
Coates' Canons Blog: New Design-Build Construction Method – No Local Act Required

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Those familiar with local government construction contracting know the drill – put out an RFQ to hire

an architect or engineer to design the project and then bid the construction work. But what if a local government wants to hire both its design professional *and* its contractor at the beginning of the project to work together from conception to completion? How does a local government bid that kind of contract? The General Assembly answered this question during the 2013 session when it 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:
 1. **G.S. 143-128.1A** for design-build;
 2. **G.S. 143-128.1B** for design-build bridging, and
 3. **G.S. 143-128.1C** for public-private partnerships.

The new delivery methods are authorized for any state or local government capital project. This post discusses the first of these new methods – design-build. Future posts will discuss the other two new methods.

Background 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 was considered an alternative construction method requiring either State Building Commission approval or legislative authorization. While design-build was not statutorily restricted for building construction projects costing \$300,000 or less^[3] 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 this type of contract or a public private partnership both legally and practically unwieldy. Consequently, it was not uncommon for local governments to request, and the General Assembly to enact, 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 (**S.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 for future projects.^[4]

What is Design-Build? 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. **Who is a Design-Builder?** 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 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] **New Design-Build Contracting Process** 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. 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." **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 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] **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. **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 requirement mirrors the "3-bid minimum" rule for formal construction bids^[14]). 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. **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). **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. **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. For more information about the design-build contracting method visit the **Design-Build Institute of America** (BDIA). A discussion of design-build, design-build bridging, public-private partnerships is now included in the curriculum for the School of Government's **Contracting for Construction and Design Services** course which will be offered later this year on October 1-2 (early bird registration will open in June).

[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)).

[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.

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

[7] G.S. 143-128.1A(e).

[8] G.S. 143-128.1A(b).

[9] G.S. 143-128.1A(c).

[10] G.S. 143-64.31(a).

[11] G.S. 143-128.1A(c).

[12] G.S. 143-128.1A(e).

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- [13] G.S. 143-128.1A(d).
[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).

Links

- canons.sog.unc.edu/wp-content/uploads/2014/01/construction-plans-and-hat.jpg
- www.ncleg.net/Sessions/2013/Bills/House/HTML/H857v8.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-128
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-64.31
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- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-129
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_44A/Article_3.html
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