

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2021

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HOUSE BILL 820
PROPOSED COMMITTEE SUBSTITUTE H820-CSST-12 [v.2]
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Short Title: Construction Contract Changes.

(Public)

Sponsors:

Referred to:

May 5, 2021

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY THE DESIGN-BUILD AND DESIGN-BUILD BRIDGING
3 STATUTES, TO PROHIBIT WAIVER OF FUTURE CLAIMS FOR PROGRESS
4 PAYMENTS ON CONSTRUCTION CONTRACTS, TO REQUIRE ATTORNEYS' FEES
5 IN CERTAIN LIEN CLAIMS, AND TO CLARIFY THE LAW DECLARING CERTAIN
6 INDEMNITY CONTRACTS VOID.

7 The General Assembly of North Carolina enacts:

8 **SECTION 1.(a)** G.S. 143-128.1A reads as rewritten:

9 **"§ 143-128.1A. Design-build contracts.**

10 (a) Definitions for purposes of this section:

11 (1) Design-builder. – As defined in G.S. 143-128.1B.

12 (1g) Design professional. – As defined in G.S. 143-128.1B.

13 (1p) First-tier subcontractor. – As defined in G.S. 143-128.1B.

14 (2) Governmental entity. – As defined in G.S. 143-128.1B.

15 (3) Licensed contractor. – As defined in G.S. 143-128.1B.

16 (4) Licensed subcontractor. – A person or entity, not including design
17 professionals or employees of the design-builder, that will be performing work
18 under the design-builder and whose scope of work proposed for the project
19 requires that it be licensed in accordance with Article 2 or Article 4 of Chapter
20 87 of the General Statutes.

21 (5) Unlicensed subcontractor. – A person or entity, not including design
22 professionals or employees of the design-builder, that will be performing work
23 under the design-builder and whose scope of work proposed for the project
24 does not require that it be licensed in accordance with Article 2 or Article 4 of
25 Chapter 87 of the General Statutes.

26 (b) A governmental entity shall establish in writing the criteria used for determining the
27 circumstances under which the design-build method is appropriate for a project, and such criteria
28 shall, at a minimum, address all of the following:

29 (1) The extent to which the governmental entity can adequately and thoroughly
30 define the project requirements prior to the issuance of the request for
31 qualifications for a design-builder.

32 (2) The time constraints for the delivery of the project.

33 (3) The ability to ensure that a quality project can be delivered.

34 (4) The capability of the governmental entity to manage and oversee the project,
35 including the availability of experienced staff or outside consultants who are
36 experienced with the design-build method of project delivery.



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- (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. The governmental entity shall not limit or otherwise preclude any respondent from submitting a response so long as the respondent, itself or through its proposed team, is properly licensed and qualified to perform the work defined by the public notice issued under subsection (c) of this section.
- (6) The criteria utilized by the governmental entity, including a comparison of the advantages and disadvantages of using the design-build delivery method for a given project in lieu of the delivery methods identified in subdivisions (1), (2), and (4) of G.S. 143-128(a1).
- (c) A governmental entity shall issue a public notice of the request for qualifications that includes, at a minimum, general information on each of the following:
- (1) The project site.
 - (2) The project scope.
 - (3) The anticipated project budget.
 - (4) The project schedule.
 - (5) The criteria to be considered for selection and the weighting of the qualifications criteria.
 - (6) Notice of any rules, ordinances, or goals established by the governmental entity, including goals for minority- and women-owned business participation and small business participation.
 - (7) Other information provided by the owner to potential design-builders in submitting qualifications for the project.
 - (8) A statement ~~providing that~~ directing each design-builder shall to submit in its response to the request for qualifications an explanation of its project team ~~selection, which selection. The governmental entity may specify which one of the following project team selection options shall be used, or if not specified, the response shall consist of either of the following project team selection options:~~
- a. A list of the licensed contractors, licensed subcontractors, and ~~licensed~~ design professionals whom the design-builder proposes to use for the project's design and construction. If this project team selection option, the design-builder may self-perform some or all of the work with employees of the design-builder and, without bidding, also enter into negotiated subcontracts to perform some or all of the work with subcontractors, including, but not exclusively with, those identified in the list. In submitting its list, the design-builder may, but is not required to, include one or more unlicensed subcontractors the design-builder proposes to use. If this project team selection option is used, the design-builder may, at its election and with or without the use of negotiated subcontracts, accept bids for the selection of one or more of its first-tier subcontractors.
 - b. ~~An~~ A list of the licensed contractors and design professionals whom the design-builder proposes to use for the project's design and construction and an outline of the strategy the design-builder plans to use for open contractor and subcontractor selection based upon the provisions of Article 8 of Chapter 143 of the General Statutes. If this project team selection option is used, the design-builder may also self-perform some or all of the work with employees of the design-builder but shall not enter into negotiated contracts with first-tier subcontractors.

