

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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SENATE DRS65054-LCx-8B (12/30)

Short Title: Lease Purchase Two New Prisons.

(Public)

Sponsors: Senator Kerr.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO INCREASE FROM THREE TO FIVE THE NUMBER OF PRISONS
THE STATE IS AUTHORIZED TO FINANCE BY LEASE PURCHASE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 148-37.2 reads as rewritten:

"§ **148-37.2. Lease-purchase of ~~three~~ prison facilities.**

(a) Authorization. – The Secretary of Correction may, as provided in this section, enter contracts with private for-profit or nonprofit firms for the construction of ~~three~~ close security correctional facilities ~~totaling up to 3,000 cells described in subsection (a1) of this section~~ to be operated by the Department pursuant to a lease that contains a schedule for purchase of the facilities over a period of up to 20 years.

The State, with the prior approval of the Council of State and the State Treasurer as provided in this section, is authorized to execute and deliver one or more lease-purchase agreements with a special nonprofit corporation providing for the lease-purchase by the State of the Projects from the special nonprofit corporation in connection with and under an arrangement whereby certificates of participation are sold and delivered by the special nonprofit corporation in order to provide funds to pay the purchase price of the Projects. The Projects will be constructed by selected contractors designated to the special nonprofit corporation by the State Property Office of the Department of Administration in consultation with the Department of Correction. The selected contractors will be responsible for arranging for and obtaining their own construction financing, which will consist solely of private funds. The Projects will be sold to the special nonprofit corporation, with the purchase price paid by the special nonprofit corporation from the proceeds of the certificates of participation. The State may lease the real property upon which the Projects will be located, if owned by the State, to the selected contractors constructing the Projects and to the special nonprofit corporation for nominal consideration.

1 (a1) Facilities Authorized. – The following facilities are authorized under this
2 section:

3 (1) 2001 Facilities. – Three close security correctional facilities totaling up
4 to 3,000 cells.

5 (2) 2003 Facilities. – Two close security correctional facilities
6 substantially identical to the facilities described in subdivision (1) of
7 this subsection and totaling up to 2,000 cells. If the State is able to
8 negotiate a contract for one or both of these facilities with the selected
9 contractor for the facilities described in subdivision (1) of this
10 subsection on terms that are reasonable and desirable to the State as
11 determined by the State Treasurer, the Secretary of Administration,
12 and the Council of State, then a request for proposals or a request for
13 qualifications under subsection (c) of this section is not required. The
14 remaining provisions of this section continue to apply.

15 (b) Definitions. – The following definitions apply in this section:

16 (1) Certificates of participation. – Certificates or other instruments
17 delivered by a special nonprofit corporation as provided in this section
18 evidencing the assignment of proportionate and undivided interests in
19 the rights to receive lease payments to be made by the State pursuant
20 to a lease-purchase agreement.

21 (2) Construction contract agreement. – A contract between the Department
22 of Correction and the selected contractors for construction of the
23 Projects, under which the selected contractors will be responsible for
24 arranging for and obtaining their own construction financing, which
25 will consist solely of private funds. The contract may be in the form of
26 a construction manager at-risk contract.

27 (3) Lease-purchase agreement. – A lease-purchase agreement entered into
28 pursuant to this section, under which the State will lease the Projects
29 from the special nonprofit corporation, with option to purchase.

30 (4) Projects. – ~~Three close security correctional facilities providing up to~~
31 ~~3,000 cells~~ Facilities described in subsection (a1) of this section to be
32 constructed by selected contractors, sold to the special nonprofit
33 corporation, and leased to the State pursuant to this section.

34 (5) Purchase agreement. – A contract under which the special nonprofit
35 corporation will purchase the Projects from the selected contractors.

36 (6) Selected contractors. – One or more private firms selected to construct
37 the ~~Projects.~~ Projects or selected to manage the construction of the
38 projects pursuant to a construction manager at-risk contract.

39 (7) Special nonprofit corporation. – A nonprofit corporation created under
40 Chapter 55A of the General Statutes and designated by the State
41 Treasurer for entering into the transactions contemplated by this
42 section.

