

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: SB 914 (3rd Edition)

SHORT TITLE: Public Construction Law Changes

SPONSOR(S): Sen. Dalton

FISCAL IMPACT					
	Yes (X)	No ()	No Estimate Available ()		
	<u>FY 2001-02</u>	<u>FY 2002-03</u>	<u>FY 2003-04</u>	<u>FY 2004-05</u>	<u>FY 2005-06</u>
REVENUES					
EXPENDITURES					
General Fund					
Administration					
Office of Secretary	\$32,355	\$64,711	\$64,711	\$64,711	\$64,711
State Construction	\$89,080	\$178,161	\$178,161	\$178,161	\$178,161
	\$386,938NR				
HUB Office	\$95,826	\$231,652	\$231,652	\$231,652	\$231,652
	\$134,000NR				
POSITIONS:	8	8	8	8	8
PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED:					
Department of Administration: State Construction Office, Office of the Secretary , and Office for Historically Underutilized Businesses. Department of Insurance					
EFFECTIVE DATE: Sections 8(a) thru 8(e) - July 1, 2001; Section 11.1 – March 1, 2002; Remaining sections of Parts I and II – Jan. 1, 2002. The remainder of the bill – when it becomes law.					

BILL SUMMARY:

SUMMARY¹: *Senate Bill 914 would make changes in the public construction laws to permit greater flexibility and efficiencies in public building design, construction and plan review, primarily through the concept of construction managers at risk, would increase the mandatory performance and payment bond threshold for public construction projects, and would make changes intended to enhance and improve good faith efforts to recruit*

¹ From Research Division Committee Counsel.

and select minority businesses for participation in public construction contracts. The bill would also change the law to provide for construction and design supervisory authority for projects up to \$2 million for the University of North Carolina until December 31, 2006, promote greater energy efficiency in State buildings and make clarifying changes to the scope of practice for landscape architecture.

BILL ANALYSIS: The bill would make the following changes to current law:

Construction Flexibility for Public Entities (Part I, Sections 1, 2, 3, 5)

The bill would permit public entities to utilize the services of a construction manager at risk as an alternative construction method. The construction manager, a licensed general contractor, would contract directly with the public entity. The construction manager generally would not perform work on the project, but would provide services to the public entity in preparing and coordinating bid packages, scheduling, controlling costs, value engineering, evaluation, pre-construction services, and administering the construction of the project. The construction manager would guarantee the cost of the project and would be required to provide a performance and payment bond to the public entity.

Contracts by a public entity with a construction management would be excepted from the provisions of Article 8 of Chapter 143 (Procedure for Letting of Public Contracts).

The bill would also make various construction bidding methods available to all levels of government, not just local school administrative units, including the State, counties, cities and other public bodies. These construction-bidding methods would include separate-prime, single-prime, dual bidding, construction management services, and alternative contracting methods. The bill would raise the size of the contracts covered by the formal bid requirements from \$100,000 to \$300,000.

These changes would become effective January 1, 2002 and apply to construction projects for which bids or proposals are solicited on or after that date.

Dispute Resolution in Public Construction Contracts (Part I, Section 3; Part II, Section 11)

The bill would require the State Building Commission to develop dispute resolution procedures, including mediation, for subcontractors on State capital improvement projects (Part II, Section 11, G.S. 143-135.26(12)). For all construction and repair projects, public entities would be required to use the Commission's dispute resolution process or adopt another dispute resolution process, and would have to make this process available to all the parties involved in the public entity's construction project. The public entity could set a reasonable threshold, not to exceed \$15,000, concerning the amount in controversy that must be at issue before a party may require other parties to participate in the dispute resolution process. The public entity would determine how the costs of the dispute resolution process would be divided, but at least one-third of the cost would be paid by the public entity if the public entity were a party to the dispute. Finally, the public entity could require by contract that a party participate in mediation as a precondition to initiating litigation concerning a dispute. (Part I, Section 3, G.S. 143-128(g)). These changes would become effective January 1, 2002.

