

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: SB 914 (4th Edition)

SHORT TITLE: Public Construction Law Changes

SPONSOR(S): Senator. Dalton

FISCAL IMPACT					
	Yes (X)	No ()	No Estimate Available ()		
	<u>FY 2001-02</u>	<u>FY 2002-03</u>	<u>FY 2003-04</u>	<u>FY 2004-05</u>	<u>FY 2005-06</u>
REVENUES					
EXPENDITURES					
General Fund					
Dept of Justice Administration	\$0	\$64,791	\$64,791	\$64,791	\$64,791
Office of Secretary	\$32,396	\$64,791	\$64,791	\$64,791	\$64,791
State Construction	\$112,358	\$224,715	\$224,715	\$224,715	\$224,715
	\$361,894NR				
HUB Office	\$139,938	\$333,877	\$333,877	\$333,877	\$333,877
	\$366,160NR				
Total	\$284,730R	\$688,174	\$688,174	\$688,174	\$688,174
	\$\$728,054NR				
POSITIONS:	10	10	10	10	10
PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Justice and Department of Administration: State Construction Office, Office of the Secretary, and Office for Historically Underutilized Businesses.					
Department of Insurance					
EFFECTIVE DATE: Sections 8(a) thru 8(e) - July 1, 2001; Section 11.1 – March 1, 2002; Remaining sections of Parts I and II – Jan. 1, 2002. The remainder of the bill – when it becomes law.					

BILL SUMMARY:

SUMMARY¹: Senate Bill 914 would make changes in the public construction laws to permit greater flexibility and efficiencies in public building design, construction and plan review, primarily through the concept of construction managers at risk, would increase the mandatory performance and payment bond threshold for public construction projects, and would make changes intended to enhance and improve good faith efforts to recruit and select minority businesses for participation in public construction contracts. The bill would also change the law to provide for construction and design supervisory authority for projects up to \$2 million for the University of North Carolina until December 31, 2006, promote greater energy efficiency in State buildings and make clarifying changes to the scope of practice for landscape architecture.

BILL ANALYSIS: The bill would make the following changes to current law:

Construction Flexibility for Public Entities (Part I, Sections 1, 2, 3, 5)

The bill would permit public entities to utilize the services of a construction manager at risk as an alternative construction method. The construction manager, a licensed general contractor, would contract directly with the public entity. The construction manager generally would not perform work on the project, but would provide services to the public entity in preparing and coordinating bid packages, scheduling, controlling costs, value engineering, evaluation, pre-construction services, and administering the construction of the project. The construction manager would guarantee the cost of the project and would be required to provide a performance and payment bond to the public entity.

Contracts by a public entity with a construction management would be excepted from the provisions of Article 8 of Chapter 143 (Procedure for Letting of Public Contracts).

The bill would also make various construction bidding methods available to all levels of government, not just local school administrative units, including the State, counties, cities and other public bodies. These construction-bidding methods would include separate-prime, single-prime, dual bidding, construction management services, and alternative contracting methods. The bill would raise the size of the contracts covered by the formal bid requirements from \$100,000 to \$300,000.

These changes would become effective January 1, 2002 and apply to construction projects for which bids or proposals are solicited on or after that date.

Dispute Resolution in Public Construction Contracts (Part I, Section 3; Part II, Section 11)

The bill would require the State Building Commission to develop dispute resolution procedures, including mediation, for subcontractors on State capital improvement projects (Part II, Section 11, G.S. 143-135.26(12)). For all construction and repair projects, public entities would be required to use the Commission's dispute resolution process or adopt another dispute resolution process, and would have to make this process available to all the parties involved in the public entity's construction project. The public entity could set a reasonable threshold, not to exceed \$15,000, concerning the amount in controversy that must be at issue before a party may require other parties to participate in the dispute

¹ From Research Division Committee Counsel.

resolution process. The public entity would determine how the costs of the dispute resolution process would be divided, but at least one-third of the cost would be paid by the public entity if the public entity were a party to the dispute. Finally, the public entity could require by contract that a party participate in mediation as a precondition to initiating litigation concerning a dispute. (Part I, Section 3, G.S. 143-128(g)). These changes would become effective January 1, 2002.

