

2013 Legislative Summary: Public Purchasing and Contracting

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The 2013 legislative session was active in the area of public purchasing and contracting. Bills proposing changes to our state's public contracting statutes included authorizing design-build and public private partnership construction contracts, authorizing local preferences, and requiring E-Verify by construction contractors. As always, some passed and some did not. Summarized below are enacted bills affecting public purchasing and contracting as well as a brief listing of bills that remained pending when the General Assembly adjourned.

Enacted Legislation

1. Legislation Affecting Construction Contracting

Design-Build Construction Contracting. [HB857 \(S.L. 2013-401\)](#) (Public Contracts/Construction Methods/DB/P3). *Effective Date: September 22, 2013, and applies to all project bid on or after that date. It does not supersede any local design-build local acts enacted prior to July 1, 2013.* HB857 amends G.S. 143-128 authorizing public entities to use three new construction delivery methods: design-build, design-build bridging, and public private partnership. Including design-build as a statutorily-authorized method of building construction and repair contracting was one of the North Carolina Association of County Commissioners' [legislative goals](#) for this year's session, and the bill received considerable input from both local government and industry representatives.

The design-build construction method is an integrated construction approach that delivers both design (architectural and engineering) and construction services under one contract with a single point of responsibility. Design-build is sometimes confused with construction management at-risk (CMR), which unlike design-build, has been an authorized building construction method under [GS 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.

It is not uncommon for the General Assembly to pass local bills authorizing individual cities and counties to use the design-build method or public private partnership method for local projects. Indeed, during the 2013 long session, Buncombe County received design-build authorization for two economic development projects ([HB222/S.L. 2013-31](#) and [HB555/S.L. 2013-40](#)), and similar local acts were enacted for the Town of Clinton ([SB111/S.L. 2013-115](#)) and the Town of Cornelius ([HB195/S.L. 2013-352](#)). Onslow County received authorization for a public private partnership project ([SB75 /S.L. 2013-37](#)). The passage of HB857 eliminates the need for these types of local acts.

Under HB857, specific contracting procedures are set out for each newly authorized construction delivery method:

- 1. Design-Build Contracts:** To enter into a design-build contract, the unit of government must establish written criteria for the project, publish notice of a request for qualifications (the minimum time for publication is not specified), receive at least three responses (or else readvertise as with formal construction bidding), rank the three most qualified respondents, and begin negotiations with the highest ranked. As with other contracts subject to the Mini-Brooks Act, the unit of government cannot solicit project cost estimates in the initial RFQ, and can only negotiate contract price after ranking based on qualifications. If negotiations with the highest-ranked respondent are not successful, the unit of government may initiate negotiations with the second-highest ranked design-builder, and so on, until the unit of government either rejects all proposals or selects a design-builder with whom to contract. Once the contract is awarded, the selected design-builder must provide performance and payment bonds and can only substitute key personnel after obtaining written approval from the unit of government.
- 2. Design-Build Bridging Contracts:** The contracting process for design-build bridging contracts is similar to that of design-build contracts, but the unit of government would first select a design professional to design up to 35% of the project, then publish notice a RFQ and solicit bids based on partial completion of the design. Unlike design-build, fees and cost estimates are solicited in the design-build bridging RFQ and the contract is awarded based on the lowest responsive, responsible bidder standard of award. As with design-build, the winning bidder must provide performance and payment bonds and can only substitute key personnel after obtaining written approval from the unit of government.
- 3. Public Private Partnership Contracts:** Under this contracting method, a unit of government may into a contract with a private developer for a construction project where the developer must provide at least 50% of the financing of the total cost of the

project. The development contract 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 government unit. Performance and payment bond requirements apply, and the Local Government Commission must approve the contract if it a capital or operating lease. The unit of government must make findings in writing at an open meeting that it has a critical need for the project. The development contract itself must specify the parties' property interests, development responsibilities, financing responsibilities, and good faith efforts to comply with HUB participation requirements. The development contract must be procured using a qualification based selection process under which developers must provide evidence of financial stability, experience with similar projects, and an explanation of the project team. The government unit may select one or more developers with whom to negotiate the contract. The contract must be awarded at an open meeting after at least 30 days' public notice and a public hearing.