Minority Participation in Public Construction Contracts (Part I, Sections 1, 3.1, 3.6, and 5.1)

Current law requires the State to have a verifiable ten percent (10%) goal for participation by minority businesses in the total value of work for each building project, and requires cities, counties, and other public bodies to set verifiable percentage goals for minority participation in building projects.

The bill is intended to enhance and improve minority business participation in public construction contracts by providing for the following:

- In addition to original construction, minority business participation goals (which would remain at 10%) would apply to repair work and work done by a private entity on a facility to be leased or purchased by the State. (The minority participation goals would apply only to projects costing \$300,000 or more). On State projects, the Secretary of the Department of Administration would identify the appropriate percentage goal for each category of minority business as defined in statute based on the particular contract type.
- Local governmental units or other public or private entities that receive State funds for construction work for projects costing more than \$100,000 (including project work done by a private entity on a facility to be leased or purchased by a local government unit) shall be subject to the 10% goal. However, local governments would be permitted to apply for a different verifiable goal that was adopted prior to December 1, 2001 if the local government had and continues to have a sufficiently strong basis in evidence to justify the use of that goal.
- Each entity required to have a verifiable percentage goal would have to make a "good faith effort" to recruit minority participation. Public entities would have to establish the good faith efforts that it will take prior to soliciting bids on a project, and shall require its contractors to make good faith efforts. First tier subcontractors would likewise have to comply with the requirements applicable to contractors as to good faith efforts, and good faith efforts would apply to the selection of a substitute subcontractor.
- All bidders on any construction or repair project would have to identify good faith efforts made to ensure minority business participation, documented as prescribed by statute.
- Before awarding a contract, a public entity would be required to develop and implement a minority business participation outreach plan, attend the scheduled pre-bid conference, notify minority businesses of potential contracting opportunities, and utilize other media likely to inform potential minority businesses of the bid.
- Public entities would have to require bidders to undertake good faith efforts, which would include 1) contacting minority businesses, 2) making the construction plans available for review by prospective minority businesses, 3) breaking down or combining elements of work into economically feasible units to facilitate minority participation, 4) working with minority trade, community or contractor organizations, 5) attending any pre-bid meetings, 6) providing assistance in getting required bonding or insurance or providing alternative to bonding, 7) negotiating in good faith with interested minority businesses, 8) providing assistance to an otherwise qualified minority business in need of equipment or funds to secure financial assistance or supplies, 9) negotiating joint venture and partnership

arrangements with minority businesses, and 10) providing quick pay agreements and policies to enable minority contractors and suppliers to meet cash-flow demands. No later than June 30, 2002, the Secretary would be required to adopt rules establishing points to be awarded for taking each effort and the minimum number of points required. Prior to July 1, 2002 (when the rules will be in place), a bidder must show compliance with at least five of these ten efforts.

- The term "minority business" would be expanded to include businesses owned by socially and economically disadvantaged individuals (as defined by federal law governing federal procurement contracts).
- Public entities would have to report to the Office of Historically Underutilized Business information concerning minority business utilization. Public entities that fail to comply with this requirement would be required to develop a corrective plan. Failure to file a corrective plan or to implement the plan could result in the loss of authority to enter into construction or repair contracts without prior review by the Department of Administration.
- An advisory board would be appointed by the Secretary of the Department of Administration to develop recommendations to improve the recruitment and utilization of minority businesses. These recommendations would be presented to the General Assembly, the State Construction Office, the University of North Carolina, and the community college system.
- For construction or repair work subject to the informal bidding process, public entities would be required to solicit minority business participation, maintain a record of contractors solicited and document efforts to recruit minority business participation, and report information and provide documentation concerning efforts to recruit minority business participation to the Office for Historically Underutilized Business upon the completion of the project.

These changes would become effective January 1, 2002 and apply to construction projects for which bids or proposals are solicited on or after that date.

