

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

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HOUSE BILL 869

Short Title: Design-Build Clarifications. (Public)

Sponsors: Representatives Arp, Jarvis, and Hunter (Primary Sponsors).

For a complete list of sponsors, refer to the North Carolina General Assembly web site.

Referred to: Commerce, if favorable, Rules, Calendar, and Operations of the House

April 22, 2019

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY THE DESIGN BUILD AND DESIGN BUILD BRIDGING
3 STATUTES.

4 The General Assembly of North Carolina enacts:

5 **SECTION 1.** G.S. 143-128.1A reads as rewritten:

6 **"§ 143-128.1A. Design-build contracts.**

7 (a) Definitions for purposes of this section:

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

9 (1g) Design professional. – As defined in G.S. 143-128.1B.

10 (1p) First-tier subcontractor. – As defined in G.S. 143-128.1B.

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

12 (3) Licensed contractor. – As defined in G.S. 143-128.1B.

13 (4) Licensed subcontractor. – A person or entity, not including employees of the
14 licensed contractor, that will be performing work under a licensed contractor
15 and whose scope of work proposed for the project requires that it be licensed
16 in accordance with Article 2 or Article 4 of Chapter 87 of the General Statutes.

17 (5) Unlicensed subcontractor. – A person or entity, not including employees of
18 the licensed contractor, that will be performing work under a licensed
19 contractor and that is not a licensed subcontractor or design professional.

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

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

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

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

28 (4) The capability of the governmental entity to manage and oversee the project,
29 including the availability of experienced staff or outside consultants who are
30 experienced with the design-build method of project delivery.

31 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
32 recruit and select small business entities. The governmental entity shall not
33 limit or otherwise preclude any respondent from submitting a response so long
34 as the respondent, itself or through its proposed team, is properly licensed and



- 1 qualified to perform the work defined by the public notice issued under
2 subsection (c) of this section.
- 3 (6) The criteria utilized by the governmental entity, including a comparison of the
4 advantages and disadvantages of using the design-build delivery method for a
5 given project in lieu of the delivery methods identified in subdivisions (1), (2),
6 and (4) of G.S. 143-128(a1).
- 7 (c) A governmental entity shall issue a public notice of the request for qualifications that
8 includes, at a minimum, general information on each of the following:
- 9 (1) The project site.
10 (2) The project scope.
11 (3) The anticipated project budget.
12 (4) The project schedule.
13 (5) The criteria to be considered for selection and the weighting of the
14 qualifications criteria.
15 (6) Notice of any rules, ordinances, or goals established by the governmental
16 entity, including goals for minority- and women-owned business participation
17 and small business participation.
18 (7) Other information provided by the owner to potential design-builders in
19 submitting qualifications for the project.
20 (8) A statement providing that each design-builder shall submit in its response to
21 the request for qualifications an explanation of its project team ~~selection,~~
22 ~~which selection.~~ The statement shall consist of either one of the following:
- 23 a. A list of the licensed contractors, licensed subcontractors, and licensed
24 design professionals whom the design-builder proposes to use for the
25 project's design and construction. If the design-builder elects to use
26 this option, the design-builder may self-perform some or all of the
27 work with employees of the design-builder and, without bidding, also
28 enter into negotiated subcontracts to perform some or all of the work
29 with licensed subcontractors, including, but not exclusively with those
30 identified in the list. In submitting its list, the design-builder may, but
31 is not required to, include one or more unlicensed subcontractors the
32 design-builder proposes to use.
- 33 b. ~~An~~ A list of the licensed contractors and design professionals whom
34 the design-builder proposes to use for the project's design and
35 construction and an outline of the strategy the design-builder plans to
36 use for open contractor and subcontractor selection based upon the
37 provisions of Article 8 of Chapter 143 of the General Statutes. If the
38 design-builder elects to use this option, the design-builder may also
39 self-perform some or all of the work with employees of the
40 design-builder. In submitting the list, the design-builder may, but is
41 not required to, include one or more of the licensed or unlicensed
42 subcontractors the design-builder proposes to use. If listed, the
43 design-builder may enter into negotiated subcontract with those
44 identified licensed or unlicensed subcontractors in lieu of bidding the
45 scope of work that would otherwise be performed by the identified
46 licensed or unlicensed subcontractors.
- 47 (d) Following evaluation of the qualifications of the design-builders, the three most
48 highly qualified design-builders shall be ranked. If after the solicitation for design-builders not
49 as many as three responses have been received from qualified design-builders, the governmental
50 entity shall again solicit for design-builders. If as a result of such second solicitation not as many
51 as three responses are received, the governmental entity may then begin negotiations with the