Minority Participation in Public Construction Contracts (Part I, Sections 1, 3.1, 3.6, and 5.1)

Current law requires the State to have a verifiable ten percent (10%) goal for participation by minority businesses in the total value of work for each building project, and requires cities, counties, and other public bodies to set verifiable percentage goals for minority participation in building projects.

The bill is intended to enhance and improve minority business participation in public construction contracts by providing for the following:

- In addition to original construction, minority business participation goals (which would remain at 10%) would apply to repair work and work done by a private entity on a facility to be leased or purchased by the State. On State projects, the Secretary of the Department of Administration would identify the appropriate percentage goal for each category of minority business as defined in statute based on the particular contract type.
- Local governmental units or other public or private entities that receive State funds for construction work for projects costing more than \$100,000 (including project work done by a private entity on a facility to be leased or purchased by a local government unit) shall be subject to the 10% goal. However, local governments would be permitted to apply for a different verifiable goal that was adopted prior to December 1, 2001 if the local government had and continues to have a sufficiently strong basis in evidence to justify the use of that goal.
- Each entity required to have a verifiable percentage goal would have to make a "good faith effort" to recruit minority participation. Public entities would have to establish the good faith efforts that it will take prior to soliciting bids on a project, and shall require its contractors to make good faith efforts. First tier subcontractors would likewise have to comply with the requirements applicable to contractors as to good faith efforts, and good faith efforts would apply to the selection of a substitute subcontractor.
- All bidders on any construction or repair project would have to identify good faith efforts made to ensure minority business participation, documented as prescribed by statute.
- Before awarding a contract, a public entity would be required to develop and implement a minority business participation outreach plan, attend the scheduled pre-bid conference, notify minority businesses of potential contracting opportunities, and utilize other media likely to inform potential minority businesses of the bid.

- Public entities would have to require bidders to undertake good faith efforts, which would include 1) contacting minority businesses, 2) making the construction plans available for review by prospective minority businesses, 3) breaking down or combining elements of work into economically feasible units to facilitate minority participation, 4) working with minority trade, community or contractor organizations, 5) attending any pre-bid meetings, 6) providing assistance in getting required bonding or insurance or providing alternative to bonding, 7) negotiating in good faith with interested minority businesses, 8) providing assistance to an otherwise qualified minority business in need of equipment or funds to secure financial assistance or supplies, 9) negotiating joint venture and partnership arrangements with minority businesses, and 10) providing quick pay agreements and policies to enable minority contractors and suppliers to meet cash-flow demands. No later than June 30, 2002, the Secretary would be required to adopt rules establishing points to be awarded for taking each effort and the minimum number of points required. Prior to July 1, 2002 (when the rules will be in place), a bidder must show compliance with at least five of these ten efforts.
- The term "minority business" would be expanded to include businesses owned by socially and economically disadvantaged individuals (as defined by federal law governing federal procurement contracts).
- Public entities would have to report to the Office of Historically Underutilized Business information concerning minority business utilization. Public entities that fail to comply with this requirement would be required to develop a corrective plan. Failure to file a corrective plan or to implement the plan could result in the loss of authority to enter into construction or repair contracts without prior review by the Department of Administration.
- An advisory board would be appointed by the Secretary of the Department of Administration to develop recommendations to improve the recruitment and utilization of minority businesses. These recommendations would be presented to the General Assembly, the State Construction Office, the University of North Carolina, and the community college system.
- For construction or repair work subject to the informal bidding process, public entities would be required to solicit minority business participation, maintain a record of contractors solicited and document efforts to recruit minority business participation, and report information and provide documentation concerning efforts to recruit minority business participation to the Office for Historically Underutilized Business upon the completion of the project.

These changes would become effective January 1, 2002 and apply to construction projects for which bids or proposals are solicited on or after that date.

Construction And Design Administration (Part II, Sections 11, 11.1)

The bill would make changes to the powers and duties of the State Building Commission, including exemption from plan review for certain projects, expeditious plan review, agency evaluation of energy contracts, open-end design agreements, and dispute resolution procedures. The bill would change the vote by which an alternative contracting method may be approved from 2/3 to a majority. These changes would become effective January 1,

2002. The bill would, beginning March 1, 2002, provide an alternative to begin construction if fire safety reviews of public building specifications are not completed by the Insurance Department within 60 days.