Construction And Design Administration (Part II, Sections 11, 11.1)

The bill would make changes to the powers and duties of the State Building Commission, including exemption from plan review for certain projects, expeditious plan review, agency evaluation of energy contracts, open-end design agreements, and dispute resolution procedures. The bill would change the vote by which an alternative contracting method may be approved from 2/3 to a majority. These changes would become effective January 1, 2002. The bill would, beginning March 1, 2002, provide an alternative to begin construction if fire safety reviews of public building specifications are not completed by the Insurance Department within 60 days.

Energy Efficiency in State Buildings (Part III, Sections 12(a)-(g) and 13)

The bill changes the Guaranteed Energy Savings Contract law to make to applicable to State agencies in addition to local governments as is currently allowed. These changes would become effective when the act becomes law.

Changes in Landscape Architecture Law (Part IV, Sections 13.1(a)-(d))

The bill would amend the Landscape Architecture statutes to clarify what construction design matters may be performed by landscape architects. This change is to clarify a conflicting overlap of responsibilities with licensed engineers. The bill would also require engineers and landscape architects to enter into a Memorandum of Understanding regarding their respective responsibilities and authorize an LRC study on the subject. These provisions would become effective when the act becomes law.

Miscellaneous

Section 4 would raise the limit for public bidding from \$100,000 to \$300,000 for construction projects and from \$50,000 to \$90,000 for purchases of apparatus, supplies, materials, or equipment. **Section 4.1** would repeal a local act for Greensboro that had allowed Greensboro a \$70,000 limit for purchases of materials and equipment (less than the proposed limit). **Section 5.2** would add language to G.S. 143-135.5 that would make it the State's policy not to accept bids or proposals from or engage in business with firms that discriminates on the basis of race, gender, religion, national origin, age, physical disability, or any other form of unlawful discrimination in its solicitation, selection, hiring or treatment of another business. **Section 6** would raise the level of contracts for which architectural plans are required for public projects by varying amounts depending on the type of work being done.

Section 7 would raise the threshold for which performance and payment bonds are required on government projects from \$100,000 to \$300,000. This change is consistent with the changes being made in the competitive bidding laws in elsewhere in the bill.

Sections 8(a) through (e) restores The University of North Carolina's exemption from State Construction Office oversight and raises the cap for the exemption from \$500,000 to \$2 million, and continues other construction law exceptions applicable to UNC construction that had expired July 1, 2001. This change would become effective July 1, 2001 and would expire December 31, 2006.

All of Section 10 involves local provisions involving construction law exceptions. **Sections 10. (a) and (b)** would remove the sunset on Johnston County School Board to use the Unitary System Approach model school plan. **Section 10. (c)** would repeal the sunset on the Charlotte-Mecklenburg School Board's authority to use design-built construction for school projects. **Section 10. (d)** would authorize the use of force account by the New Hanover Regional Medical Center. This section would expire December 31, 2007.

Section 14 would require the University of North Carolina and all other public entities to report annually to the Department of Administration (beginning April 1, 2003) on the effectiveness and cost-benefit of utilization of each of the authorized construction methods used by the public entity.

Except for Sections 8(a) through (e), the above miscellaneous provisions would become effective when the act becomes law.

Note: Sections 3.2, 3.3, 3.4, 3.5, and 9 contain conforming changes.

ASSUMPTIONS AND METHODOLOGY:

Department of Administration:

The Department estimates that this bill will have a fiscal impact on the Office of the Secretary, the State Construction Office and the Office for Historically Underutilized Businesses. The additional costs are primarily related to the implementation of the minority business participation requirements of the bill. The discussion for each of the three divisions follows.

Office of the Secretary:

The Secretary estimates that DOA will need one Attorney III (salary grade 82) at a cost of \$60,944 to provide the legal and policy assistance in drafting rules and implementing statutory requirements set forth in the G.S. §§ 143-128.2, 143-128.3, and 143-135.5 as revised by the bill. These provisions require the Secretary to draft rules establishing points to be awarded for a public entity's good faith efforts at minority business participation and to adopt guidelines for local government units to implement the provisions of G.S. § 143-128.2.

