

New Construction Delivery Methods Authorized for North Carolina Local Governments

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September 2013*

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Overview

In 2013, the General Assembly enacted legislation authorizing three new contracting methods for public construction projects: design-build (DB), design-build bridging (DBB), and public-private partnerships (P3). [S.L. 2013-401/H857](#)¹ (Public Contracts/Construction Methods/DB/P3) accomplishes this in three primary ways:

1. Amends [G.S. 143-128](#) authorizing these new construction delivery methods for large building construction projects.
2. Requires governmental units to enter into these contracts under the qualifications-based selection method of [G.S. 143-64.31 \(the Mini-Brooks Act\)](#).
3. Establishes specific procurement requirements for each type of contract by enacting three new statutes:
 - a. [G.S. 143-128.1A](#) for design-build;
 - b. [G.S. 143-128.1B](#) for design-build bridging, and
 - c. [G.S. 143-128.1C](#) for public-private partnerships.

¹ S.L. 2013-401 became effective on September 22, 2013, and applies to all projects bid on or after that date.

The new delivery methods are authorized for any state and local government construction project provided that the statutory requirements are met. The legislation also imposes more stringent reporting requirements on public entities utilizing both the new construction delivery methods and construction management at risk. Finally, the legislation places a cap on the ability of local governments to exempt themselves from the Mini-Brooks Act.

Prior to H857’s enactment, state law authorized four contracting methods for large building construction projects: single-prime, separate-prime (also referred to as multi-prime), dual-bidding (bidding both single- and separate-prime simultaneously), and construction management at risk.² Design-build and P3 were considered alternative construction methods requiring either State Building Commission approval or legislative authorization. While design-build and P3 were not statutorily restricted for building construction projects costing \$300,000 or less³ or projects that did not involve a building (such as installing sewer pipes or erecting a water tank), the competitive bidding requirements of Article 8 of Chapter 143 made entering into these contracts both legally and practically unwieldy. Consequently, it was not uncommon for the General Assembly to pass local bills authorizing individual local governments to use design-build or public private partnerships for specific projects. For example, during the 2013 session alone, Buncombe County (S.L. 2013-31 and -40), the Town of Clinton (S.L. 2013-115), and the Town of Cornelius (HS.L. 2013-352) were authorized to use design-build, and Onslow County received authorization for a public private partnership project (S.L. 2013-37). H857 eliminates the need for these types of local acts.⁴

Design-Build	Design-Build Bridging	Public-Private Partnership
<ul style="list-style-type: none"> • One contract • DB team • 100% of design & construction 	<ul style="list-style-type: none"> • Two contracts • Designer for 35% of design • DB team for rest of design & construction 	<ul style="list-style-type: none"> • One contract • Private developer • Shared costs & responsibilities

² G.S. 143-128(a1).

³ The limitations on construction contracting methods under G.S. 143-128(a1) only apply to construction and repair projects involving *buildings* that cost over \$300,000 (G.S. 143-128(g)(2)).

⁴ S.L. 2013-401 does not supersede any design-build local acts enacted prior to July 1, 2013; local acts that became law prior to July 2, 2013 remain in effect and local governments may continue to proceed on projects authorized under those local acts. The one exception is authorization for Durham County to use design-build for a water and wastewater treatment facility. The local authorization was enacted in S.L. 2013-386, Sec. 5 (S315) and then repealed in S.L. 2013-410, Sec. 39.5 (H92). Durham County may still use the newly authorized design-build or design-build bridging methods for this project.

Design Build Contracting

The design-build method is an integrated approach to a construction project that delivers both design (architectural and engineering) and construction services under one contract with a single point of responsibility. Under this project delivery method, the public owner is provided the benefit of the design team and contractor working together to achieve the public owner's objectives under a single contract. The designer works directly with the contractor instead of for the owner.⁵

Design-build is sometimes confused with construction management at-risk (CMR), which has been an authorized building construction method under [G.S. 143-128](#) for over a decade. One fundamental difference between design-build and CMR is that, under CMR, the local government is required to contract separately with an architect and/or engineer for design services, while a design-build project involves a single contract with both the design professional and the contractor encompassing the design *and* construction phases of the project. Under CMR, the designer works directly for the public owner; under design-build, the designer works with the contractor.