(d) Following evaluation of the qualifications of the design-builders, the three most highly qualified design-builders shall be ranked. If after the solicitation for design-builders not as many as three responses have been received from qualified design-builders, the governmental entity shall again solicit for design-builders. If as a result of such second solicitation not as many as three responses are received, the governmental entity may then begin negotiations with the highest-ranked design-builder under G.S. 143-64.31 even though fewer than three responses were received. If the governmental entity deems it appropriate, the governmental entity may invite some or all responders to interview with the governmental entity.

(e) The design-builder shall be selected in accordance with Article 3D of this Chapter. Each design-builder shall ~~certify~~certify, in the response to the request for qualifications in subsection (c) of this section, to the governmental entity that each ~~licensed~~ design professional who is a member of the design-build team, including subconsultants, was selected based upon demonstrated competence and qualifications in the manner provided by G.S. 143-64.31.

(f) The design-builder shall provide a performance and payment bond to the governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. The design-builder shall obtain written approval from the governmental entity prior to changing key personnel as listed in ~~sub-subdivisions~~sub-subdivisions (c)(8)a. or (c)(8)b. of this section after the contract has been awarded. For purposes of this subsection, 'key personnel' shall mean either of the following:

(1) For the project team selection option under sub-subdivision (c)(8)a. of this section, the licensed contractors, licensed subcontractors and design professionals identified in the response to the request for qualifications.

(2) For the project team selection option under sub-subdivision (c)(8)b. of this section, the licensed contractors and design professionals identified in the response to the request for qualifications."

SECTION 1.(b) G.S. 143-128.1B reads as rewritten:

"§ 143-128.1B. Design-build bridging contracts.

(a) Definitions for purposes of this section:

(1a) Costs of the subcontractor work. – The sum total amount of all first-tier subcontract packages bid or proposed to be bid under subsection (f) of this section.

(1) Design-build bridging. – A design and construction delivery process whereby a governmental entity contracts for design criteria services under a separate agreement from the construction phase services of the design-builder.

(2) Design-builder. – An appropriately licensed person, corporation, or entity that, under a single contract, offers to provide or provides design services and general contracting services where services within the scope of the practice of professional engineering or architecture are performed respectively by a licensed engineer or licensed architect and where services within the scope of the practice of general contracting are performed by a licensed general contractor.

(3) Design criteria. – The requirements for a public project expressed in drawings and specifications sufficient to allow the design-builder to make a responsive bid proposal.

(4) Design professional. – Any professional licensed under Chapters 83A, 89A, or 89C of the General Statutes.

(5) First-tier subcontractor. – A subcontractor who contracts directly with the design-builder, excluding design professionals.

(5g) General conditions. – A specific list compiled by the government entity that identifies the tools, resources, and equipment not directly related to the actual construction activities, but that are required to complete the project and for

which the design-builder is to be compensated. As examples, this term includes the following: on-site construction office and storage trailers; electrical and other utility services during construction; on-site construction superintendent, construction supervisors, and clerical staff; trash collection; security; and other temporary measures. This term shall not include either of the following:

a. Construction work to be bid pursuant to subsection (f) of this section.

b. Design services of a design professional.

(6) Governmental entity. – Every officer, board, department, commission, or commissions charged with responsibility of preparation of specifications or awarding or entering into contracts for the erection, construction, alteration, or repair of any buildings for the State or for any county, municipality, or other public body.

(7) Licensed contractor. – A person or entity whose scope of work proposed for the project requires that it be licensed in accordance with the provisions of Article 1 of Chapter 87 of the General Statutes.

(b) A governmental entity shall establish in writing the criteria used for determining the circumstances under which engaging a design criteria design professional is appropriate for a project, and such criteria shall, at a minimum, address all of the following:

(1) The extent to which the governmental entity can adequately and thoroughly define the project requirements prior to the issuance of the request for proposals for a design-builder.

(2) The time constraints for the delivery of the project.

(3) The ability to ensure that a quality project can be delivered.

(4) The capability of the governmental entity to manage and oversee the project, including the availability of experienced staff or outside consultants who are experienced with the design-build method of project delivery.

(5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities. The governmental entity shall not limit or otherwise preclude any respondent from submitting a response so long as the respondent, itself or through its proposed team, is properly licensed and qualified to perform the work defined by the public notice issued under subsection (d) of this section.

(6) The criteria utilized by the governmental entity, including a comparison of the advantages and disadvantages of using the design-build delivery method for a given project in lieu of the delivery methods identified in subdivisions (1), (2), and (4) of G.S. 143-128(a1).

(b1) The governmental entity, as a criterion in subsection (b) of this section, shall not require the design-builder to provide the costs of the subcontractor work in the design criteria package.