The drafting of rules is a responsibility of the Secretary's legal counsel. However, per the Department, it currently has a significant backlog of rules to be drafted for the 26 divisions within the Department. Thus, it cannot meet the requirements of the bill with existing resources. In addition to drafting the rules, the attorney would also provide assistance with the implementation of the minority business participation goals required by the bill in that the attorney would be involved with challenges to the point system expected from the public entities and the design and construction community.

Fiscal Research believes the Department's need for an additional attorney is a reasonable one. However, we have adjusted their estimate from \$60,944 to \$64,711, annually, based on the minimum salary for the position and benefits at 15.66 percent for social security and retirement and \$2,932 for medical. The recurring cost for fiscal year 2001-02 would be \$32,355, assuming a January 1, 2002 effective date for the position.

State Construction Office:

The State Construction Office expects this bill to increase the responsibilities in historically underutilized business (HUB) reporting requirements, energy conservation reporting, reporting requirements relating to the effectiveness and cost of alternative contracting methods, establishment of administrative rules and in providing additional support and service to the State Building Commission. To meet these additional responsibilities, SCO estimates that it will need 3 additional Building Systems Engineers (salary grade 80) at a cost of \$228,953. One of these positions would be responsible for monitoring minority business participation goals as directed in § 3.1 of the bill, such as ensuring compliance with the good faith efforts that public entities are required by G.S. § 143.128.2(a) and (b) to make. Under G.S. § 143-34, this will require further oversight and involvement of the SCO in the award of contracts. Another would be responsible for drafting the administrative rules for the State Building Commission as directed in § 11 of the bill. Specifically, the State Building Commission has been given

additional responsibility for drafting of administrative rules related to the State's Capital Facilities program. These rules govern the review of plans and specifications and types of projects to be reviewed. In addition, rules for evaluation of energy savings contracts and dispute resolution procedures must be developed. These are all new issues and responsibilities that must be researched and studied by knowledgeable technically educated individuals to assure proper drafting of the rules. In addition, as provided for in § 11.1 of the bill, the State Building Commission may become involved in Department of Insurance responsibilities for review of plans if DOI fails to act on plans within 60 days of submission. This is an expansion of the SBC's duties and powers. The third position would evaluate the use of energy savings contracts and implement energy efficiency goals for all State Buildings as directed in § 12.(f) of the bill. Currently only local governments have the authority to enter into guaranteed energy savings contracts. Under the bill, all state government entities will be able to enter into these arrangements. As part of the SCO's responsibility under G.S. § 143-341, proposals and contracts will have to be reviewed from both a technical and contractual standpoint. This is a new responsibility which will require a technically proficient individual to be involved and dedicated to this new process.

In addition to the additional personnel, the SCO estimates that it will need \$386,938 in nonrecurring funding for equipment and system upgrades. Specifically, it estimates that it will need 20 new computers at a cost of \$35,700 and a new server and additional server ports at a cost of \$14,194. The current computers do not contain enough memory, RAM, or operating space to run the web-based application efficiently. Replacing the server would prevent loss of data due to the increased demands on the system. SCO also estimates that it will need \$300,000 to upgrade Interscope, the SCO's web-based application, to allow public access for tracking of project status. SCO believes the increased requirements of tracking and monitoring alternative contracting methods and minority business participation reporting requirements mandates the enhancements to the system. Finally, SCO estimates that it will need a new copier at a cost of \$37,938 for the printing and distribution of reports, guidelines and information on the changes in the administrative rules and construction statutes to the design and construction community.

Based on our review of the bill, FRD believes that the estimate provided by SCO is reasonable. However, we have adjusted the amount requested for the three positions from \$229,953 to \$178,161, annually. The FRD estimate of the position cost is based on the minimum salary (\$48,812) for a grade 80 positions plus retirement and social security at 15.66 percent (\$7,643) and medical at \$2,932. ($\$48,812 + \$7,643 + \$2,932 = \$59,387 * 3 = \$178,161$). Additionally, though we believe the computer and equipment needs are existing needs within SCO and are not mandated by the bill, we believe the additional requirements of the bill make their need for these items more crucial. Thus, our estimate includes the nonrecurring cost of \$386,938 for computers, equipment and system upgrades. The recurring cost for fiscal year 2001-02 would be \$80,080 assuming a January 1, 2002 effective date for the positions.

