

New Construction Delivery Methods Authorized for North Carolina Local Governments

*Norma Houston
September 2013*

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: G.S. 143-128.1A (for DB), G.S. 143-128.1B (for DBB), and G.S. 143-128.1C (for P3).

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

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

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)).

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, 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 presumably eliminates the need for these types of local acts.⁴

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 for the contractor instead of the owner.⁵

Design-build is sometimes confused with construction management at-risk (CMR), which unlike design-build, 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 for the public owner; under design-build, the designer works for the contractor.

Under the design-build method, project specifications are not drawn prior to initiating the procurement process. Instead, the project owner advertises general information about the project and selects the design-builder based on the firm's (or individual's) qualifications to design and construct the project. Once under contract, the design-builder (oftentimes 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

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.

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

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 contracting services must be performed by a licensed general contractor. While it is possible for one individual to hold both an architect or engineering license and a general contractor license, a design-builder typically is a corporation or firm that employs both licensed designers and licensed general contractors, or a 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.

1. *Criteria for Using DB:*⁸ 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 G.S. 143-128.1B(a)(2).

⁷ G.S. 143-128.1A(e).

⁸ G.S. 143-128.1A(b).

- 6) The criteria used by the unit, including a cost-benefit analysis of using design-build in lieu of traditional construction bidding methods.
2. *Published Notice:*⁹ The unit must issue a public notice of a request for qualifications (RFQ). The statute does not specify a minimum time for or method of publication, so units may wish to follow the published notice procedures for formal purchase and construction contracts under G.S. 143-129. As with other contracts subject to the Mini-Brooks Act, the unit must make good faith efforts to notify minority firms.
 3. *RFQ Requirements:*¹⁰ The RFQ notice 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).
 4. *Receiving Proposals:*¹¹ 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 (just as is required for formal construction bids). After the second advertisement, the unit may consider proposals even if three are not received.
 5. *Evaluating Proposals and Awarding the Contract:*¹² After receiving proposals, the unit evaluates them and ranks the three most qualified respondents based on the criteria

⁹ G.S. 143-128.1A(c).

¹⁰ *Id.*

¹¹ G.S. 143-128.1A(d).

¹² *Id.*; G.S. 143-128.1A(e); G.S. 143-64.31.

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.

6. *P/P Bonds:*¹³ Once the contract is awarded, 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 more than \$50,000 on projects costing over \$300,000.
7. *Substituting Key Personnel:*¹⁴ 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, subcontractors, and design professionals under the competitive bidding requirements of Article 8 of Chapter 143.

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 and then solicits proposals from design-build firms based on the partial project design. The unit then contracts with a design-builder to complete the design and perform construction. The preliminary design documents act as “bridging” documents between initial project concept and the design-build phase (hence the name of this construction method). These bridging documents, termed “design criteria” in the new design-build bridging statute, provide enough project requirements in preliminary drawings and specifications to enable design-build bidders to submit a responsive bid.¹⁵

¹³ G.S. 143-128.1A(f).

¹⁴ *Id.*; G.S. 44A-26.

¹⁵ G.S. 143-128.1B(a)(3). 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.

Second, unlike design-build, fees and cost estimates are solicited in the RFP for design-build services and the contract is awarded based on the lowest responsive, responsible bidder standard of award.

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.

1. *Criteria for Using DBB:*¹⁶ The unit must establish written criteria for determining when engaging a design criteria design professional (the architect or engineer who produces the design criteria) 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. The criteria must address the same six factors as are required for a design-build project (see #1 in the Design-Build section above).
2. *Selecting 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 contracts with an architect or engineer. This design professional (whether it be an employee or a contract design professional) 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.

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).

¹⁶ G.S. 143-128.1B(b).

3. *Published Notice:*¹⁷ The unit must issue a public notice of a request for proposals (RFP). The statute does not specify the minimum time for or method of publication, so units may wish to follow the published notice procedures for formal purchase and construction contracts under G.S. 143-129. As with other contracts subject to the Mini-Brooks Act, the unit must make good faith efforts to notify minority firms.
4. *RFP Requirements:*¹⁸ The RFP notice 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 fees for providing the general conditions of the contract, design services and general construction services.
5. *Receiving Responses:*¹⁹ 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.
6. *Evaluating Responses and Awarding the Contract:*²⁰ 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.
7. *Subcontractors:*²¹ 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).²²

¹⁷ G.S. 143-128.1B(d).

¹⁸ *Id.*

¹⁹ G.S. 143-128.1B(e).

²⁰ *Id.*

²¹ G.S. 143-128.1B(f).

²² G.S. 143-128.1B(a)(5).

8. *P/P Bonds; Substituting Key Personnel:* As with design-build, the winning bidder must provide performance and payment bonds as required under Article 3 of Chapter 44A, and can only substitute key personnel after obtaining written approval from the unit of government.²³

Public Private Partnership Contracting

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.”²⁴ Under the P3 construction delivery method, the unit 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, but the private developer must provide at least 50% of the financing for the total cost of the project.²⁵ The Local Government Commission must approve the contract if it is a capital or operating lease.²⁶

Under the P3 procurement statute, the unit of government must make findings in writing at an open meeting that it has a critical need for the project. The unit enters into the development contract using a qualification based selection process under which the developer must provide evidence of financial stability, experience with similar projects, an explanation of the project team, a statement of availability to undertake the project and a projected timeline for project completion, and any other information the unit requires. The RFQ must be published in a newspaper of general circulation (the statute does not specify the length of time for publication). The unit may select one or more developers with whom to negotiate the contract, and may award the contract to the private developer the unit determines is best qualified. The unit must award the contract at an open meeting after a public hearing and at least 30 days’ published notice of the terms of the contract.

The development contract must specify the parties’ property interests, development responsibilities, financing responsibilities, and good faith efforts to comply with HUB participation requirements. It 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

²³ G.S. 143-128.1B(g).

²⁴ G.S. 143-128.1C(a)(8).

²⁵ G.S. 143-128.1C(b).

²⁶ 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).

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 G.S. 143-128.1A apply.

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. Performance and payment bond requirements apply along with specific procedures for claims under a payment bond made against the private developer.²⁷

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.²⁸ This enforcement mechanism is applicable to CMR contracts as well as design-build, design-build bridging, and P3.

²⁷ G.S. 143-128.1C(g).

²⁸ 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.

New 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 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](#) (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](#) (AIA) also has a set of design-build contract documents that can be purchased at www.aia.org.