HB857 also amends the Mini-Brooks Act exemption authorized under G.S. 143-64.32. 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.

Energy Savings Contracts. [SB547 \(S.L. 2013-396\)](#) (Energy Savings Contracting Amendments). *Effective Date: August 23, 2013.*

SB547 makes several significant changes to the procurement requirements for Guaranteed Energy Savings Contracts (GESC). First, the legislation requires contractors who are qualified to bid on guaranteed energy savings contracts (GESC) be prequalified by the State Energy Office. These contractors are now referred to as "qualified providers."

Second, proposals received in response to GESC solicitations must be reviewed and evaluated by a "qualified reviewer" who must be a licensed architect or engineer with experience in the design, implementation, and installation of energy efficiency measures. The qualified reviewer must provide a report on his qualitative and quantitative evaluations of the proposals, but the government unit is not bound by any recommendations the reviewer offers.

Third, the legislation revises the RFP procedures for entering into a GESC. The procurement process is now primarily a Qualifications Based Selection process similar to that required under

the Mini-Brooks Act (G.S. 143-64.31) for hiring architects and engineers.¹ Under the new procurement process, the government unit cannot solicit any cost estimates or estimates of energy savings in the initial RFQ. Instead, the government unit must review and rank proposals based on the qualifications of the qualified provider respondents, conformity with specifications, time for contract performance, and references from past clients. Based on its initial rankings, the government unit must select a short list of finalists and have the highest ranked qualified provider respondent prepare a cost-savings analysis showing project costs compared to estimated energy savings. From this analysis, the government unit may then negotiate contract price and cost-savings with the qualified provider. If negotiations are not successful, the government unit may then negotiate with the second-highest ranked qualified provider, and so on, until the government unit selects a qualified provider with whom to contract.

Fourth, the State Energy Office must review the selected qualified provider's proposal, cost-benefit analysis, and other relevant documents prior to the award of the contract.

Finally, the qualified provider must conduct an annual reconciliation of estimated and actual energy savings, and in doing so, must use one of the specific measurement and verification methodologies stipulated in the legislation.

Mechanics Liens. [HB180 \(S.L. 2013-16\)](#) (Mechanics Liens/Technical Corrections). *Effective Date: April 1, 2013.*

This bill made technical corrections to the mechanics lien law revisions enacted by the General Assembly during the 2012 short session. This bill, which is *not* applicable to local governments, is included in this summary as a reminder that the requirement to register a lien agent for construction projects established during the 2012 session *does not apply to public entities* as North Carolina law does not authorize the filing of liens against units of government.

2. Limitations on Contracting

E-Verify Required for Public Contracts. [HB786 \(S.L. 2013-418\)](#) (Reclaim NC Act). *Effective Date: September 4, 2013.*

In a dramatic turn of legislative events, HB786 was passed by the General Assembly, vetoed by the Governor, and then passed by the General Assembly again when both chambers voted by wide margins to override the Governor's veto. While [controversy over the bill](#) focused on the change in E-verify requirements for temporary workers (extending the employment period for exempted seasonal workers from 90 days to nine months), the legislation also has a significant impact on public contracting.

¹ The Mini-Brooks Act also applies to contracts for surveying, construction management at risk, and design-build, design-build bridging, and public private partnership contracts.

HB786 imposes E-Verify requirements on contractors who enter into certain contracts with state agencies and local governments (for those not familiar with E-Verify, the program is briefly described at the end of this bill summary). The legislation specifically prohibits governmental units from entering into certain contracts “unless the contractor and the contractor’s subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes.”² It is important to note that the E-verify requirement applies to *subcontractors* as well as contractors.