The State Construction Office notes that this bill does not in any significant matter decrease the current workload of the SCO staff. The only duty it eliminates is the review of University projects less than \$2,000,000. Review of projects since 1988 indicates that this equates to less than 30 per year on average. Currently under \$500,000 projects are not

reviewed by the SCO. Current projects in house are approximately 1,500. All claims associated with the University projects would continue to be heard by the SCO. The new mediation process does not eliminate the SCO from the claims process. One of the reasons stated by the University system to us in their request to increase the threshold from \$500,000 to \$2,000,000 was so the SCO could concentrate on the larger projects (over \$2million) and enhance their reviews and improve turnaround times. Under Part I of the legislation, the CM at Risk construction method will not eliminate the SCO under GS 143-341 in contract negotiation preparation or oversight. The SCO will still be involved with bid protest and claims from subcontracts.

Office of Historically Underutilized Businesses.

The HUB Office estimates that the bill will increase its responsibilities in the following ways:

1. Proposed 143-128.2(a):

- Currently under 143-128, the HUB Office works and interacts with over 230 state entities, which includes – state agencies, community colleges, public schools and state universities.
- Under proposed 143-128.2(a) – In addition to the aforementioned 230 state entities, the HUB Office would be responsible for working private entities and local units of government that receive certain state funds.
- DOA would be responsible for determining compliance of 10% goal set for private entity and local government projects.
- In addition, the Secretary would be responsible for identifying appropriate verifiable goals for state projects, based on specific contract types.
- Under subsection (b), the HUB Office would be responsible for determining the public entities’ compliance of bid solicitation, notification and good faith.
- Under subsection (c), the HUB Office would be responsible for determining each bidder’s compliance of bid solicitation, notification and good faith, which would include reviewing “good faith affidavit” that would be required to be submitted with each bid.
- Under subsection (e), public entities would have to implement a minority business outreach plan to identify and utilize minority bidders.
- Under subsection (f), the public entities would have to require their bidders to undertake good faith efforts, in which the Secretary would be responsible for the establishing and implementing a “points system” for good faith effort.
- Under subsection (g), DOA/HUB Office would have to implement a new category of minority persons, which would include “socially and economically” disadvantaged as defined by federal regulation, 15 U.S.C. 637. Currently, HUB status only focuses on ownership, and not social and economic standards.

2. **Proposed 113-315.36 for NC Seafood Industrial Park:**
Proposed GS 143-128(2) applies to the NC Seafood Industrial Park, therefore, DOA/HUB guidelines and oversight would be required for projects as outlined by this provision.
3. **Proposed GS 143B-437.29 Contracting with minority businesses**
Requires the Authority to comply with policies as 143-128.2, 143-135.5 and Executive Order 150; which would require DOA/HUB to review, monitor and determine compliance.
4. **Proposed 143-128.3 Minority Business Participation Administration**
 - **Under subsection (a)**, all public entities subject to GS 143-128.2, which would include in addition to the state entities, private entities and local units of government, would be required to submit to DOA/HUB Office – information on each building project that illustrates the entities’ verifiable goal, good faith efforts and minority business utilization for each project.
 - DOA/HUB Office would have to compile data “quarterly” from the University System and the State Board of Community Colleges. All other entities would be required to report “semi-annually.”
 - DOA Secretary would have to report to the Joint Legislative Committee on Government Operations – every six months.
 - The aforementioned items under subsection (a) would require additional and extensive data collection and reporting requirements, not currently provided by DOA and/or HUB Office.
 - **Under subsection (b)**, the Secretary would be responsible for “notification of failure to comply with 143-128.2”.
 - In addition, under this subsection, the Secretary would be responsible for reviewing correction action plans and implementing sanctions for non-compliance.
 - The Secretary would be responsible for handling grievances and legal challenges to in contested cases.
 - **Under subsection (c)**, the Secretary would be responsible for “notification of failure to comply with 143-128.2”.
 - The Secretary shall study and make recommendations to the General Assembly and state agencies on how to improve the effectiveness and efficiency of the State capital facilities and minority business participation and good faith efforts as outlined in 143-128.2.
 - **Under subsection (d)**, the Secretary is responsible for appointing an advisory board to develop recommendations to improve recruitment and utilization of minority businesses. Additional resources would be required to staff this function; as well as provide travel reimbursement expenses to board members.
 - The Secretary would be responsible for providing guidance to agencies with increasing minority business participation, which could include breaking down or combining construction packages that would be economically feasible for minority business participation.

