been received from qualified design-builders, the governmental entity shall again solicit for design-builders. If as a result of such second solicitation not as many as three responses are received, the governmental entity may then make its selection. From the grouping of the top three design-builders, the governmental entity shall select the design-builder who is the lowest responsive, responsible bidder based on the cumulative amount of fees provided in accordance with subdivision (d)(10) of this section and taking into consideration quality, performance, and the time specified in the proposals for the performance of the contract. Each design-builder shall certify to the governmental entity that each licensed design professional who is a member of the design-build team, including subconsultants, was selected based upon demonstrated competence and qualifications in the manner provided by G.S. 143-64.31.

Design–Build Bridging Contracts (cont'd)

(f) The design-builder shall accept bids based upon the provisions of this Article from first-tier subcontractors for all construction work under this section.

(g) The design-builder shall provide a performance and payment bond to the governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. The design-builder shall obtain written approval from the governmental entity prior to changing key personnel, as listed under subdivision (d)(9) of this section, after the contract has been awarded. (2013-401, s. 4.)

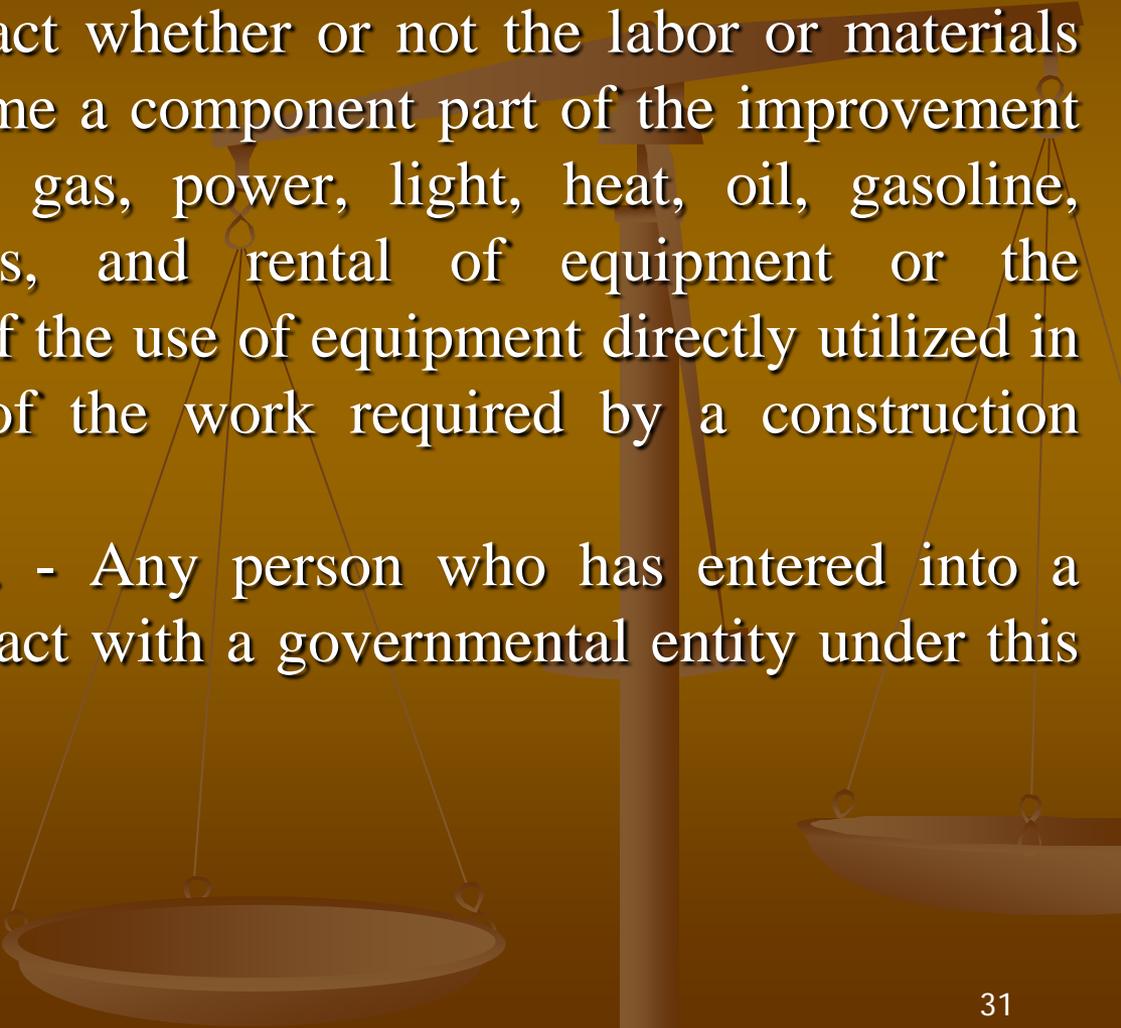
Public-Private Partnership Financing Contracts