Under the design-build method, project specifications are not drawn prior to initiating the contracting process. Instead, the project owner advertises general information about the project and selects the design-builder based on its qualifications to design and construct the project. Once under contract, the design-builder (a team comprised of the designer and the general contractor) works with the owner to design the project based on the owner's project criteria, usually by preparing a preliminary design followed by detailed specifications after the owner's approval of the preliminary design. The design work can be done in phases, allowing construction to commence and proceed in phases to expedite project completion, or the design work can be finalized prior to construction. Under both systems, the designer continues to work with the builder throughout the project addressing unforeseen issues or design revisions as the project proceeds.

The new design-build statutes define a design-builder as “an appropriately licensed person, corporation, or entity that, under a single contract, offers to provide or provides design services and general contracting services.”⁶ Architectural and engineering services must be performed by licensed architects and engineers, and contractor services must be performed by a licensed general contractor. While it is possible for one individual to hold both an engineering license and a general contractor license, a design-builder typically is a corporation, firm, or joint venture that employs both licensed design professionals and licensed general contractors, or a

⁵ NC State Building Commission Resolution on Design-Build Construction (adopted May 22, 2012), available at www.nc-sco.com.

⁶ G.S. 143-128.1A(a)(1), cross-referencing G.S. 143-128.1B(a)(2).

construction firm that subcontracts with an architect or engineer. The new design-build statute requires the design-builder to certify that each licensed designer and subconsultant who is a member of the design-build team was selected based on “demonstrated competence and qualifications” under the qualifications-based selection process of the Mini-Brooks Act ([G.S. 143-64.31](#)).⁷

To enter into a design-build contract, the unit of government must follow specific procurement procedures set out in the new [G.S. 143-128.1A](#). These procedures are outlined below:

1. **Criteria for Using DB:**⁸ To initiate the contracting process, the unit must establish written criteria for determining when design-build is appropriate for a project. While the criteria must be in writing, governing board approval is not specifically required (although it may be highly advisable). The statute requires the unit to adopt the criteria for each project.

The criteria must address at least the following six factors:

- 1) The unit’s ability to “adequately and thoroughly” define the project requirements in the RFP;
- 2) Time constraints for project delivery;
- 3) The unit’s ability to ensure that a quality project can be delivered;
- 4) The availability of qualified staff or outside consultants experienced in design-build to manage and oversee the project;
- 5) Good faith efforts to comply with historically underutilized business participation requirements (G.S. 143-128.2 and -128.4) and to recruit and select small business entities (the term “small business entities” is not defined in the statute); and
- 6) The criteria used by the unit, including a cost-benefit analysis of using design-build in lieu of traditional construction bidding methods.

An example of criteria adopted by the City of Greenville under this new statute is available on the School of Government’s [Local Government Purchasing and Contracting website](#) under “legislative updates.”

2. **Public Notice:**⁹ After adopting its criteria, the unit must issue a public notice of a request for qualifications (RFQ) for the project. The statute does not specify a minimum time for or method of notice (for example, formal published notice is not required). Since a design-builder is selected under the qualifications-based selection method of the Mini-Brooks Act, units may wish to use the same notice procedures they employ for announcing

⁷ G.S. 143-128.1A(e).

⁸ G.S. 143-128.1A(b).

⁹ G.S. 143-128.1A(c).

requirements for architects and engineers. In the alternative, units could choose to follow the published notice procedures for formal purchase and construction contracts under [G.S. 143-129\(b\)](#). As with other contracts subject to the Mini-Brooks Act, the unit must make good faith efforts to notify minority firms of the opportunity to submit qualifications.¹⁰

3. **RFQ Requirements:**¹¹ The RFQ must include information on the following eight items:

- 1) Project site;
- 2) Project scope;
- 3) Anticipated project budget;
- 4) Project schedule;
- 5) Qualifications selection criteria and criteria weighting;
- 6) Notice of the unit's rules, ordinances, or goals (presumably related to the project), including goals for MWBE and small business participation;
- 7) Other information provided to potential design-bidders in submitting qualifications for the project; and
- 8) Statement requiring each design-builders to submit *with its RFP* an explanation of its project team selection consisting of either:
 - a. List of licensed contractors, licensed subcontractors and licensed design professionals the design-builder proposes to use on the project, or
 - b. The design-builder's strategy for selecting contractors and subcontractors based on the requirements of Article 8 of Chapter 143 (in other words, competitive bidding procedures).