- **Under subsection (e)**, the Secretary is responsible adopting rules for State entities, University system, Community College system and local units of government to implement GS 143-128.2.
 - **Under subsection (f)**, the Secretary would be required to report findings and recommendations as required under this section to the Joint Legislative Committee on Governmental Operations “annually”
- 5. Proposed 143-131 – Informal Bids for counties, cities, towns and other subdivisions:**
- **Under subsection (b)**, all public entities are report to DOA/HUB Office project data such as project type, dollar amount, minority business participation and documentation of efforts to recruit minority participation. “upon completion of each project.”
 - This function will increase data collection for project under the informal letting process.
- 6. Proposed 143-135.5 – State Policy; cooperation in promoting the use of small, minority, physically handicapped and women business contractors.**
- **Under subsection (b)**, the Secretary will provide data for enforcement of anti-discrimination policy and be responsible for data collection on businesses sited for anti-discrimination as set forth by 143-135.5 (b).

To meet these additional responsibilities, HUB estimates that it will need four additional professional level positions (salary grade 75) at a total cost of \$280,000 as well as \$30,000 for position upgrades. These positions would work with projects providing job-site interaction to audit for compliance with the good faith efforts requirements and to ensure the accuracy of the affidavits submitted by the contractors. They would assist the prime contractors and construction managers with implementation of the minority business participation requirements required by this bill. They would also review the public entities compliance with the good faith efforts requirements of the bill. One of the positions would also have some responsibility for certification of minority businesses.

The HUB Office received a nonrecurring appropriation for fiscal year 2001-2002. It believes that this funding will allow it to also meet the outreach requirements of the bill. However, on a recurring basis, it believes it will need \$40,000 to continue the outreach efforts.

The HUB Office also estimates that it would need \$9,000 for computers for the new positions and \$125,000 to upgrade its automated system to provide for electronic receipt of the required reports from the public entities, more accurate and efficient reporting, and tracking and monitoring of compliance with the minority participation requirements.

The Fiscal Research Division believes the identified needs are reasonable. However, we have adjusted their estimate for the positions from \$280,000 to \$191,652. Our estimate is based on the minimum salary (\$38,891) for a grade 75 position plus 15.66 percent for social security and retirement (\$6,090), and \$2932 for medical. ($\$38,891 + \$6,090 + \$2,932 = \$47,913 * 4 = \$191,652$). Also, our estimate does not include the requested funding for position upgrades as this is an existing need that is not mandated by this bill.

And, we have not adjusted the estimate of the nonrecurring cost for equipment and computer upgrades. The first year recurring cost would be \$95,826 assuming a January 1, 2002 effective date for the positions.

Department of Insurance:

Section 11.1 requires the Commissioner of Insurance to review plans subject to G.S. 58-31-40 within 30 days of submission. It also allows an additional 30-day extension if necessary to complete the review. The turnaround time for completing reviews depends on the number of plans as well as on whether the plans have been submitted accurately and completely. Currently, the DOI has 7 reviewers for plans submitted by the community colleges and for private structures and the turnaround time is approximately 28 days. There are 6 reviewers for state projects and the turnaround time is approximately 20 days. Substantial increases in the number of plans may increase the turnaround time for reviewing plans. However, without an estimate of the number of plans that will be submitted, the Department cannot provide an estimate of the extent of the additional resources, if any, it may need to continue to review plans within 30 days of submission.

TECHNICAL CONSIDERATIONS:

FISCAL RESEARCH DIVISION 733-4910

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DATE: November 29, 2001



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