

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

H

2

HOUSE BILL 1043*
Committee Substitute Favorable 6/9/14

Short Title: Prequalification Update.

(Public)

Sponsors:

Referred to:

May 15, 2014

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 STUDIED
4 BY THE JOINT PURCHASE AND CONTRACT STUDY COMMITTEE.

5 The General Assembly of North Carolina enacts:

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

7 "§ 143-135.8. Prequalification.

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

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

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

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

18 (3) The governmental entity has adopted the assessment tool and criteria for that
19 specific project, which must include the prequalification scoring values and
20 minimum required score for prequalification on that project.

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

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

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

26 (3) Clearly state the prequalification criteria, which must comply with all of the
27 following:

28 a. Be rationally related to construction or repair work.

29 b. Not require that the bidder has previously been awarded a
30 construction or repair project by the governmental entity.

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

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

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



* H 1 0 4 3 - V - 2 *

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
16 potential bidders have the skill, judgment, integrity, sufficient financial
17 resources, and ability necessary to the faithful performance of a contract for
18 construction or 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, provided that public entity and the construction
48 manager at risk shall jointly develop the assessment tool and criteria for that specific project,
49 which must include the prequalification scoring values and minimum required score for
50 prequalification on that project. The public entity shall require the construction manager at risk
51 to submit its plan for compliance with G.S. 143-128.2 for approval by the public entity prior to

1 soliciting bids for the project's first-tier subcontractors. A construction manager at risk and
2 first-tier subcontractors shall make a good faith effort to comply with G.S. 143-128.2,
3 G.S. 143-128.4, and to recruit and select small business entities. A construction manager at risk
4 may perform a portion of the work only if (i) bidding produces no responsible, responsive
5 bidder for that portion of the work, the lowest responsible, responsive bidder will not execute a
6 contract for the bid portion of the work, or the subcontractor defaults and a prequalified
7 replacement cannot be obtained in a timely manner, and (ii) the public entity approves of the
8 construction manager at risk's performance of the work. All bids shall be opened publicly, and
9 once they are opened, shall be public records under Chapter 132 of the General Statutes. The
10 construction manager at risk shall act as the fiduciary of the public entity in handling and
11 opening bids. The construction manager at risk shall award the contract to the lowest
12 responsible, responsive bidder, taking into consideration quality, performance, the time
13 specified in the bids for performance of the contract, the cost of construction oversight, time for
14 completion, compliance with G.S. 143-128.2, and other factors deemed appropriate by the
15 public entity and advertised as part of the bid solicitation. The public entity may require the
16 selection of a different first-tier subcontractor for any portion of the work, consistent with this
17 section, provided that the construction manager at risk is compensated for any additional cost
18 incurred.

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

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

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

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

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

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

41 **SECTION 5.** G.S. 143-133.1, as created by Section 3 of this act, reads as rewritten:
42 **"§ 143-133.1. Reporting.**

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

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

- 1 (3) A list of all other firms considered but not selected as the construction
2 manager at risk, design-builder, or private developer, ~~and the amount of their~~
3 ~~proposed fees for services.~~ developer.
- 4 (4) A report on the form of bidding utilized by the construction manager at risk,
5 design-builder, or private developer on the project.
- 6 (5) A detailed explanation of why the particular delivery method was used in
7 lieu of the delivery methods identified in G.S. 143-128(a1) subdivisions (1)
8 through (3) and the anticipated benefits to the public entity from using the
9 particular delivery method.

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

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

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

35 **SECTION 6.** G.S. 143-128.1B(b)(6) reads as rewritten:

36 "(6) The criteria utilized by the governmental entity, including a comparison of
37 the ~~cost and benefit~~ advantages and disadvantages of using the design-build
38 delivery method for a given project in lieu of the delivery methods identified
39 in subdivisions (1), (2), and (4) of G.S. 143-128(a1)."

40 **SECTION 7.** G.S. 143-128.1A(b)(6) reads as rewritten:

41 "(6) The criteria utilized by the governmental entity, including a comparison of
42 the ~~costs and benefits~~ advantages and disadvantages of using the
43 design-build delivery method for a given project in lieu of the delivery
44 methods identified in subdivisions (1), (2), and (4) of G.S. 143-128(a1)."