Energy Efficiency in State Buildings (Part III, Sections 12(a)-(g) and 13)

The bill changes the Guaranteed Energy Savings Contract law to make to applicable to State agencies in addition to local governments as is currently allowed. These changes would become effective when the act becomes law.

Changes in Landscape Architecture Law (Part IV, Sections 13.1(a)-(d))

The bill would amend the Landscape Architecture statutes to clarify what construction design matters may be performed by landscape architects. This change is to clarify a conflicting overlap of responsibilities with licensed engineers. The bill would also require engineers and landscape architects to enter into a Memorandum of Understanding regarding their respective responsibilities and authorize an LRC study on the subject. These provisions would become effective when the act becomes law.

Miscellaneous

Section 4 would raise the limit for public bidding from \$100,000 to \$300,000 for construction projects and from \$50,000 to \$90,000 for purchases of apparatus, supplies, materials, or equipment. **Section 4.1** would repeal a local act for Greensboro that had allowed Greensboro a \$70,000 limit for purchases of materials and equipment (less than the proposed limit). **Section 5.2** would add language to G.S. 143-135.5 that would make it the State's policy not to accept bids or proposals from or engage in business with firms that discriminates on the basis or race, gender, religion, national origin, age, physical disability, or any other form of unlawful discrimination in its solicitation, selection, hiring or treatment of another business. **Section 6** would raises the level of contracts for which architectural plans are required for public projects by varying amounts depending on the type of work being done.

Section 7 would raise the threshold for which performance and payment bonds are required on government projects from \$100,000 to \$300,000. This change is consistent with the changes being made in the competitive bidding laws in elsewhere in the bill.

Sections 8(a) through (e) restores The University of North Carolina's exemption from State Construction Office oversight and raises the cap for the exemption from \$500,000 to \$2 million, and continues other construction law exceptions applicable to UNC construction that had expired July 1, 2001. This change would become effective July 1, 2001 and would expire December 31, 2006.

All of Section 10 involves local provisions involving construction law exceptions. **Sections 10. (a) and (b)** would remove the sunset on Johnston County School Board to use the Unitary System Approach model school plan. **Section 10. (c)** would repeal the sunset on the Charlotte-Mecklenburg School Board's authority to use design-built construction for school projects. **Section 10. (d)** would authorize the use of force account by the New Hanover Regional Medical Center. This section would expire December 31, 2007.

Section 14 would require the University of North Carolina and all other public entities to report annually to the Department of Administration (beginning April 1, 2003) on the

effectiveness and cost-benefit of utilization of each of the authorized construction methods used by the public entity.

Except for Sections 8(a) through (e), the above miscellaneous provisions would become effective when the act becomes law.

Note: Sections 3.2, 3.3, 3.4, 3.5, and 9 contain conforming changes.

ASSUMPTIONS AND METHODOLOGY:

Department of Administration:

The Department estimates that this bill will have a fiscal impact on the Office of the Secretary, the State Construction Office and the Office for Historically Underutilized Businesses. The additional costs are primarily related to the implementation of the minority business participation requirements of the bill. The discussion for each of the three divisions follows.

Office of the Secretary:

The Secretary estimates that DOA will need one Attorney II (salary grade 82) at a cost of \$60,944 to provide the legal and policy assistance in drafting rules and implementing statutory requirements set forth in the G.S. §§ 143-128.2, 143-128.3, and 143-135.5 as revised by the bill. These provisions require the Secretary to draft rules establishing points to be awarded for a public entity's good faith efforts at minority business participation and to adopt guidelines for local government units to implement the provisions of G.S. § 143-128.2.

The drafting of rules is a responsibility of the Secretary's legal counsel. However, per the Department, it currently has a significant backlog of rules to be drafted for the 26 divisions within the Department. Thus, it cannot meet the requirements of the bill with existing resources. In addition to drafting the rules, the attorney would also provide assistance with the implementation of the minority business participation goals required by the bill in that the attorney would be responsible for providing guidance to the public entities in developing the minority participation outreach plans, assisting in the corrective action required for those agencies that fail to comply with G.S. § 143-128.2, providing any legal advice required by the implementation of the point system.