§ 143-128.1C. Public-private partnership construction contracts.

(a) Definitions for purposes of this section:

- (1) Construction contract. - Any contract entered into between a private developer and a contractor for the design, construction, reconstruction, alteration, or repair of any building or other work or improvement required for a private developer to satisfy its obligations under a development contract.
- (2) Contractor. - Any person who has entered into a construction contract with a private developer under this section.
- (3) Design-builder. - Defined in G.S. 143-128.1B.
- (4) Development contract. - Any contract between a governmental entity and a private developer under this section and, as part of the contract, the private developer is required to provide at least fifty percent (50%) of the financing for the total cost necessary to deliver the capital improvement project, whether through lease or ownership, for the governmental entity.

Public-Private Partnership Financing Contracts (cont'd)

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- (5) Governmental entity. - Defined in G.S. 143-128.1B.
- (6) Labor or materials. - Includes all materials furnished or labor performed in the performance of the work required by a construction contract whether or not the labor or materials enter into or become a component part of the improvement and shall include gas, power, light, heat, oil, gasoline, telephone services, and rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the work required by a construction contract.
- (7) Private developer. - Any person who has entered into a development contract with a governmental entity under this section.

Public-Private Partnership Financing Contracts (cont'd)

- (8) Public-private project. - A capital improvement project undertaken for the benefit of a governmental entity and a private developer pursuant to a development contract that includes construction of a public facility or other improvements, including paving, grading, utilities, infrastructure, reconstruction, or repair, and may include both public and private facilities.
- (9) State entity. - The State and every agency, authority, institution, board, commission, bureau, council, department, division, officer, or employee of the State. The term does not include a unit of local government as defined in G.S. 159-7.

Public-Private Partnership Financing Contracts (cont'd)

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

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

Public-Private Partnership Financing Contracts (cont'd)

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

- (1) The property interest of the governmental entity and all other participants in the development of the project.
- (2) The responsibilities of the governmental entity and all other participants in the development of the project.

Public-Private Partnership Financing Contracts (cont'd)

- (3) The responsibilities of the governmental entity and all other participants with respect to financing of the project.
- (4) The responsibilities to put forth a good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities.

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

- (1) Construction of the entire public-private project.
- (2) Reconstruction or repair of the public-private project or any part thereof subsequent to construction of the project.
- (3) Construction of any addition to the public-private project.
- (4) Renovation of the public-private project or any part thereof.
- (5) Purchase of apparatus, supplies, materials, or equipment for the public-private project whether during or subsequent to the initial equipping of the project.
- (6) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities.

Public-Private Partnership Financing Contracts (cont'd)

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

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

Public-Private Partnership Financing Contracts (cont'd)

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

- (1) A previously engaged contractor defaults, and a qualified replacement cannot be obtained after a good-faith effort has been made in a timely manner.
- (2) The governmental entity approves the private developer to perform the work.

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

- (1) A payment bond shall be required for any development contract as follows: A payment bond in the amount of one hundred percent (100%) of the total anticipated amount of the construction contracts to be entered into between the private developer and the contractors to design or construct the improvements required by the development contract. The payment bond shall be conditioned upon the prompt payment for all labor or materials for which the private developer or one or more of its contractors or those

Public-Private Partnership Financing Contracts (cont'd)

(1) (cont'd)

contractors' subcontractors are liable. The payment bond shall be solely for the protection of the persons furnishing materials or performing labor or services for which the private developer or its contractors or subcontractors are liable. The total anticipated amount of the construction contracts shall be stated in the development contract and certified by the private developer as being a good-faith projection of its total costs for designing and constructing the improvements required by the development contract. The payment bond shall be executed by one or more surety companies legally authorized to do business in the State of North Carolina and shall become effective upon the awarding of the development contract. The development contract may provide for the requirement of a performance bond.