45 **SECTION 8.(a)** There is established a Blue Ribbon Commission to Study the
46 Building and Infrastructure Needs of the State (Commission).

47 **SECTION 8.(b)** The Commission shall be composed of 17 members as follows:

- 48 (1) Six members appointed by the Speaker of the House of Representatives, as
49 follows:
50 a. Three members of the House of Representatives.

- 1 b. One person upon recommendation of the North Carolina League of
2 Municipalities.
3 c. One member of the public, licensed as an architect in this State.
4 d. One member of the public, licensed as a professional engineer in this
5 State.
6 (2) Six members appointed by the President Pro Tempore of the Senate, as
7 follows:
8 a. Three members of the Senate.
9 b. One person upon recommendation of the North Carolina County
10 Commissioners Association.
11 c. One person upon recommendation of the North Carolina School
12 Boards Association.
13 d. One member of the public, licensed as a general contractor in this
14 State.
15 (3) Five members appointed by the Governor, as follows:
16 a. The State Treasurer, or the Treasurer's designee.
17 b. The Secretary of Administration, or the Secretary's designee.
18 c. The President of The University of North Carolina, or the President's
19 designee.
20 d. The President of the State System of Community Colleges, or the
21 President's designee.
22 e. A member of the State Water Infrastructure Authority.

23 **SECTION 8.(c)** The Commission shall study the following matters related to
24 building and infrastructure needs, including new repairs, renovations, expansion, and new
25 construction, in North Carolina:

- 26 (1) The anticipated building construction needs of State agencies, The
27 University of North Carolina, and the State System of Community Colleges
28 until 2025.
29 (2) The anticipated water and sewer infrastructure construction needs of
30 counties and cities until 2025.
31 (3) The anticipated building needs of the local school boards until 2025.
32 (4) The anticipated costs of such building and infrastructure needs.
33 (5) A process that would prioritize needs within each infrastructure category and
34 among all categories, with an emphasis on developing criteria that focuses
35 on public safety and economic development.
36 (6) The feasibility of establishing a building and infrastructure fund, which
37 would be a dedicated source of revenue for capital funding for counties,
38 cities, local school boards, The University, the State System of Community
39 Colleges, and State agencies.
40 (7) Funding options for meeting the anticipated capital needs until 2025.
41 (8) Other matters the Commission deems relevant and related.

42 **SECTION 8.(d)** The Speaker of the House of Representatives shall designate one
43 Representative as cochair, and the President Pro Tempore of the Senate shall designate one
44 Senator as cochair. The Commission shall meet upon the call of the cochairs. A quorum of the
45 Commission shall be 10 members. Any vacancy on the Commission shall be filled by the
46 appointing authority.

47 **SECTION 8.(e)** Members of the Commission shall receive per diem, subsistence,
48 and travel allowances in accordance with G.S. 120-3.1, G.S. 138-5, or G.S. 138-6, as
49 appropriate. The Commission, while in the discharge of its official duties, may exercise all
50 powers provided for under G.S. 120-19 and G.S. 120-19.4. The Commission may meet upon
51 the call of the cochairs. The Commission may meet in the Legislative Building or the

1 Legislative Office Building. With approval of the Legislative Services Commission, the
2 Legislative Services Officer shall assign professional staff to assist the Commission in its work.
3 The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign
4 clerical staff to the Commission, and the expenses relating to the clerical employees shall be
5 borne by the Commission.

6 All State departments and agencies and local governments and their subdivisions
7 shall furnish the Commission with any information in their possession or available to them.

8 **SECTION 8.(f)** The Commission may make an interim report of its findings and
9 recommendations to the 2015 General Assembly and shall make a final report of its findings
10 and recommendations to the 2016 Regular Session of the 2015 General Assembly. The
11 Commission shall terminate on December 31, 2016, or upon the filing of its final report,
12 whichever occurs first.

13 **SECTION 9.** Section 8 of this act is effective when it becomes law. The remainder
14 of this act becomes effective October 1, 2014, and applies to contracts awarded on or after that
15 date.