Fiscal Research believes the Department's need for an additional attorney is a reasonable one. However, we have adjusted their estimate from \$60,944 to \$64,711, annually, based on the minimum salary for the position and benefits at 15.66 percent for social security and retirement and \$2,932 for medical. The recurring cost for fiscal year 2001-02 would be \$32,355, assuming a January 1, 2002 effective date for the position.

State Construction Office:

The State Construction Office expects this bill to increase the responsibilities in historically underutilized business (HUB) reporting requirements, energy conservation

reporting, reporting requirements relating to the effectiveness and cost of alternative contracting methods, establishment of administrative rules and in providing additional support and service to the State Building Commission. To meet these additional responsibilities, SCO estimates that it will need 3 additional Building Systems Engineers (salary grade 80) at a cost of \$236,715.

One of these positions would be responsible for monitoring minority business participation goals as directed in § 3.1 of the bill. As the administrator of the state construction contracts, SCO would be responsible for implementing the minority participation requirements for the construction contracts that it administers to ensure the State's compliance with G.S. § 143.128.2. This will require an additional review in the award of contracts to ensure that the State's good faith efforts are incorporated and to ensure that bidders on state contracts have met the good faith requirements.

Another engineer would be responsible for drafting the administrative rules for the State Building Commission as directed in § 11 of the bill. Specifically, the State Building Commission has been given additional responsibility for drafting of administrative rules related to the State's Capital Facilities program. These rules govern the review of plans and specifications and types of projects to be reviewed. In addition, rules for evaluation of energy savings contracts and dispute resolution procedures must be developed. These are all new issues and responsibilities that must be researched and studied by individuals with technical expertise to assure proper drafting of the rules. In addition, as provided for in § 11.1 of the bill, the State Building Commission may become involved in Department of Insurance responsibilities for review of plans if DOI fails to act on plans within 60 days of submission. This is an expansion of the SBC's duties and powers.

The third position would evaluate the use of energy savings contracts and implement energy efficiency goals for all state buildings as directed in § 12.(f) of the bill. Currently only local governments have the authority to enter into guaranteed energy savings contracts. Under the bill, all state government entities will be able to enter into these arrangements. As part of the SCO's responsibility under G.S. § 143-341, proposals and contracts will have to be reviewed from both a technical and contractual standpoint. This is a new responsibility which will require a technically proficient individual to be involved and dedicated to this new process. Their review would include verification that the plans are in compliance with existing building codes as well as verification that the project realized the savings as guaranteed by the contractor.

In addition to the additional personnel, the SCO estimates that it will need \$387,832 in nonrecurring funding for equipment and system upgrades. Specifically, it estimates that it will need 20 new computers at a cost of \$35,700 and a new server and additional server ports at a cost of \$14,194. The computers would replace the existing computers which do not contain enough memory, RAM, or operating space to run the web-based application efficiently. Replacing the server would provide additional capacity and prevent loss of data due to the increased demands on the system. SCO also estimates that it will need \$300,000 to upgrade Interscope, the SCO's web-based application, to allow public access for tracking of project status. The bill requires SCO to track minority participation statistics by category. Point system data would also be collected. Additionally, all entities are required to report on the effectiveness and cost-benefit of utilization of each of the construction methods authorized in G.S. 143-128(a1). SCO believes the increased requirements of

tracking and monitoring alternative contracting methods and minority business participation reporting requirements mandates the enhancements to the system. Finally, SCO estimates that it will need a new copier at a cost of \$37,938 for the printing and distribution of reports, guidelines and information on the changes in the administrative rules and construction statutes to the design and construction community.

Based on our review of the bill, FRD believes that the estimate of \$236,715 for personnel provided by SCO is reasonable. The cost for each of the three Building Systems Engineers includes recurring cost \$65,754 (\$54,316 SER + \$8,506 SS/Retirement + \$2,932 Medical) for salaries and benefits based on the special entry rate approved by the Office of State Personnel and operating cost of \$9,151 for travel, supplies, continuing education. The nonrecurring cost for each position is \$4,000 for equipment and office furniture. The total recurring cost for the three positions is \$224,715 and the nonrecurring is \$12,000.