Note: Design-builders must also certify that each licensed design professional who is a member of the design-build team, including subconsultants, was selected through the qualifications-based selection method required under the Mini-Brooks Act.¹² While it appears that this certification is required of each design-builder submitting a proposal in response to the unit of government's RFQ, it is unclear whether the certification must be submitted with the proposal as is the case with the project team members or selection strategy described above. Units of government can clarify this uncertainty by specifically stating in the RFQ that the certification be submitted with the proposal.

4. **Receiving Proposals:**¹³ In order to consider proposals, the unit must receive at least three responses to its RFQ. If the unit receives less than three responses, it must resolicit (this

¹⁰ G.S. 143-64.31(a).

¹¹ G.S. 143-128.1A(c).

¹² G.S. 143-128.1A(e).

¹³ G.S. 143-128.1A(d).

requirement mirrors the “3-bid minimum” rule for formal construction bids¹⁴). After the second solicitation, the unit may consider proposals even if three are not received. As with the initial solicitation, the statute does not specify a method or time frame for resolicitation, so units should follow the same procedures used for the initial solicitation.

5. **Evaluating Proposals and Awarding the Contract:**¹⁵ After receiving proposals, the unit evaluates them and ranks the three most qualified respondents based on the criteria included in the RFQ. The unit then negotiates a contract at a “fair and reasonable price” with the highest ranked design-builder. *As with other contracts subject to the Mini-Brooks Act, the unit cannot solicit project cost estimates or fees in the RFQ, and can only negotiate contract price after ranking the respondents based on qualifications.* If negotiations with the highest-ranked respondent are not successful, the unit may initiate negotiations with the second-highest ranked and so on, until the unit either rejects all proposals or selects a design-builder with whom to contract. During its evaluation process, the unit may, if it chooses to do so, interview some or all of the respondents. The statute design-build statute does not require governing board approval of the contract award, even for those projects costing \$500,000 or more (which, under traditional construction bidding methods, do require governing board approval).
6. **Performance and Payment Bonds:**¹⁶ Once the contract award decision is made, the selected design-builder must provide bonds under [Article 3 of Chapter 44A](#), which requires performance and payment bonds for 100% of the contract amount for each contract costing more than \$50,000 on projects costing over \$300,000.
7. **Substituting Key Personnel:**¹⁷ After contract award, the design-builder can only substitute key personnel (the contractors, subcontractors, and design professionals identified in the design-builder’s response to the RFQ) after obtaining written approval from the unit. This requirement does not apply if the design-builder selects contractors and subcontractors under the competitive bidding requirements of [Article 8 of Chapter 143](#). Since design professionals are not selected under Article 8, it is unclear whether this exception applies to substituting design professionals. Local governments could address this ambiguity in the terms and conditions of the contract with the design-builder.

¹⁴ G.S. 143-132.

¹⁵ G.S. 143-128.1A(d), (e); G.S. 143-64.31.

¹⁶ G.S. 143-128.1A(f); G.S. 44A-26.

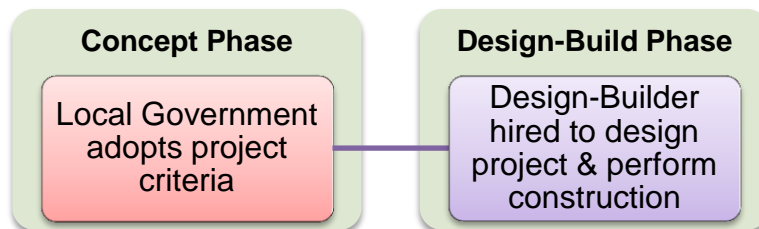
¹⁷ G.S. 143-128.1A(f).