The new laws specifically prohibit governmental units from entering into contracts with contractors who have not (or their subs have not) complied with E-Verify requirements. Although the new statutes don’t specify the consequences for entering into a contract in violation of this prohibition, it may be reasonable to assume that the contract would be void.

The scope of HB786 varies depending on the unit of government and the type of contract. The new prohibition applies to five categories of public contracts:

1. **Cities:** The prohibition applies to *all* city contracts, regardless of type and cost.
2. **Counties:** As with cities, the prohibition applies to *all* county contracts, regardless of type and cost.
3. **Formal Purchase and Construction/Repair Contracts:** The prohibition applies to *all* contracts subject to G.S. 143-129, which are purchase contracts with an estimated cost of \$90,000 or more, and construction or repair contracts with an estimated cost of \$500,000 or more. G.S. 143-129 applies to virtually all public entities.
4. **State Contracts:** The prohibition applies to *all* state contracts subject to Article 3 of Chapter 143.
5. **State IT Contracts:** The prohibition applies to *all* state information technology contracts procured by the Office of Information Technology Services (ITS).

For cities and counties, the scope of HB786 is clear – the prohibition applies to *all* contracts, including those not subject to competitive bidding requirements such as service contracts. For other units of local government, such as local school boards and water/sewer authorities, the prohibition *only* applies to purchase and construction/repair contracts in the formal bidding range.

From a practical standpoint, how can local governments ensure that contractors and their subcontractors have complied with E-Verify requirements? The legislation does not specifically create an affirmative obligation on local governments to independently verify a contractor’s compliance. However, because a contract entered into in violation of the new requirement could be void, local governments have a vested interest in ensuring compliance by their

² Article 2 of Chapter 64 establishes North Carolina’s E-Verify requirements for private employers.

contractors, and their contractors' subcontractors. To avoid placing an undue burden on local governments and bidders by requiring specific documentation for each employee, local governments may wish to consider requiring all bidders to include *with their bids* an affidavit (1) attesting to the contractor's compliance with E-Verify (or, if the contractor employs less than 25 employees in this state, attesting to that fact), and (2) attesting to the contractor's subcontractors' compliance with E-Verify (or, if any subcontractors employ less than 25 employees in this state, attesting to that fact). In addition, local governments should also consider including a *provision in the contract* awarded to the winning bidder that requires the contractor to ensure compliance by any subcontractors subsequently hired by the contractor. A violation of this provision would provide grounds for a breach of contract claim by the local government should the contractor fail to ensure that his or her subcontractors have complied with the E-Verify requirement. The affidavit requirement and contract provision could also be incorporated into local government's overall process for entering into service contracts and other that are not bid, such that the contract would not be executed until an affidavit of compliance is obtained. This system would be especially relevant for cities and counties for whom the E-Verify requirement applies to *all* contracts, not just those subject to competitive bidding requirements.

The new E-Verify requirement went into effect at 9:20a.m. on September 4, 2013. Local governments should take appropriate steps immediately to ensure compliance with the new law, especially for those contracts that are currently going through the bidding process (the effective date of the legislation did not exempt or "grandfather" contracts currently under bid).

A bill similar to HB786, [HB160](#) (Public Contracts/Illegal Immigrants), would prohibit state and local government construction and purchase contracts with contractors who employ illegal immigrants, and also requires contractors to use the E-Verify program to verify the legal employment status of their employees. Unlike HB786, HB160 is specifically limited to purchase and construction/repair contracts, and sets out more specific requirements in the bidding process. This bill remained pending in the House Government Committee upon adjournment and did not meet the crossover deadline, so it is not eligible for consideration during the 2014 short session.

What is E-Verify? The [E-Verify program](#) is a free, web-based system operated by the U.S. Department of Homeland Security in partnership with the Social Security Administration that allows participating employers to electronically verify the legal employment status of newly hired employees. Employers submit information taken from a new hire's Form I-9 (Employment Eligibility Verification Form) through E-Verify to the Social Security Administration and U.S. Citizenship and Immigration Services (USCIS) to determine whether the information matches government records and whether the new hire is authorized to work in the United

States. The employer receives an electronic verification of the new hire's legal employment status.