1 highest-ranked design-builder under G.S. 143-64.31 even though fewer than three responses
2 were received. If the governmental entity deems it appropriate, the governmental entity may
3 invite some or all responders to interview with the governmental entity.

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

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

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

15 "**§ 143-128.1B. Design-build bridging contracts.**

16 (a) Definitions for purposes of this section:

17 (1a) Costs of the subcontractor work. – The sum total amount of all first-tier
18 subcontract packages bid or proposed to be bid for all construction work under
19 this section.

20 (1) Design-build bridging. – A design and construction delivery process whereby
21 a governmental entity contracts for design criteria services under a separate
22 agreement from the construction phase services of the design-builder.

23 (2) Design-builder. – An appropriately licensed person, corporation, or entity
24 that, under a single contract, offers to provide or provides design services and
25 general contracting services where services within the scope of the practice of
26 professional engineering or architecture are performed respectively by a
27 licensed engineer or licensed architect and where services within the scope of
28 the practice of general contracting are performed by a licensed general
29 contractor.

30 (3) Design criteria. – The requirements for a public project expressed in drawings
31 and specifications sufficient to allow the design-builder to make a responsive
32 bid proposal.

33 (4) Design professional. – Any professional licensed under Chapters 83A, 89A,
34 or 89C of the General Statutes.

35 (5) First-tier subcontractor. – A subcontractor who contracts directly with the
36 design-builder, excluding design professionals.

37 (5g) General conditions. – A specific list compiled by the government entity that
38 identifies the tools, resources, and equipment not directly related to the actual
39 construction activities, but that are required to complete the project and for
40 which the design-builder is to be compensated. As examples, this term shall
41 include: on-site construction office and storage trailers; electrical and other
42 utility services during construction; on-site construction superintendent,
43 construction supervisors and clerical staff; trash collection; security; and other
44 temporary measures. This term shall not include any of the following:

45 a. Construction work to be bid pursuant to subsection (f) of this section.

46 b. Design services of a design professional.

47 c. The cost of subcontractor work.

48 (6) Governmental entity. – Every officer, board, department, commission, or
49 commissions charged with responsibility of preparation of specifications or
50 awarding or entering into contracts for the erection, construction, alteration,

1 or repair of any buildings for the State or for any county, municipality, or other
2 public body.

3 (7) Licensed contractor. – A person or entity whose scope of work proposed for
4 the project requires that it be licensed in accordance with the provisions of
5 Article 1 of Chapter 87 of the General Statutes.

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

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

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

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

14 (4) The capability of the governmental entity to manage and oversee the project,
15 including the availability of experienced staff or outside consultants who are
16 experienced with the design-build method of project delivery.

17 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
18 recruit and select small business entities. The governmental entity shall not
19 limit or otherwise preclude any respondent from submitting a response so long
20 as the respondent, itself or through its proposed team, is properly licensed and
21 qualified to perform the work defined by the public notice issued under
22 subsection (d) of this section.

23 (6) The criteria utilized by the governmental entity, including a comparison of the
24 advantages and disadvantages of using the design-build delivery method for a
25 given project in lieu of the delivery methods identified in subdivisions (1), (2),
26 and (4) of G.S. 143-128(a1).

27 (c1) The governmental entity, as a criteria in subsection (b) of this section, shall not require
28 the design-builder to provide the costs of the subcontractor work in the design criteria package.
29 The design-builder may be required to disclose such cost after the contract has been executed.

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

43 (1) Programmatic needs, interior space requirements, intended space utilization,
44 and other capacity requirements.