(c) On or before entering into a contract for design-build services under this section, the governmental entity shall select or designate a staff design professional, or a design professional who is independent of the design-builder, to act as its design criteria design professional as its representative for the procurement process and for the duration of the design and construction. If the design professional is not a full-time employee of the governmental entity, the governmental entity shall select the design professional on the basis of demonstrated competence and qualifications as provided by G.S. 143-64.31. The design criteria design professional shall develop design criteria in consultation with the governmental entity. The design criteria design professional shall not be eligible to submit a response to the request for proposals nor provide design input to a design-build response to the request for proposals. The design criteria design professional shall prepare a design criteria package equal to thirty-five percent (35%) of the

completed design documentation for the entire construction project. The design criteria package shall not require the design-builder to include the costs of the subcontractor work in its response and shall include all of the following:

- (1) Programmatic needs, interior space requirements, intended space utilization, and other capacity requirements.
- (2) Information on the physical characteristics of the site, such as a topographic survey.
- (3) Material quality standards or performance criteria.
- (4) Special material requirements.
- (5) Provisions for utilities.
- (6) Parking requirements.
- (7) The type, size, and location of adjacent structures.
- (8) Preliminary or conceptual drawings and specifications sufficient in detail to allow the design-builder to make a proposal which is responsive to the request for proposals.
- (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.
- (10) The list of general conditions prepared by the governmental entity for which the design-builder is to provide a fixed fee in accordance with sub-subdivision (10)a. of subsection (d) of this section.
- (11) The form of the contract to be entered into by the successful design-builder to whom the project is awarded pursuant to subsection (e) of this section. The form of the contract may, upon discretion of the governmental entity, allow for multiple phases, termination for convenience and rights arising therefrom, and the subsequent setting of guaranteed maximum prices.
- (12) A statement directing each design-builder to submit in its response to the request for qualifications an explanation of its proposed plan for its good-faith compliance with G.S. 143-128.2.

(d) A governmental entity shall issue a public notice of the request for proposals that includes, at a minimum, general information on each of the following:

- (1) The project site.
- (2) The project scope.
- (3) The anticipated project budget.
- (4) The project schedule.
- (5) The criteria to be considered for selection and the weighting of the selection criteria.
- (6) Notice of any rules, ordinances, or goals established by the governmental entity, including goals for minority- and women-owned business participation and small business entities.
- (7) The thirty-five percent (35%) design criteria package prepared by the design criteria design professional.
- (8) Other information provided by the owner to design-builders in submitting responses to the request for proposals for the project.
- (9) A statement providing that each design-builder shall submit in its request for proposal response an explanation of its project team selection, which shall consist of a list of the licensed contractor and ~~licensed~~ design professionals whom the design-builder proposes to use for the project's design and construction.
- (10) A statement providing that each design-builder shall submit in its request for proposal a separate sealed envelope with all envelope, contemporaneously with the response to the request for proposals, the design-builder's fixed fees, excluding the costs of the subcontractor work, for designing and constructing

the project in accordance with requirements set forth by the government entity's criteria and the terms and conditions set forth in the form of the contract under subdivision (11) of subsection (c) of this section for each of the following: following, listed separately by item:

- a. The design-builder's price for providing the general conditions of the contract identified in the request for proposal.
- b. The design-builder's proposed fee for general construction services services not otherwise provided for in this subdivision.
- c. The design-builder's fee for design services services necessary to complete the project.

(e) Following evaluation of the qualifications of the design-builders, the governmental entity shall rank the design-builders who have provided responses, grouping the top three without ordinal ranking. If after the solicitation for design-builders not as many as three responses have been received from qualified design-builders, the governmental entity shall again solicit for design-builders. If as a result of such second solicitation not as many as three responses are received, the governmental entity may then make its selection. From the grouping of the top three design-builders, the governmental entity shall select the design-builder who is the lowest responsive, responsible bidder based on the cumulative amount of fees provided in accordance with subdivision (d)(10) of this section and taking into consideration quality, performance, and the time specified in the proposals for the performance of the contract. Each design-builder shall certify to the governmental entity that each licensed design professional who is a member of the design-build team, including subconsultants, was selected based upon demonstrated competence and qualifications in the manner provided by G.S. 143-64.31.

(f) The design-builder shall accept bids based upon the provisions of this Article from first-tier subcontractors for all construction work under this section.

(g) The design-builder shall provide a performance and payment bond to the governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. The design-builder shall obtain written approval from the governmental entity prior to changing key personnel, as listed under subdivision (d)(9) of this section, after the contract has been awarded."

SECTION 1.(c) G.S. 143-129(e)(11) reads as rewritten:

"(11) Contracts by a public entity with any of the following:

- a. ~~a~~ A construction manager at risk executed pursuant to G.S. 143-128.1.
- b. A design-builder executed pursuant to G.S. 143-128.1A.
- c. A design-builder executed pursuant to G.S. 143-128.1B.
- d. A private developer executed pursuant to G.S. 143-128.1C."