Under current North Carolina law, all state agencies, cities, counties, and local school boards must use E-Verify to check the work authorization of all new employees.³ The requirement also applies to all private employers doing business in North Carolina who employ 25 or more employees in this state.⁴ Private employers subject to the E-Verify requirement must maintain a record of verification of the employee's legal work status while the employee is employed and for one year thereafter.⁵

Organized Labor Restrictions on Contractors. [HB110 \(S.L. 2013-267\)](#) (Public Contracts/Project Labor). *Effective Date: October 1, 2013, and applies to all contracts awarded on or after that date.*

This legislation enacts a new statute, GS 143-133.5, which prohibits the state or a unit of local government from requiring, prohibiting, or discriminating against a bidder or contractor for adhering to or not adhering to an agreement with a labor organization for a public construction project. The restriction also applies to the award of grant funds and tax incentives. The prohibition applies to all construction and repair contracts subject to informal or formal competitive bidding requirements under Article 8 of Chapter 143; contracts not subject to competitive bidding requirements are not included under the prohibition. The new statute also provides a mechanism by which the state or a local government may exempt a particular project from the prohibition if there is a finding (after public notice and public hearing) that the exemption is required to avert a "significant, documentable threat to public health or safety."

A similar bill passed by the House ([HB872, Protect NC Right-To-Work](#)) makes void and unenforceable any contract provision that requires a contractor or subcontractor to hire union workers. This bill met the crossover deadline and remains pending in the Senate Commerce Committee.

Employment-Related Restrictions on Contractors. [HB74 \(S.L. 2013-413\)](#) (Regulatory Reform Act of 2013). *Effective Date: August 23, 2013.*

Section 5 of this legislation amends G.S. 153A-449 and G.S. 160A-20.1 to prohibit cities and counties from imposing on contractors, as a condition of bidding, employment-related

³ G.S. 126-7.1; G.S. 160A-169.1; and G.S. 153A-99.1.

⁴ G.S. 64-26(a).

⁵ G.S. 64-26(b). For more information, see, Sejal Zota, *Immigration Enforcement in the Workplace: Form I-9, E-Verify and Social Security No-Match Letters: A Brief Guide for North Carolina Public Employers*, Public Employment Law Bulletin No. 36, March 2009 (Chapel Hill: School of Government). Available at <http://sogpubs.unc.edu/electronicversions/pdfs/pelb36.pdf>; Sejal Zota, *What Does the 2011 E-Verify Legislation Mean for Local Governments and Employers?* Immigration Law Bulletin No. 3, July 2011 (Chapel Hill: School of Government). Available at <http://sogpubs.unc.edu/electronicversions/pdfs/ilb03.pdf>.

restrictions that the city or county cannot impose on all private employers within its jurisdiction. The legislation specifically references minimum wage and paid sick leave requirements as examples of prohibited restrictions. Since cities and counties have very little authority to enact ordinances regulating private employment matters, the new prohibition virtually eliminates the ability of cities and counties to impose employment-related conditions on bidding. It is important to note that the legislation specifically applies only to cities and counties; it *does not* apply to local school boards or other political subdivisions such as water/sewer authorities.

Whether cities and counties can continue to impose drug-free workplace and random drug-testing requirements on construction contractors is an open question. Where such policies affect the employment status of an employee, they constitute an employment-related restriction that would be prohibited under HB74. However, because drug-free work zone and drug-testing requirements go directly to safety on the construction site, these requirements arguably would remain valid in that they relate to performance under the contract, but only so long as the requirements do not go further by stipulating any employment-related consequences for violating employees. For example, a violation of a drug-free work zone requirement on a construction project could still result in a breach of contract claim by the local government against the contractor, but the local government could not stipulate or demand any employment-related action by the contractor, such as suspension or termination of the violating employee, in response to the violation.