Design-Build Bridging Contracting

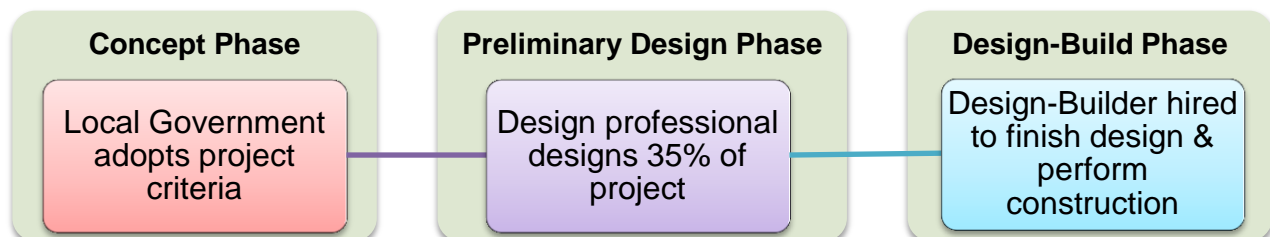
The design-build bridging construction method is a two-step process that differs from design-build in two significant ways. First, the unit contracts separately with an architect or engineer to design 35% of the project (referred to in the statute as the “design criteria”¹⁸). The unit then solicits proposals from design-build firms based on the design criteria package and contracts with a design-builder to complete the design and perform construction. The design criteria package acts as “bridging” documents between initial project concept and the design-build phase – hence the name of this construction method. These bridging documents provide enough project requirements in preliminary drawings and specifications to enable design-build bidders to submit a responsive bid.¹⁹

The second difference between design-build bridging and design-build involves the solicitation of fees and the standard of award for the contract. Under the design-build method, fees are not solicited in the RFQ for design-build services and the contract is awarded based on the qualifications-based selection method of the Mini-Brooks Act ([G.S. 143-64.31](#)). Under the design-build bridging method, fees and price estimates *are* solicited in the RFP for design-build services and the contract for these services is awarded based on the lowest responsive, responsible bidder standard of award.

Design-Build:



Design-Build Bridging:



¹⁸ G.S. 143-128.1B(a)(3).

¹⁹ *Id.* Because of the cost involved in preparing a response to a design-build solicitation, the North Carolina State Building Commission recommends developing bridging documents to reduce costs to potential bidders and encourage competition.

To enter into a design-build bridging contract, the unit of government must follow specific procedures set out in the new [G.S. 143-128.1B](#). While many aspects of these procedures mirror those for design-build (see, G.S. 143-128.1A), there are some notable differences. Units of government should be aware of these differences and take them into account when considering whether either design-build or design-build bridging is an appropriate construction delivery method for a particular project. The statutory procedures for design-build bridging are outlined below:

1. **Criteria for Using Design-Build Bridging:**²⁰ The unit must establish written criteria for determining when using this method is appropriate for a project. While the criteria must be in writing, governing board approval is not specifically required. The statute requires the unit to adopt the criteria for each project (in other words, the unit cannot adopt blanket criteria). The criteria must address the same six factors as are required for a design-build project:
 - 7) The unit's ability to "adequately and thoroughly" define the project requirements in the RFP;
 - 8) Time constraints for project delivery;
 - 9) The unit's ability to ensure that a quality project can be delivered;
 - 10) The availability of qualified staff or outside consultants experienced in design-build to manage and oversee the project;
 - 11) Good faith efforts to comply with historically underutilized business participation requirements (G.S. 143-128.2 and -128.4) and to recruit and select small business entities (the term "small business entities" is not defined in the statute); and
 - 12) The criteria used by the unit, including a cost-benefit analysis of using design-build in lieu of traditional construction bidding methods.
2. **Selecting the Design Criteria Design Professional:** Before issuing the RFP for design-build services, the unit selects either a staff design professional (an architect or engineer employed by the unit) or follows the Mini-Brooks Act to contract with an architect or engineer. This design professional (whether it be an employee or an outside design professional) develops the design criteria package, and acts as the unit's representative during the design-build contracting process and through the life of the project. The design professional is not eligible to bid on the design-build contract or provide input to a design-build bidder during the procurement process.

²⁰ G.S. 143-128.1B(b).

