
Coates' Canons Blog: New Construction Delivery Methods – Public-Private Partnerships (P3)

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In my last two posts, I described the new **design-build** and **design-build bridging** construction delivery methods authorized by the General Assembly during the 2013 legislative session. This post completes our discussion of the new delivery methods by outlining the third method authorized in **S.L. 2013-401/H857** – public-private partnerships (P3).

What is a Public-Private Partnership?

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 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). 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 for entering into a P3 contract 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."^[1] 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.^[2] The Local Government Commission must approve the contract if it involves a capital or operating lease.^[3]

P3 Contracting Process

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.

Adopt Written Findings: To begin the P3 contracting process, the unit of government must make written findings 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 adopt 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 unit.

Evaluate Responses and Select Developer: 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.

Award Development Contract: 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 for the project. At a minimum, the contract must address:

- 1) The property interests of the unit and the private developer (this could include ownership, lease arrangements, or both).
- 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 provide at least 50% of the financing for 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 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 also apply, and the statute sets out specific procedures for claims under a payment bond made against the private developer.^[4]

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.

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**).

[1] G.S. 143-128.1C(a)(8).

[2] G.S. 143-128.1C(b).

[3] 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)).

[4] G.S. 143-128.1C(g).

Links

- canons.sog.unc.edu/?p=7493
- canons.sog.unc.edu/?p=7519
- www.ncleg.net/Sessions/2013/Bills/House/HTML/H857v8.html
- www.ncleg.net/sessions/2009/bills/senate/html/s202v8.html
- www.ncleg.net/Sessions/2009/Bills/House/HTML/H1919v4.html
- www.ncleg.net/Sessions/2013/Bills/Senate/HTML/S75v4.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_136/GS_136-28.1.html
- www.ncleg.net/sessions/2011/bills/house/html/h1077v6.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_116/Article_21B.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=115C-532
- www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=121&sFolderName=%5CGeneral%20Information
- iei.ncsu.edu/emerging-issues/ongoing-programs/growth-infrastructure/
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-128.1C
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_143/Article_33C.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=66-152
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-64.31
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-128.1A
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-128.2