45 (2) Information on the physical characteristics of the site, such as a topographic
46 survey.

47 (3) Material quality standards or performance criteria.

48 (4) Special material requirements.

49 (5) Provisions for utilities.

50 (6) Parking requirements.

51 (7) The type, size, and location of adjacent structures.

- 1 (8) Preliminary or conceptual drawings and specifications sufficient in detail to
2 allow the design-builder to make a proposal which is responsive to the request
3 for proposals.
- 4 (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.
- 5 (10) The list of general conditions prepared by the governmental entity for which
6 the design-builder is to provide a fixed fee in accordance with sub-subdivision
7 (10)a. of subsection (d) of this section.
- 8 (11) The form of the contract to be entered into by the successful design-builder to
9 whom the project is awarded pursuant to subsection (e) of this section. The
10 form of the contract may, upon discretion of the governmental entity, allow
11 for multiple phases, termination for convenience and rights arising therefrom,
12 and the subsequent setting of guaranteed maximum prices.
- 13 (d) A governmental entity shall issue a public notice of the request for proposals that
14 includes, at a minimum, general information on each of the following:
- 15 (1) The project site.
- 16 (2) The project scope.
- 17 (3) The anticipated project budget.
- 18 (4) The project schedule.
- 19 (5) The criteria to be considered for selection and the weighting of the selection
20 criteria.
- 21 (6) Notice of any rules, ordinances, or goals established by the governmental
22 entity, including goals for minority- and women-owned business participation
23 and small business entities.
- 24 (7) The thirty-five percent (35%) design criteria package prepared by the design
25 criteria design professional.
- 26 (8) Other information provided by the owner to design-builders in submitting
27 responses to the request for proposals for the project.
- 28 (9) A statement providing that each design-builder shall submit in its request for
29 proposal response an explanation of its project team selection, which shall
30 consist of a list of the licensed contractor and ~~licensed~~ design professionals
31 whom the design-builder proposes to use for the project's design and
32 construction.
- 33 (10) A statement providing that each design-builder shall submit in ~~its request for~~
34 ~~proposal~~ a separate sealed envelope with all envelope, contemporaneously
35 with the response to the request for proposals, the design-builder's fixed fees
36 for each of the following: following, listed separately by item:
- 37 a. ~~The design-builder's price for providing the general conditions of the~~
38 ~~contract identified in the request for proposal.~~
- 39 b. ~~The design-builder's proposed fee for general construction~~
40 ~~services.~~ services not otherwise provided for in this subdivision.
- 41 c. ~~The design-builder's fee for design services.~~ services necessary to
42 complete the project.
- 43 (e) Following evaluation of the qualifications of the design-builders, the governmental
44 entity shall rank the design-builders who have provided responses, grouping the top three without
45 ordinal ranking. If after the solicitation for design-builders not as many as three responses have
46 been received from qualified design-builders, the governmental entity shall again solicit for
47 design-builders. If as a result of such second solicitation not as many as three responses are
48 received, the governmental entity may then make its selection. From the grouping of the top three
49 design-builders, the governmental entity shall select the design-builder who is the lowest
50 responsive, responsible bidder based on the cumulative amount of fees provided in accordance
51 with subdivision (d)(10) of this section and taking into consideration quality, performance, and

1 the time specified in the proposals for the performance of the contract. Each design-builder shall
2 certify to the governmental entity that each ~~licensed~~-design professional who is a member of the
3 design-build team, including subconsultants, was selected based upon demonstrated competence
4 and qualifications in the manner provided by G.S. 143-64.31.

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

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

12 **SECTION 3.** G.S. 143-129(e)(11) reads as rewritten:

13 "(11) Contracts by a public entity with any of the following:

- 14 a. a-A construction manager at risk executed pursuant to G.S. 143-128.1.
15 b. A design-builder executed pursuant to G.S. 143-128.1A.
16 c. A design-builder executed pursuant to G.S. 143-128.1B.
17 d. A private developer executed pursuant to G.S. 143-128.1C."

18 **SECTION 4.** This act becomes effective October 1, 2019, and applies to contracts
19 entered into, amended, or renewed on or after that date.