43 (c) Request for ~~Proposals.~~ Proposals or Qualifications. – The Secretary of
44 Correction may issue a request for proposals to private firms for the private firms to

1 construct the Projects in accordance with plans and specifications developed by the
2 Department of Correction and reviewed by the Office of State Construction. With
3 respect to the Projects described in subdivision (a1)(2) of this section, the Secretary of
4 Correction may issue requests for qualifications to private firms for the private firms to
5 manage the construction of the Projects pursuant to construction manager at-risk
6 contracts as provided in G.S. 143-128.1 and in accordance with plans and specifications
7 developed by the Department of Correction and reviewed by the Office of State
8 Construction. The request for proposals shall provide for the option of proposing on one
9 or more of the facilities, and shall require each proposer to provide a separate proposal
10 on a single facility of up to 1,000 cells. It is the intent of the General Assembly that the
11 State may decide to accept proposals for only one, for two, or for all three facilities.

12 The Secretary of Correction shall make recommendations to the State Property
13 Office of the Department of Administration on the final award decision. The
14 Department of Correction and the State Property Office of the Department of
15 Administration shall consult with the Joint Legislative Commission on Governmental
16 Operations before making the final award decision. The Department of Administration
17 shall make the final award decision, which shall then be subject to the approval of the
18 Council of State.

19 The Department of Correction will enter into a construction contract agreement with
20 the selected contractors for the construction of the Projects. The special nonprofit
21 corporation will enter into a purchase agreement with the selected contractors for the
22 sale of the constructed Projects to the special nonprofit corporation. The Department of
23 Correction shall furnish plans and specifications for review by the State Construction
24 Office. Construction contract agreements entered into under this section shall provide
25 that the Department of Correction and the Office of State Construction shall inspect and
26 review each facility during construction to ensure and determine jointly that the facility
27 is suitable for use as a correctional facility and for future acquisition by the State. The
28 Department of Correction may contract with a design consortium for construction
29 administration services.

30 (d) Approval of Lease-Purchase Agreement. – A lease-purchase agreement may
31 not be entered into pursuant to this section unless the following conditions are met
32 before the lease-purchase agreement is entered into: (i) the Council of State, by
33 resolution, approves the execution and delivery of the lease-purchase agreement, and
34 (ii) the State Treasurer approves the lease-purchase agreement and all other
35 documentation related to it, including any leasehold deed of trust or trust agreement in
36 connection with it. The resolution of the Council of State may include any matters the
37 Council of State determines. In determining whether to approve the lease-purchase
38 agreement, the State Treasurer may consider any factors as the State Treasurer considers
39 relevant in order to find and determine that all of the following conditions are met:

- 40 (1) The principal amount to be financed under the lease-purchase
41 agreement is adequate and not excessive for the purpose of paying the
42 cost of the Projects.
- 43 (2) The increase, if any, in State revenues necessary to pay the sums to
44 become due under the lease-purchase agreement is not excessive.

- 1 (3) The lease-purchase agreement can be entered into on terms desirable
2 to the State.
- 3 (4) The sale of certificates of participation will not have an adverse effect
4 on any scheduled or proposed sale of obligations of the State or any
5 State agency or of any unit of local government in the State.
- 6 (e) Terms and Conditions. – The following provisions apply to a lease-purchase
7 agreement entered into under this section:
- 8 (1) In order to secure the performance by the State of its obligations under
9 the lease-purchase agreement, the lease-purchase agreement may
10 require the eviction of the State from the occupancy of one or more of
11 the Projects in the event that the State breaches its obligations and
12 agreements under the lease-purchase agreement.
- 13 (2) No deficiency judgment may be rendered against the State or any
14 agency, department, or commission of the State in any action for
15 breach of any obligation contained in the lease-purchase agreement or
16 any other related documentation, and the taxing power of the State or
17 any agency, department, or commission of the State is not and may not
18 be pledged to secure any moneys due under the lease-purchase
19 agreement.
- 20 (3) The lease-purchase agreement shall not contain a nonsubstitution
21 clause that restricts the right of the State to replace or provide a
22 substitute for the Projects.
- 23 (4) The lease-purchase agreement may include provisions requesting the
24 Governor to submit in the Governor's budget proposal, or any
25 amendments or supplements to it, appropriations necessary to make
26 the payments required under the lease-purchase agreement.
- 27 (5) The lease-purchase agreement may contain any provisions for
28 protecting and enforcing the rights and remedies of the special
29 nonprofit corporation that are reasonable and proper and not in
30 violation of law, including covenants setting forth the duties of the
31 State with respect to the Projects, which may include provisions
32 relating to insuring, operating, and maintaining the Projects and the
33 custody, safeguarding, investment, and application of moneys.
- 34 (6) The lease-purchase agreement may designate the lease payments to be
35 paid by the State under it to be "principal components" and "interest
36 components." Any interest component of the lease payments may be
37 calculated based upon a fixed or variable interest rate or rates as
38 determined by the State Treasurer.
- 39 (7) The lease-purchase agreement may be entered into by the State, and
40 certificates of participation may be delivered by the special nonprofit
41 corporation, at any time, including at times prior to the delivery of the
42 Projects to the special nonprofit corporation for purchase, and the
43 related delivery of occupancy of the Projects to the State by the special
44 nonprofit corporation. The costs incurred in connection with the

1 preparation of the lease-purchase agreement and related documents
2 and the delivery of the certificates of participation may be paid from
3 the proceeds of the certificates of participation.