Public-Private Partnership Financing Contracts (cont'd)

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

Public-Private Partnership Financing Contracts (cont'd)

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

Public-Private Partnership Financing Contracts (cont'd)

(2) c. The notice required by sub-subdivision b. of this subdivision shall be served by certified mail or by signature confirmation as provided by the United States Postal Service, postage prepaid, in an envelope addressed to the private developer at any place where that private developer's office is regularly maintained for the transaction of business or in any manner provided by law for the service of summons. The claimants' service of a claim of lien on real property or a claim of lien on funds as funds as allowed by Article 2 of Chapter 44A of the General Statutes on the private developer shall be deemed, nonexclusively, as adequate notice under this section.

Public-Private Partnership Financing Contracts (cont'd)

- (3) Every action on a payment bond as provided in this subsection shall be brought in a court of appropriate jurisdiction in a county where the development contract or any part thereof is to be or has been performed. Except as provided in G.S. 44A-16(c), no action on a payment bond shall be commenced after one year from the day on which the last of the labor was performed or material was furnished by the claimant.
- (4) No surety shall be liable under a payment bond for a total amount greater than the face amount of the payment bond. A judgment against any surety may be reduced or set aside upon motion by the surety and a showing that the total amount of claims paid and judgments previously rendered under the payment bond, together with the amount of the judgment to be reduced or set aside, exceeds the face amount of the bond.

Public-Private Partnership Financing Contracts (cont'd)

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

Public-Private Partnership Financing Contracts (cont'd)

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

Public-Private Partnership Financing Contracts (cont'd)

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

- a. The date the bond is executed.
- b. The name of the principal.
- c. The name of the surety.
- d. The governmental entity.
- e. The development contract number.
- f. All of the following:

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

Public-Private Partnership Financing Contracts (cont'd)

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

f. All of the following:

2. "THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into a certain development contract with [governmental entity], numbered as shown above and hereto attached."
3. "NOW THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the construction or design work provided for in the development contract, and any and all duly authorized modifications of the contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue."

Public-Private Partnership Financing Contracts (cont'd)

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

f. All of the following:

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

Public-Private Partnership Financing Contracts (cont'd)

(8) In any suit brought or defended under the provisions of this subsection, the presiding judge may allow reasonable attorneys' fees to the attorney representing the prevailing party. Attorneys' fees under this subdivision are to be taxed as part of the court costs and shall be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this subdivision, the term "prevailing party" means a party plaintiff or third-party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or a party defendant or third-party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended. Notwithstanding the provisions of this subdivision, if an offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer.

Public-Private Partnership Financing Contracts (cont'd)

(9) The obligations and lien rights set forth in Article 2 of Chapter 44A of the General Statutes shall apply to a project awarded under this section to the extent of any property interests held by the private developer in the project. For purposes of applying the provisions of Article 2 of Chapter 44A of the General Statutes, the private developer shall be deemed the owner to the extent of that private developer's ownership interest. This subdivision shall not be construed as making the provisions of Article 2 of Chapter 44A of the General Statutes apply to governmental entities or public buildings to the extent of any property interest held by the governmental entity in the building.

Public-Private Partnership Financing Contracts (cont'd)

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

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

Public-Private Partnership Financing Contracts (cont'd)

- (3) Explanation of project team selection by either listing of licensed contractors, licensed subcontractors, and licensed design professionals whom the private developer proposes to use for the project's design and construction or a statement outlining a strategy for open contractor and subcontractor selection based upon the provisions of this Article.
- (4) Statement of availability to undertake the public-private project and projected time line for project completion.
- (5) Any other information required by the governmental entity.