3. **Design Criteria Package:**²¹ The design criteria design professional develops the design criteria for the project in consultation with the unit and prepares a design package consisting of 35% of the design documentation for the entire project. The design criteria package must include the following nine items:
- 1) Programmatic needs, interior space requirements, intended space utilization, and other capacity requirements;
 - 2) 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) Type, size, and location of adjacent structures;
 - 8) Preliminary or conceptual drawings and specifications in sufficient detail to enable design-build teams to submit responsive bids; and
 - 9) Notice of the unit's rules, ordinances, or goals (presumably related to the project).
4. **Public Notice:**²² After developing the design criteria package, the unit must issue a public notice of a request for proposals (RFP) for design-build firms to complete the design and perform the construction. The statute does not specify the minimum time for or method of publication. Since the design-build contract is awarded based on the lowest responsive, responsible bidder standard of award, units may want to follow the published notice procedures for formal purchase and construction contracts under [G.S. 143-129\(b\)](#).
5. **RFP Requirements:**²³ The RFP must include general information on the same eight items required for a design-build RFQ, but must also include two additional elements:
- 1) The design criteria package prepared by the design criteria design professional; and
 - 2) A statement that each design-build bidder must submit *with its proposal in a sealed envelope* its price for providing the general conditions of the contract and fees for design services and general construction services.

The solicitation of fees and prices is a significant departure from the design-build process, which prohibits soliciting fee and price estimates in the RFQ for design-build services. Note also that this information must be submitted with the bidder's proposal in a sealed envelope; a bid that does not contain sealed fee and price proposals would be considered nonresponsive.

²¹ G.S. 143-128.1B(c).

²² G.S. 143-128.1B(d).

²³ *Id.*

6. **Receiving Responses:**²⁴ As with design-build, the unit must receive at least three responses to its RFP in order to consider proposals. If the unit receives less than three responses, it must resolicit (just as is required for formal construction bids). After the second advertisement, the unit may consider proposals even if three are not received. Each bidder must certify that all members of its design-build team who are licensed design professionals, including subconsultants, were selected as required under the Mini-Brooks Act.
7. **Evaluating Responses and Awarding the Contract:**²⁵ After receiving proposals, the unit evaluates and ranks them, and then groups the top three without specific ordinal ranking. From among these three respondents the unit selects the design-builder who is the lowest responsive, responsible bidder based on the cumulative amount of fees for providing the general conditions of the contract, design services, and general construction services, and taking into consideration quality, performance, and the time specified in the proposal for performance of the contract. This standard of award is substantially different from that for design-build where the design-builder is selected based on qualifications.
8. **Subcontractors:**²⁶ The design-builder with whom the unit contracts must use the competitive bidding requirements of Article 8 of Chapter 143 in hiring first-tier subcontractors on the project (design professionals are not considered first-tier subcontractors).²⁷
9. **Performance and Payment Bonds:** As with design-build, the selected design-builder must provide bonds under [Article 3 of Chapter 44A](#), which requires performance and payment bonds for 100% of the contract amount for each contract costing more than \$50,000 on projects costing over \$300,000.
10. **Substituting Key Personnel:** After the contract is awarded, the winning bidder can only substitute key personnel after obtaining written approval from the unit of government.²⁸

Public Private Partnership Contracting

The basic concept of the P3 legislation is to provide flexible contracting authority under which units of government can partner with a private developer for the construction, operation, and financing of a capital project. Prior to the legislation's enactment, local governments had to

²⁴ G.S. 143-128.1B(e).

²⁵ *Id.*

²⁶ G.S. 143-128.1B(f).

²⁷ G.S. 143-128.1B(a)(5).

²⁸ G.S. 143-128.1B(g).

seek authorization from the General Assembly through local acts to enter into public private partnerships. The new legislation makes this development and financing option available statewide to all public entities.