4 (8) The State is authorized to agree in the lease-purchase agreement to
5 indemnify the special corporation and its directors and agents for any
6 liabilities that arise to the special corporation or directors or agents on
7 account of their participation in the activities contemplated by this act.

8 (f) Faith and Credit Not Pledged. – The payment of amounts payable by the State
9 under the lease-purchase agreement and other related documentation during any fiscal
10 biennium or fiscal year is limited to funds appropriated for that purpose by the General
11 Assembly in its discretion. No provision of this section and no lease-purchase
12 agreement creates any pledge of the faith and credit of the State or any agency,
13 department, or commission of the State within the meaning of any constitutional debt
14 limitation.

15 (g) Certificates of Participation. – The State may cooperate as necessary to
16 effectuate the delivery by the special nonprofit corporation of tax-exempt certificates of
17 participation, including participating in the preparation of offering documents, the filing
18 of required tax forms and agreeing to comply with restrictions on the use of the Projects
19 as required in order for the interest component of the lease payments to be tax-exempt.
20 Disclosures and compliance with other federal law requirements by the special
21 nonprofit corporation shall be under the direction of the State Treasurer. Certificates of
22 participation may be sold at the direction of the State Treasurer in the manner, either at
23 public or private sale, and for any price or prices that the State Treasurer determines to
24 be in the best interest of the State and to effect the purposes of this section. Interest
25 payable with respect to certificates of participation shall accrue at the rate or rates
26 determined by the State Treasurer with the approval of the special nonprofit
27 corporation.

28 Certificates of participation may be delivered pursuant to a trust agreement with a
29 corporate trustee approved by the State Treasurer. The corporate trustee may be any
30 trust company or bank having the powers of a trust company within or without the State.
31 A trust agreement may (i) provide for security and pledges and assignments with respect
32 to the security as may be permitted under this section and further provide for the
33 enforcement of any lien or security interest created pursuant to this section, and (ii)
34 contain any provisions for protecting and enforcing the rights and remedies of the
35 owners of any certificates of participation that are reasonable and proper and not in
36 violation of law as determined by the State Treasurer. The State Treasurer shall
37 designate the professionals providing legal or financial services relating to the
38 lease-purchase agreement and the delivery of certificates of participation, including the
39 provider of any credit facility and the underwriter or placement agent for any
40 certificates of participation.

41 (h) Tax Exemption. – The lease purchase agreement and any certificates of
42 participation relating to it shall at all times be free from taxation by the State or any
43 political subdivision or any of their agencies, excepting estate, inheritance, or gift taxes,
44 income taxes on the gain from the transfer of the lease-purchase agreement and

1 certificates of participation, and franchise taxes. The interest component of the lease
2 payments made by the State under the lease-purchase agreement, including the interest
3 payable with respect to any certificates of participation, is not subject to taxation as
4 income.

5 (i) Licensing Requirements. – The private for-profit or nonprofit firms
6 authorized to respond to requests for proposal or requests for qualifications authorized
7 by this section, or entitled to be a ~~Selected Contractor~~ selected contractor pursuant to
8 ~~any response to such proposal, this section,~~ need not be a licensed general contractor
9 within the meaning of G.S. 87-1 so that providing a response to ~~such request for~~
10 ~~proposal the request~~ or entering a ~~Construction Contract Agreement or Purchase~~
11 ~~Agreement shall not be deemed~~ construction contract agreement or purchase agreement
12 is not general contracting within the meaning of G.S. ~~87-1; provided that this~~87-1. This
13 subsection ~~shall not be deemed to~~ does not remove the actual construction of any prison
14 facility from the provisions of G.S. 87-1.

15 (j) Minority Business Participation. – G.S. 143-128.2 applies to the Projects
16 authorized in this section."

17 **SECTION 2.** This act is effective when it becomes law.