It is unclear whether the General Assembly intended the prohibition against employment-related restrictions to apply only to contracts subject to competitive bidding requirements or to all contracts. Nonetheless, the plain language of the new statutes specifically prohibits imposing employment-related restrictions “as a condition of bidding on a contract.” Presumably, if a contract is not bid, the prohibition would not apply. State law requires competitive bidding (either informal or formal) for purchase and construction/repair contracts costing \$30,000 or more; these contracts are clearly subject to the new prohibition. It is not uncommon, however, for local governments to competitively bid other types of contracts, such as service contracts, even if bidding is not required by state law; a cautious reading of the statute would apply the new restriction to these contracts as well.

3. State Contracts

State Furniture Contracts. [HB449 \(S.L. 2013-73\)](#) (State Contracts/Furniture). *Effective Date: June 12, 2013.*

This legislation amends G.S. 143-57.1 to make furniture vendors on the federal GSA furniture schedule qualified vendors for state furniture contracts. To qualify, the vendor must offer products on the same pricing and specifications as those the vendor offers on the GSA Furniture

Schedule. In addition, the vendor must be a resident bidder⁶ or offer products manufactured or produced in North Carolina.

State Contracts Administration. [HB56 \(S.L. 2013-234\)](#) (Amend State Contract Review Laws). *Effective Date: October 1, 2013.*

HB56 creates a new Contract Management Section of the Department of Administration's Division of Purchase and Contract to improve management and administration of state contracts for purchases and services that exceed \$1,000,000, and revises the procedures for review of state contracts by the Attorney General's Office and the State Purchasing Officer.

State IT Convenience Contracts. [HB701 \(S.L. 2013-333\)](#) (IT Purchasing/Convenience Contracts). *Effective Date: July 23, 2013.*

This legislation amends G.S. 147-33.95 by authorizing state agencies to purchase IT goods and services from multi-party cooperative purchasing agreement contracts ("convenience contracts") approved by the State Chief Information Officer.

State Refurbished Computer Purchasing. [HB289 \(S.L. 2013-128\)](#) (State Computer Equipment/Buy Refurbished). *Effective Date: June 19, 2013.*

HB289 requires the state Chief Information Officer and Department of Administration to offer state agencies and local governments the option to purchase refurbished computer equipment from registered computer equipment refurbishers. The language in the bill is not codified, meaning it is not an amendment to an existing statute. It is therefore unclear whether the General Assembly intended this purchasing option to be treated as an exemption to competitive bidding requirements such as those found in [GS 143-129\(e\)](#), but presumably the authorization would operate the same as a codified bidding exemption.

4. Real Property

Firearms Disposal. [SB443 \(S.L. 2013-158\)](#) (Disposition of Abandoned Firearms). *Effective Date: September 1, 2013, and applies to all firearms found or received by law enforcement or judicial order of disposition of a firearm on or after this date.*

SB443 amends G.S. 15-11.1 and -11.2 which govern the disposal of firearms that have been seized and forfeited during a criminal investigation ("seized") or which has been found or turned into law enforcement and remain unclaimed by their lawful owners ("unclaimed"). The procedure for disposal of a seized firearm was changed to require destruction of the firearm only if it does not have a legible identification number or is unsafe. The procedure for disposal of an unclaimed firearm was changed to eliminate the requirement that the individual who

⁶ A resident bidder is defined under G.S. 143-59(c) as one whose principal place of business is in North Carolina and who has paid unemployment or income taxes in this state.

found the firearm be given an opportunity to claim it prior to final disposal, and to eliminate the requirement that the Sheriff or chief of police obtain a judicial order for final disposal. Now, if the firearm remains unclaimed after 180 days and 30 days' public notice, the Sheriff or chief of police may order disposal of the unclaimed firearm by (1) destruction if the firearm does not have a legible identification number or is unsafe; (2) sale, trade, or exchange to a federally licensed firearms dealer; (3) sale at public auction to a licensed firearms collector, dealer, importer, or manufacturer, (4) keeping the firearm for training or experimental purposes; or (5) giving the firearm to a museum or historical society.