SECTION 1.(d) This section becomes effective October 1, 2021, and applies to contracts entered into, amended, or renewed on or after that date.

SECTION 2.(a) Article 1 of Chapter 22B of the General Statutes is amended by adding a new section to read:

"§ 22B-5. Waiver of liens or claims as a condition of progress payment invalid.

(a) Provisions in lien waivers, releases, construction agreements as defined in G.S. 22B-1(f)(1), or design professional agreements as defined in G.S. 22B-1(f)(5) purporting to require a promisor to submit a waiver or release of liens or claims as a condition of receiving interim or progress payments due from a promisee under a construction agreement or design professional agreement are void and unenforceable unless limited to the specific interim or progress payment actually received by the promisor in exchange for the lien waiver.

(b) This section does not apply to the following:

- (1) Lien waivers or releases for final payments.

(2) Agreements to settle and compromise disputed claims after the claim has been identified by the claimant in writing regardless of whether the promisor has initiated a civil action or arbitration proceeding."

SECTION 2.(b) This section becomes effective October 1, 2021, and applies to liens attached on or after that date.

SECTION 3.(a) G.S. 44A-35 reads as rewritten:

"§ 44A-35. Attorneys' fees.

(a) In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. costs with the final judgment or arbitration award.

(b) The court or arbitrator shall determine the prevailing party based on the principal amount in controversy between the parties as of the commencement of the trial, arbitration, or hearing resulting in a judgment or arbitration award, considering all relevant facts and circumstances.

(c) If a party serves (i) an offer of judgment in accordance with G.S. 1A-1, Rule 68, or (ii) a written settlement offer, so that the offer is received at least 30 days before the commencement of the trial, arbitration, or hearing resulting in a judgment or award resolving all matters in controversy between the parties, the last offer shall be deemed to be that party's monetary position for purposes of determining the amount in controversy.

(d) In determining the amount of reasonable attorneys' fees and expenses under this section, the court or arbitrator may consider all relevant facts and circumstances, including, without limitation, the following:

(1) The amount in controversy and the results obtained.

(2) The reasonableness of the time and labor expended, and the billing rates charged, by the attorneys.

(3) The novelty and difficulty of the questions raised in the action.

(4) The skill required to perform properly the legal services rendered.

(5) The relative economic circumstances of the parties.

(6) Settlement offers made prior to the commencement of the trial, arbitration, or hearing.

(7) Offers of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure and whether judgment finally obtained was more favorable than such offers.

(8) Whether a party unjustly exercised superior economic bargaining power in the conduct of the action or withheld payment of undisputed amounts.

(9) The timing of settlement offers.

(10) The extent to which the party seeking attorneys' fees prevailed in the action.

(11) The amount of attorneys' fees awarded in similar cases.

(e) A party may submit evidence relating to an award of attorneys' fees by affidavit or declaration. The court or arbitrator may admit other evidence, including, without limitation, live or deposition testimony. A party may submit expert testimony to support an award, but the court or arbitrator shall not require expert testimony.

(f) For purposes of this section, "prevailing party" is ~~a the party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the whose monetary amount sought in a claim or is a party defendant or third party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended. Notwithstanding the foregoing, in the event an offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in~~

~~an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer.~~ position at the commencement of the trial, arbitration, or hearing is closest to the amount of the judgment or arbitration award. The court or arbitrator shall determine the prevailing party based upon the principal amount in controversy between the parties as of the commencement of the trial, arbitration, or hearing resulting in a judgment or arbitration award, considering all relevant facts and circumstances."

SECTION 3.(b) This section becomes effective October 1, 2021, and applies to any claim arising on or after that date.

SECTION 4.(a) G.S. 22B-1 reads as rewritten:

"§ 22B-1. Certain indemnity and defend agreements invalid.

(a) Provisions in, or in connection with, a construction agreement or design professional agreement purporting to require a promisor to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy, void and unenforceable. Nothing contained in this subsection shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the ~~sole~~ negligence of the promisor, its agents or ~~employees~~ employees when the negligence of the promisee, the promisee's independent contractors, agents, employees or indemnitees is not a proximate cause of the damages sought.

(b) Provisions in, or in connection with, a construction agreement or design professional agreement purporting to require a promisor to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, indemnitees, or any other person or entity against losses, damages, or expenses are against public policy, void, and unenforceable unless the ~~the~~ fault of the promisor or its derivative parties is a proximate cause of the loss, damage, or expense indemnified.

...."

SECTION 4.(b) This section becomes effective October 1, 2021, and applies to construction agreements and design professional agreements entered into on or after that date.

SECTION 5. Except as otherwise provided, this act is effective when it becomes law.