Public-Private Partnership Financing Contracts (cont'd)

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

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

Public-Private Partnership Financing Contracts (cont'd)

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

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

Public-Private Partnership Financing Contracts (cont'd)

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

Public-Private Partnership Financing Contracts (cont'd)

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

(m) This section shall not apply to any contract or other agreement between or among The University of North Carolina or one of its constituent institutions, a private, nonprofit corporation established under Part 2B of Article 1 of Chapter 116 of the General Statutes, or any private foundation, private association, or private club created for the primary purpose of financial support to The University of North Carolina or one of its constituent institutions. (2013-401, s. 4.)

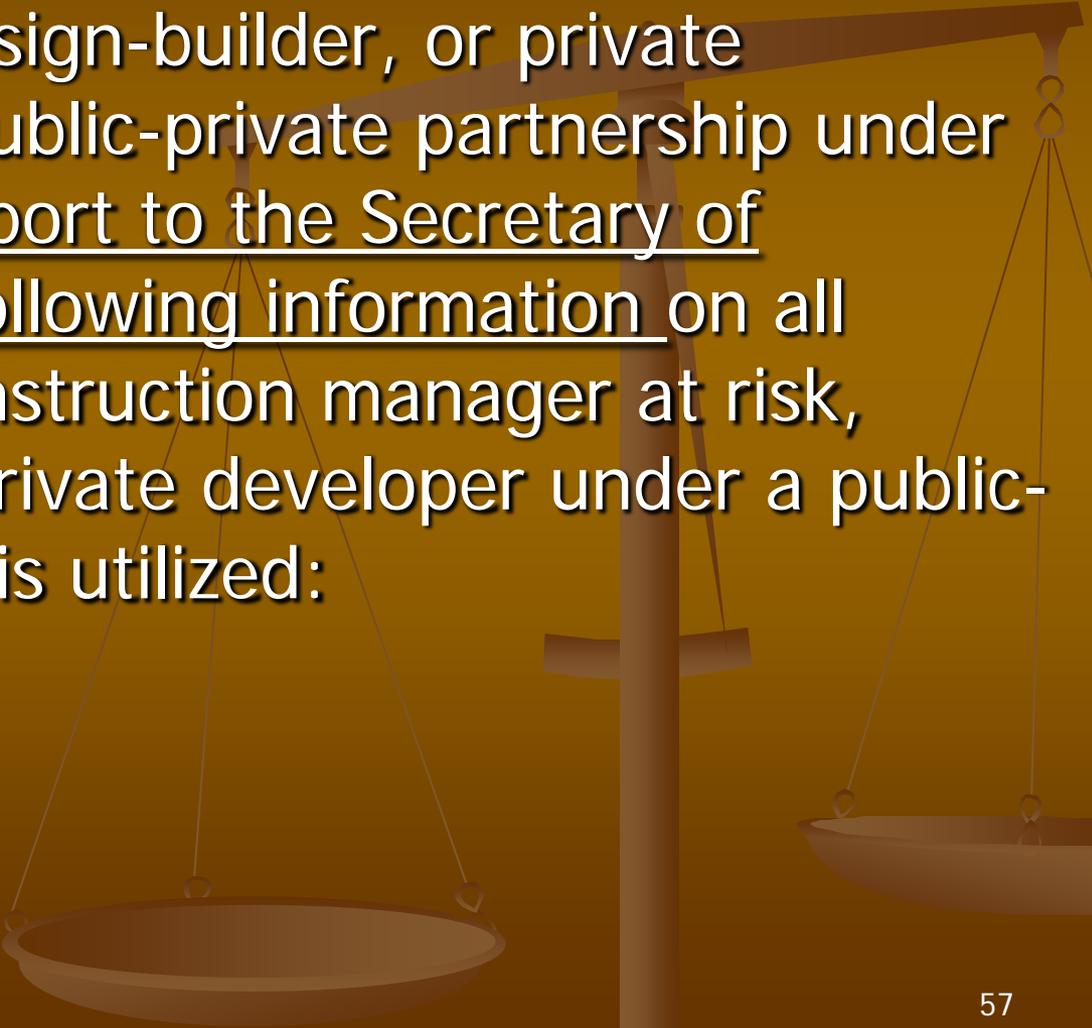
So What Does It Mean?