Community College Lease Purchases. [HB754 \(S.L. 2013-310\)](#) (Lease Purchase of Real Property/Comm. Coll.). *Effective Date: July 18, 2013.*

This legislation amends G.S. 115D-58.15 by authorizing community colleges to use lease purchase and installment purchase contracts for acquiring real property. The authorization *only* applies to real property acquisitions funded by *local funds*.

Legislation Not Enacted

The following bills either did not pass during the 2013 long session or did not meet the crossover deadline.⁷

County-Controlled School Construction. [SB236](#) (Counties Responsible for School Construction). As originally introduced in the Senate, SB236 authorized counties to assume responsibility for construction and ownership of public school facilities. The bill passed the Senate amid [great controversy](#), and by the time it reached the House, it had been reduced from a statewide bill to only applying in nine counties: Beaufort, Dare, Davie, Guilford, Harnett, Lee, Rockingham, Rowan, and Wake. The House changed the bill entirely, converting it to a bill authorizing superior court judges to perform marriages. The Senate rejected these changes and the bill remained pending in conference when the General Assembly adjourned. *Bills in conference are eligible for consideration during the 2014 short session.*

Charter Schools. [SB42](#) (Charter School/Govt. Unit) would add charter schools to the property disposal statute that authorizes property conveyances between units of government (G.S. 160A-274). While the bill passed the Senate on a strong 42-3 vote, it remained pending in the House Rules Committee when the General Assembly adjourned. It is still eligible for consideration during the 2014 short session. On the other hand, [SB575](#) (Counties May Fund Charter School Capital) which authorized counties to fund capital projects for charter schools,

⁷ Under the Senate and House Rules, bills that do not pass one chamber prior to the crossover deadline are not eligible for consideration during the ensuing short session.

was never considered in the Senate and did not meet the crossover deadline, so it is not eligible for consideration during the short session.

Local Preferences. Several bills proposed local or resident bidder preferences, a topic of continued interest among local governments. [HB284](#) (Local Contracts/Local Bidder Preference) authorized cities and counties to give a price-match bid preference to local bidders for construction and purchase contracts if the local bidder's bid is within 5% or \$10,000 (whichever is less) of the nonlocal low bidder. A "local bidder" is defined as a business that has paid unemployment taxes or income taxes in North Carolina and whose principal place of business is in the city or county giving the preference. [SB232](#) (Public Contracts/Local Business Preference) is similar to HB284. [SB19](#) (Bldg. Contracts/Local Business Participation) gives a somewhat different twist to local preference bills – it mandates that cities and counties require bidders on building construction projects to make good faith efforts to solicit participation by local businesses and subcontractors under a process similar to that required for historically underutilized businesses [HUB]. [HB728](#) (NC First) codified Governor Perdue's Executive Order 50 which established a price-match bid preference for in-state bidders on state agency purchase contracts. As written, the bill only applies to state agency contracts, not local government contracts. *None of these bills met the crossover deadline, so they are not eligible for consideration during the 2014 short session.*

Contractor Safety. [HB906](#) (N.C. Public Contractor Safety Act) would require prequalification of construction contractors and subcontractors based on occupational health and safety records. *This bill did not meet the crossover deadline, so it is not eligible for consideration during the 2014 short session.*

Public Notice. [SB186](#) (Notice Publication by Counties and Cities) would authorize cities and counties to give public notice by electronic means only in lieu of publication in the newspaper. This authorization would apply to all legal notices for which newspaper publication is currently required, including those for bidding and property disposal. *This bill did not meet the crossover deadline, so it is not eligible for consideration during the 2014 short session.*

Public Meetings and Open Records. [SB125](#) (Public Meeting/Records Law Violations) makes violations of the state's open meetings and public records laws a Class 3 misdemeanor. *This bill did not meet the crossover deadline, so it is not eligible for consideration during the 2014 short session.*