Public-private partnerships are not new in North Carolina. This type of contracting method has been authorized from time to time by the General Assembly, such as for the Department of Revenue's Tax Information Management System in 2009 ([S.L. 2009-451, Sec. 6.20](#)), the Town of Matthews in 2010 ([S.L. 2010-52](#)), Onslow County in 2013 ([S.L. 2013-37](#)), and certain Department of Transportation projects ([G.S. 136-28.1](#)) and toll roads ([S.L. 2012-184](#)). Similar public-private financing authorization has been available for well over a decade for NCSU's Centennial Campus, UNC-CH's Horace Williams Campus, and the Millennial Campuses of other UNC constituent institutions ([Article 21B of Chapter 116](#)). Public schools have had public-private partnership authorization since 2006 for built-to-suit capital leases ([G.S. 115C-532](#); this statute expires July 1, 2015). And, since 1987, cities have been able to undertake public-private partnerships as part of a downtown development project, although that statute's authority is geographically limited to capital projects in a city's central business district (CBD) ([G.S. 160A-458.3](#)). Public-private partnerships were the subject of a [2009 legislative study commission](#) and a study by [NCSU's Institute for Emerging Issues](#). What is new is the statutory framework of [G.S. 143-128.1C](#) and the availability of this contracting and financing method for any unit of local government without having to obtain specific legislative authorization through a local act.

A public private project is defined under the new [G.S. 143-128.1C](#) as a "capital improvement project undertaken for the benefit of a governmental entity and 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."²⁹ Under the P3 construction delivery method, the unit of government is authorized to acquire, construct, own, lease (as lessor or lessee), and operate a public-private project or facilities within a public-private project, and may make loans or grants for these purposes. Importantly, the private developer must provide at least 50% of the financing for the total cost of the project.³⁰ The Local Government Commission must approve the contract if it involves a capital or operating lease.³¹

To enter into a P3 contract, units of government must comply with the statutory requirements set out in [G.S. 143-128.1C](#). The procedures are similar to those required for design-build and design-build bridging contracts only in that they are based on the Mini-Brooks Act. Otherwise, the P3 procurement requirements are substantially different.

²⁹ G.S. 143-128.1C(a)(8).

³⁰ G.S. 143-128.1C(b).

³¹ G.S. 143-128.1C(j). A capital or operating lease involving a public school cannot contain provisions relating to student assignment (G.S. 143-128.1C(l)).

Written Findings: To begin the P3 contracting process, the unit of government must make findings in writing that it has a critical need for the project. While the statute does not specifically require governing board approval, entities that are a public body under the Open Meetings Act ([Article 33C of Chapter 143](#)) must make these findings at an open meeting of the body, which for local governments means the governing board must approve the findings. Unlike the design-build and design-build bridging statutes, there are no specific criteria that must be adopted by the governing board other than a finding that there is a critical need for the project.

Determine Programming Needs: After approving the use of the P3 method, the unit must determine its programming requirements for the facilities to be constructed under the P3 contract and the form in which private developers submit their qualifications. This information forms the basis of the RFQ the unit advertises.

Publish Notice of RFQ: Next, the unit must advertise notice for interested private developers to submit their qualifications. The advertisement must be published in a newspaper of general circulation within the county in which the unit is located. The statute does not specify a minimum timeframe for the publication period, but units should choose a time sufficient for interested parties to develop a proposal taking into consideration the complexity of a P3 project. While the unit is not required to publish the programming requirements in the advertisement itself, it must make these requirements available to potential respondents in whatever form the unit deems appropriate.

Receive Responses: Units may choose to receive responses to its RFQ in any form it deems appropriate; sealed proposals and a public opening are not required. Private developers must submit the following information as part of their response to the RFQ:

- 1) Evidence of financial stability (the statute specifies that information that constitutes a "trade secret" under [G.S. 66-152\(3\)](#) remains confidential).
- 2) Experience with similar projects.
- 3) An explanation of project team selection by either listing 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 competitive bidding procedures.
- 4) A statement of the developer's availability to undertake the public-private project and projected time line for project completion.
- 5) Any other information required by the governmental entity.

Evaluate Responses: The unit may award the development contract to the private developer it determines to be best qualified, which is the standard of award under the Mini-Brooks Act ([G.S. 143-64.31](#)). However, unlike a traditional Mini-Brooks Act selection process, the unit may

negotiate with one or more of the respondents during the evaluation process. The statute is silent on the criteria the unit must use in evaluating the qualifications of the respondents, so the unit is free to develop their own criteria based on its programming needs, project scope, and any other factors related to the project it deems appropriate.

Development Contract Award: The unit's governing board must award the development contract at an open meeting after a public hearing and at least 30 days' published notice of the terms of the contract. The advertisement of the terms of the contract and the public hearing must be in a newspaper of general circulation within the county in which the unit is located. The unit must also make available a summary of the contract terms and conditions, and indicate how to obtain a copy of the complete contract.