(sorting out the Statutes)

- Analysis to apply Mini-Brooks to the different construction delivery methods
 - Construction Manager at Risk Services
 - Design-Build Services
 - Design-Build Bridging Contracts (separate contracts for design and for construction)
 - Public-Private Partnership Construction contracts

NCGS 143-64.31 (cont'd)

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



NCGS 143-64.31 (cont'd)

b) Public entities ... under this section shall report to the Secretary of Administration the following information ...:

- (1) A detailed explanation of the reason why the particular construction manager at risk, [design-builder, or private developer] was selected.
- (2) The terms of the contract with the construction manager at risk, [design-builder, or private developer].

NCGS 143-64.31 (cont'd)

b) Public entities ... under this section shall report to the Secretary of Administration the following information ...:

- (3) A list of all other firms considered but not selected as the construction manager at risk, [design-builder, or private developer] and the amount of their proposed fees for services.
- (4) A report on the form of bidding utilized by the construction manager at risk, [design-builder, or private developer] on the project.

NCGS 143-64.31 (cont'd)

b) Public entities ... under this section shall report to the Secretary of Administration the following information ...:

- (5) A detailed explanation of why the particular delivery method was used in lieu of the delivery methods identified in G.S. 143-128(a1) subdivisions (1) through (3) and the anticipated benefits to the public entity from using the particular delivery method.

§ 143-128. Requirements for certain building contracts.

(a) Preparation of specifications. - ...

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

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

NCGS 143-128(a1) (cont'd)

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

- (1) Separate-prime bidding.
- (2) Single-prime bidding.
- (3) Dual bidding pursuant to subsection (d1) of this section.

[These construction contracts are not subject to Mini-Brooks]

[The design services contracts are separately contracted with the unit of government and are subject to Mini-Brooks.]

NCGS 143-128(a1) (cont'd)

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

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

[Construction management at risk contracts are subject to Mini-Brooks.]

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

[Design services are separately contracted with the unit of government and are subject to Mini-Brooks.]

NCGS 143-128(a1) (cont'd)

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

- (6) Design-build contracts pursuant to G.S. 143-128.1A.
(Subject to Mini-Brooks.)
- (7) Design-build bridging contracts pursuant to G.S. 143-128.1B.
(Design Criteria Design Professional portion is subject to Mini-Brooks.)
- (8) Public-private partnership construction contracts (financing contracts) pursuant to G.S. 143-128.1C.
(For public-private partnerships using the design-build project delivery method, same as (6) above. Otherwise, a financing arrangement only.)

§ 143-128.1A. Design-build contracts.

(a) Definitions for purposes of this section:

(1) Design-builder. - As defined in G.S. 143-128.1B.

(2) Governmental entity. - As defined in G.S. 143-128.1B.

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

(1) – (6) ...

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

(1) – (8) ...

§ 143-128.1A. Design-build contracts. (cont'd)

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

§ 143-128.1A. Design-build contracts. (cont'd)

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

(f) The design-builder shall provide a performance and payment bond to the governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. The design-builder shall obtain written approval from the governmental entity prior to changing key personnel as listed in sub-subdivision (c)(8)a. of this section after the contract has been awarded. (2013-401, s. 4.)

§ 143-128.1B. Design-build bridging contracts.

(a) Definitions for purposes of this section:

- (1) Design-build bridging. - A design and construction delivery process whereby a governmental entity contracts for design criteria services under a separate agreement from the construction phase services of the design-builder.
- (2) Design-builder. - An appropriately licensed person, corporation, or entity that, under a single contract, offers to provide or provides design services and general contracting services where services within the scope of the practice of professional engineering or architecture are performed respectively by a licensed engineer or licensed architect and where services within the scope of the practice of general contracting are performed by a licensed general contractor.

§ 143-128.1B. Design-build bridging contracts. (cont'd)

(a) Definitions for purposes of this section: (cont'd)

- (3) Design criteria. - The requirements for a public project expressed in drawings and specifications sufficient to allow the design-builder to make a responsive bid proposal.
- (4) Design professional. - Any professional licensed under Chapters 83A, 89A, or 89C of the General Statutes.
- (5) First-tier subcontractor. - A subcontractor who contracts directly with the design-builder, excluding design professionals.
- (6) Governmental entity. - Every officer, board, department, commission, or commissions charged with responsibility of preparation of specifications or awarding or entering into contracts for the erection, construction, alteration, or repair of any buildings for the State or for any county, municipality, or other public body.

