

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

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SENATE BILL 227

Short Title: Lease Purchase Two New Prisons.

(Public)

Sponsors: Senators Kerr; Holloman and Jenkins.

Referred to: Finance.

February 26, 2003

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.

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

- 1           (1)    2001 Facilities. – Three close security correctional facilities totaling up  
2           to 3,000 cells.
- 3           (2)    2003 Facilities. – Two close security correctional facilities  
4           substantially identical to the facilities described in subdivision (1) of  
5           this subsection and totaling up to 2,000 cells. If the State is able to  
6           negotiate a contract for one or both of these facilities with the selected  
7           contractor for the facilities described in subdivision (1) of this  
8           subsection on terms that are reasonable and desirable to the State as  
9           determined by the State Treasurer, the Secretary of Administration,  
10          and the Council of State, then a request for proposals or a request for  
11          qualifications under subsection (c) of this section is not required. The  
12          remaining provisions of this section continue to apply.
- 13       (b)    Definitions. – The following definitions apply in this section:
- 14           (1)    Certificates of participation. – Certificates or other instruments  
15           delivered by a special nonprofit corporation as provided in this section  
16           evidencing the assignment of proportionate and undivided interests in  
17           the rights to receive lease payments to be made by the State pursuant  
18           to a lease-purchase agreement.
- 19           (2)    Construction contract agreement. – A contract between the Department  
20           of Correction and the selected contractors for construction of the  
21           Projects, under which the selected contractors will be responsible for  
22           arranging for and obtaining their own construction financing, which  
23           will consist solely of private funds. The contract may be in the form of  
24           a construction manager at-risk contract.
- 25           (3)    Lease-purchase agreement. – A lease-purchase agreement entered into  
26           pursuant to this section, under which the State will lease the Projects  
27           from the special nonprofit corporation, with option to purchase.
- 28           (4)    ~~Projects. – Three close security correctional facilities providing up to~~  
29           ~~3,000 cells~~ Facilities described in subsection (a1) of this section to be  
30           constructed by selected contractors, sold to the special nonprofit  
31           corporation, and leased to the State pursuant to this section.
- 32           (5)    Purchase agreement. – A contract under which the special nonprofit  
33           corporation will purchase the Projects from the selected contractors.
- 34           (6)    Selected contractors. – One or more private firms selected to construct  
35           the ~~Projects.~~ Projects or selected to manage the construction of the  
36           projects pursuant to a construction manager at-risk contract.
- 37           (7)    Special nonprofit corporation. – A nonprofit corporation created under  
38           Chapter 55A of the General Statutes and designated by the State  
39           Treasurer for entering into the transactions contemplated by this  
40           section.
- 41       (c)    Request for ~~Proposals.~~ Proposals or Qualifications. – The Secretary of  
42       Correction may issue a request for proposals to private firms for the private firms to  
43       construct the Projects in accordance with plans and specifications developed by the  
44       Department of Correction and reviewed by the Office of State Construction. With

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

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

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

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

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

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

1 and the delivery of the certificates of participation may be paid from  
2 the proceeds of the certificates of participation.

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

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

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

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

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

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

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

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

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