Additionally, though we believe the computer and equipment needs are existing needs within SCO and are not mandated by the bill, we believe the additional requirements of the bill make their need for these items more crucial. Thus, our estimate includes the nonrecurring cost of \$349,894 for computers, equipment and system upgrades. We have not included their estimated cost for a copier. The recurring cost for fiscal year 2001-02 would be \$112,358 assuming a January 1, 2002 effective date for the positions.

The State Construction Office notes that this bill does not in any significant matter decrease the current workload of the SCO staff. The only duty it eliminates is the review of University projects less than \$2,000,000. Review of projects since 1988 indicates that this equates to less than 30 per year on average. Currently under \$500,000 projects are not reviewed by the SCO. Current projects in house are approximately 1,500. All claims associated with the University projects would continue to be heard by the SCO. The new mediation process does not eliminate the SCO from the claims process. One of the reasons stated by the University system to us in their request to increase the threshold from \$500,000 to \$2,000,000 was so the SCO could concentrate on the larger projects (over \$2million) and enhance their reviews and improve turnaround times. Under Part I of the legislation, the CM at Risk construction method will not eliminate the SCO under GS 143-341 in contract negotiation preparation or oversight. The SCO will still be involved with bid protest and claims from subcontracts.

Office of Historically Underutilized Businesses.

This bill will require HUB to identify a new category of minority contractors (i.e. socially and economically disadvantaged). Also, all public entities are required to submit quarterly or semiannual reports to HUB on their minority participation efforts. Currently HUB is receiving reports from the 230 state agencies, community colleges, universities and local educational authorities. This bill will also require the municipalities (approximately 500) and the 100 counties to report to HUB semi annually. Further, though not explicitly stated in the bill, the Secretary would be responsible for reviewing the reports for the entities' compliance with G.S. 143-128.2 and to take corrective action.

To meet these additional responsibilities, HUB estimates that it will need five additional positions at a total cost of \$229,877 as well as \$30,000 for position upgrades. These positions include an administrative support position (grade 63), two statisticians (grade 73 and 76), a business officer III (grade 77) and an auditor III (grade 78). The statistician would be responsible for assisting with the design of the report database and analyzing the data submitted by the public entities. The business officer III would be responsible for certification and verification efforts with minority contractors including the new category. The auditor would be responsible for reviewing the reports for compliance and consulting with the entities on their corrective action plans. The administrative support position would provide clerical assistance with the processing the additional report and staffing the HUB Advisory Board.

The HUB Office received a nonrecurring appropriation for fiscal year 2001-2002. It believes that this funding will allow it to also meet the outreach requirements of the bill. However, on a recurring basis, it believes it will need \$40,000 to continue the outreach efforts.

The HUB Office also estimates that it would need \$366,160 nonrecurring to enhance VendorLink to include those minority contractors that would not register through e-procurement and to develop a web-based application for the minority participation reports. It would also need \$14,000 recurring for the annual maintenance of the web-server. The web-based application would provide for the electronic receipt of the required reports from the public entities, more accurate and efficient reporting, and tracking and monitoring of compliance with the minority participation requirements.

The HUB Office estimates that it would need \$50,000 recurring for the expenses of the HUB Advisory Board.

The Fiscal Research Division believes the identified needs are reasonable. The estimate would include the following personnel cost:

Position	Grade	Salary	SS/Ret	Medical	Total
Administrative Support	63	\$22,921	\$3,589	\$2,932	\$29,442
Statistician II	73	\$34,452	\$5,395	\$2,932	\$42,779
Statistician II	76	\$39,338	\$6,160	\$2,932	\$48,430
HUB Certification Specialist (B/O III)	77	\$37,665	\$5,898	\$2,932	\$46,495
HUB Compliance Officer (Auditor III)	78	\$43,055	\$6,742	\$2,932	\$52,729
Total Salaries and Benefits					\$219,877
Operating Cost					\$10,000
Total Recurring Position Cost					\$229,877

Our estimate does not include the requested funding for position upgrades as this is an existing need that is not mandated by this bill. The first year recurring cost would be \$114,938 assuming a January 1, 2002 effective date for the positions.