Development Contract Terms and Conditions: The development contract between the unit and the private developer specifies the parties' interests, roles, and responsibilities. At a minimum, the contract must address:

- 1) The property interests of the unit and the private developer (this could include both ownership and lease arrangements).
- 2) The development responsibilities of the unit and the private developer (this could include both construction and on-going operation and maintenance activities).
- 3) The financing responsibilities of the unit and the private developer (remember that the private developer must finance at least 50% of the total cost of the project).
- 4) The parties' good faith efforts to comply with HUB participation requirements and to recruit and select small business entities (the term "small business entities" is not defined in the statute).

The development contract also may require the developer to be responsible for some or all of the construction, purchase of materials and equipment, compliance with HUB participation requirements, and to use the same contractor(s) as the governmental unit. It also may require the developer to purchase materials for the project at a reasonable price. If the project utilizes the design-build construction delivery method, the procurement requirements of the new design-build statute ([G.S. 143-128.1A](#)) apply. Performance and payment bond requirements apply, and the statute sets out specific procedures for claims under a payment bond made against the private developer.³²

The private developer with whom the unit contracts cannot perform any design or construction work on the project unless a contractor defaults, a qualified replacement cannot be obtained in a timely manner, and the unit approves.

³² G.S. 143-128.1C(g).

Finally, the private developer and its contractors must comply with state HUB participation requirements, which include bidders' good faith efforts to solicit historically underutilized businesses on building construction projects costing \$300,000 or more ([G.S. 143-128.2](#)).

Reporting Requirements

The reporting requirements of G.S. 143-64.31(b) apply to design-build, design-build bridging, and P3 contracts. Units must report to the NC Department of Administration the reason why the particular design-builder or private developer was selected, contract terms, firms considered but not selected and their proposed fees, the procurement procedure, a detailed explanation of why that construction delivery method was used in lieu of a traditional bidding method, and the anticipated benefits.

The legislation also amended the Mini-Brooks Act to establish an enforcement mechanism for compliance with reporting requirements. Under the new subsection (d) of G.S. 143-64.3, the unit must submit the required report within 12 months of taking beneficial occupancy of the project. A unit that does not comply is prohibited from using CMR, design-build, design-build bridging, or P3 until it files the delinquent report. While noncompliance does not void existing contracts (the new G.S. 143-64.31(d) specifies that "contracts entered into in violation of this prohibition shall not be deemed ultra vires and shall remain valid and fully enforceable."), the statute now creates a private cause of action for an injunction against the local government compelling it to file the required reports and from commencing or continuing a design-build or P3 project until the reports are filed. Plaintiffs are not entitled damages or attorney's fees, and a four year statute of limitation applies.³³ This enforcement mechanism is applicable to CMR contracts as well as design-build, design-build bridging, and P3.

Cap on Mini-Brooks Act Exemption

H857 amended the Mini-Brooks Act exemption authorized under G.S. 143-64.32 by limiting the contracts for which the exemption may be utilized. The exemption is now available *only* for contracts with an estimated fee of *less than \$50,000*. Contracts with an estimated fee of \$50,000 or more can no longer be exempted from the Mini-Brooks Act. This new limitation applies to *all* contracts subject to the Mini-Brooks Act: architectural, engineering, surveying, construction management at risk, design-build, design-build bridging, and public private

³³ The prohibition against recovering attorney's fees does not include fees recovered under Rule 11 of the Rules of Civil Procedure (G.S. 1A-11) or where there is a finding of a nonjusticiable issue (G.S. 6-21.5). The statute of limitations is calculated from the date on which the unit took beneficial occupancy of the project for which the report is due.

partnership. The legislation does not invalidate any contracts entered into under the exemption prior to September 22, 2013, the date on which the legislation went into effect.

Additional Design-Build Resources

The [Design-Build Institute of America](http://www.dbia.org) (DBIA) provides education and resources on design-build, including recommended [best practices](#) and [sample contracts](#). Information is available on the DBIA website at www.dbia.org. The [American Institute of Architects](http://www.aia.org) (AIA) also has a set of design-build contract documents that can be purchased at www.aia.org.