§ 143-128.1B. Design-build bridging contracts. (cont'd)

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

(1) – (6) ...

(c) On or before entering into a contract for design-build services under this section, the governmental entity shall select or designate a staff design professional, or a design professional who is independent of the design-builder, to act as its design criteria design professional as its representative for the procurement process and for the duration of the design and construction. [...] The design criteria package shall include all of the following:

(1) – (9) ...

§ 143-128.1B. Design-build bridging contracts. (cont'd)

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

(1) – (9) ...

(10) A statement providing that each design-builder shall submit in its request for proposal a sealed envelope with all of the following:

a. The design-builder's price for providing the general conditions of the contract.

b. The design-builder's proposed fee for general construction services.

c. The design-builder's fee for design services.

§ 143-128.1B. Design-build bridging contracts. (cont'd)

(e) Following evaluation of the qualifications of the design-builders, the governmental entity shall rank the design-builders who have provided responses, grouping the top three without ordinal ranking. [...] From the grouping of the top three design-builders, the governmental entity shall select the design-builder who is the lowest responsive, responsible bidder based on the cumulative amount of fees provided in accordance with subdivision (d)(10) of this section and taking into consideration quality, performance, and the time specified in the proposals for the performance of the contract. Each design-builder shall certify to the governmental entity that each licensed design professional who is a member of the design-build team, including subconsultants, was selected based upon demonstrated competence and qualifications in the manner provided by G.S. 143-64.31.

§ 143-128.1B. Design-build bridging contracts. (cont'd)

(f) The design-builder shall accept bids based upon the provisions of this Article from first-tier subcontractors for all construction work under this section.

(g) The design-builder shall provide a performance and payment bond to the governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. The design-builder shall obtain written approval from the governmental entity prior to changing key personnel, as listed under subdivision (d)(9) of this section, after the contract has been awarded. (2013-401, s. 4.)

§ 143-128.1C. Public-private partnership construction contracts.

(a) Definitions for purposes of this section:

- (1) Construction contract. - Any contract entered into between a private developer and a contractor for the design, construction, reconstruction, alteration, or repair of any building or other work or improvement required for a private developer to satisfy its obligations under a development contract.
- (2) Contractor. - Any person who has entered into a construction contract with a private developer under this section.
- (3) Design-builder. - Defined in G.S. 143-128.1B.
- (4) Development contract. - Any contract between a governmental entity and a private developer under this section and, as part of the contract, the private developer is required to provide at least fifty percent (50%) of the financing for the total cost necessary to deliver the capital improvement project, whether through lease or ownership, for the governmental entity.

Public-Private Partnership Financing Contracts (cont'd)

- (8) Public-private project. - A capital improvement project undertaken for the benefit of a governmental entity and a private developer pursuant to a development contract that includes construction of a public facility or other improvements, including paving, grading, utilities, infrastructure, reconstruction, or repair, and may include both public and private facilities.
- (9) State entity. - The State and every agency, authority, institution, board, commission, bureau, council, department, division, officer, or employee of the State. The term does not include a unit of local government as defined in G.S. 159-7.

Public-Private Partnership Financing Contracts (cont'd)

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

- (1) The property interest of the governmental entity and all other participants in the development of the project.
- (2) The responsibilities of the governmental entity and all other participants in the development of the project.

Public-Private Partnership Financing Contracts (cont'd)

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

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

Public-Private Partnership Financing Contracts (cont'd)

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

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

Public-Private Partnership Financing Contracts (cont'd)

- (3) Explanation of project team selection by either listing of licensed contractors, licensed subcontractors, and licensed design professionals whom the private developer proposes to use for the project's design and construction or a statement outlining a strategy for open contractor and subcontractor selection based upon the provisions of this Article.
- (4) Statement of availability to undertake the public-private project and projected time line for project completion.
- (5) Any other information required by the governmental entity.

Public-Private Partnership Financing Contracts (cont'd)

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

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

NCGS 143-128(a1) REVIEW

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

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

QUESTIONS ?