Also, we believe the requested funding for the advisory council, the system upgrades and the outreach efforts are also reasonable. These costs are summarized below:

	FY 2001-02	FY 2002-03
	NR	Recurring
	Recurring	Recurring

Upgrade IT System			
3 contractors for 6 mos	\$336,960		
Web Server	\$20,000		
4 PC	\$9,200		
Annual Web Server Maintenance			\$14,000
HUB Advisory Board			
Travel/Operating Expenses		\$25,000	\$50,000
Outreach/Training		\$0	\$40,000
Total	\$366,160	\$25,000	\$104,000

Department of Insurance:

Section 11.1 requires the Commissioner of Insurance to review plans subject to G.S. 58-31-40 within 30 days of submission. It also allows an additional 30-day extension if necessary to complete the review. The turnaround time for completing reviews depends on the number of plans as well as on whether the plans have been submitted accurately and completely. Currently, the DOI has 7 reviewers for plans submitted by the community colleges and for private structures and the turnaround time is approximately 28 days. There are 6 reviewers for state projects and the turnaround time is approximately 20 days. Substantial increases in the number of plans may increase the turnaround time for reviewing plans. However, without an estimate of the number of plans that will be submitted, the Department cannot provide an estimate of the extent of the additional resources, if any, it may need to continue to review plans within 30 days of submission.

Attorney General’s Office, Department of Justice

Section 3.6

Background: Section 3.6 in the fourth edition of SB 914 adds new responsibilities for the Attorney General in the administration of G.S. 143-128.2, “Minority business participation goals.” These responsibilities are set out in Section 3.6 which establishes new G.S. 143-128.3, “Minority business participation administration” in subsections (b) and (f). The primary responsibilities for administration are assigned to the Department of Administration (DOA), while the role of the A.G. is at the secondary review level.

G.S. 143-28.3 requires all public entities to report certain information and data on minority business participation for each building project to DOA, Office of Historically Underutilized Businesses. DOA is also required to follow up with agencies that have not complied with minority business goals as set out in 143-128.2. and direct the development of a “corrective plan.”

Under G.S. 143-128.3, the A.G. does not get involved unless the public entity has failed to comply with DOA’s directive to prepare a “corrective plan.” Specifically, if after notification from the Secretary of DOA, a public entity does not file a corrective plan or does not file a plan in accordance with DOA terms, both the DOA and the Attorney General are charged to do *one or both* of the following:

- (1) approve new corrective plans once the public entity has consulted with HUB and/or
- (2) Prevent the public entity from bidding another contract without prior review by the A.G. and DOA of a good faith compliance plan.

Section 3.6 also requires the Secretary of DOA to provide additional information to the A.G. including information on the failure of an entity to report data in accordance with Section 3.6 and any false statements, documents or other information relating to minority business participation (G.S. 143-128.3 (f)).

Fiscal Impact: Given that the A.G. is assigned new responsibilities by this bill, some fiscal impact is anticipated. *The fiscal impact is difficult to determine since one cannot predict the number of public entities that will be non-compliant.* However, the Attorney General's Office believes that one Attorney III is needed to carry out the new role assigned to the A.G. based on the following:

- Currently, State Construction indicates there are 1,216 projects worth \$4 billion in the pipeline and normally over 1000 projects are ongoing at any one time. Given the volume of ongoing projects, there is the "potential" for a certain number of cases to reach the stage requiring A.G. review of a corrective plan.
- The A.G.'s Office indicates that one intent of G.S. 143-128.3 (b) is to provide an additional level of review over that provided by DOA. Assigning current attorneys in the Office that work with DOA may not provide adequate independence.

If the volume of cases forwarded to the A.G.'s Office is small it is likely that existing resources could handle new cases. However, given the "potential" for new work and the need for an additional level of review of corrective plans, Fiscal Research believes the need for one attorney is reasonable.

However, we do not believe a position is needed at an Attorney III level. The legal work is not likely to involve litigation. If a position is established, it should be at the Attorney I or II level. The cost of an Attorney II is \$64,791. Because this section of the bill is effective January 1, 2002 and since the A.G. is only involved in a review if DOA requirements are not met, any cost for an Attorney would not begin until July 1, 2002.

TECHNICAL CONSIDERATIONS:

FISCAL RESEARCH DIVISION 733-4910

PREPARED BY: Marilyn Chism

APPROVED BY: James D. Johnson

DATE: December 3, 2001



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