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HOUSE BILL DRH10412-ST-3B

Short Title: Construction Contract Changes. (Public)

Sponsors: Representative Arp.

Referred to:

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.



- 1 (5) A good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to
2 recruit and select small business entities. The governmental entity shall not
3 limit or otherwise preclude any respondent from submitting a response so long
4 as the respondent, itself or through its proposed team, is properly licensed and
5 qualified to perform the work defined by the public notice issued under
6 subsection (c) of this section.
- 7 (6) The criteria utilized by the governmental entity, including a comparison of the
8 advantages and disadvantages of using the design-build delivery method for a
9 given project in lieu of the delivery methods identified in subdivisions (1), (2),
10 and (4) of G.S. 143-128(a1).
- 11 (c) A governmental entity shall issue a public notice of the request for qualifications that
12 includes, at a minimum, general information on each of the following:
- 13 (1) The project site.
14 (2) The project scope.
15 (3) The anticipated project budget.
16 (4) The project schedule.
17 (5) The criteria to be considered for selection and the weighting of the
18 qualifications criteria.
19 (6) Notice of any rules, ordinances, or goals established by the governmental
20 entity, including goals for minority- and women-owned business participation
21 and small business participation.
22 (7) Other information provided by the owner to potential design-builders in
23 submitting qualifications for the project.
24 (8) A statement ~~providing that directing~~ each design-builder ~~shall to~~ submit in its
25 response to the request for qualifications an explanation of its project team
26 ~~selection, which selection.~~ The governmental entity may specify which of the
27 following the statement must include, or if not specified, the statement shall
28 consist of either of the following:
- 29 a. A list of the licensed contractors, licensed subcontractors, and licensed
30 design professionals whom the design-builder proposes to use for the
31 project's design and construction. If this option, the design-builder
32 may self-perform some or all of the work with employees of the
33 design-builder and, without bidding, also enter into negotiated
34 subcontracts to perform some or all of the work with licensed
35 subcontractors, including, but not exclusively with, those identified in
36 the list. In submitting its list, the design-builder may, but is not
37 required to, include one or more unlicensed subcontractors the
38 design-builder proposes to use. If this option is used, the
39 design-builder may, at its election and with or without the use of
40 negotiated subcontracts, accept bids for the selection of one or more
41 of its first-tier subcontractors.
- 42 b. ~~An~~ A list of the licensed contractors and design professionals whom
43 the design-builder proposes to use for the project's design and
44 construction and an outline of the strategy the design-builder plans to
45 use for open contractor and subcontractor selection based upon the
46 provisions of Article 8 of Chapter 143 of the General Statutes. If this
47 option is used, the design-builder may also self-perform some or all of
48 the work with employees of the design-builder but shall not enter into
49 negotiated contracts with first-tier subcontractors.
- 50 (d) Following evaluation of the qualifications of the design-builders, the three most
51 highly qualified design-builders shall be ranked. If after the solicitation for design-builders not

1 as many as three responses have been received from qualified design-builders, the governmental
2 entity shall again solicit for design-builders. If as a result of such second solicitation not as many
3 as three responses are received, the governmental entity may then begin negotiations with the
4 highest-ranked design-builder under G.S. 143-64.31 even though fewer than three responses
5 were received. If the governmental entity deems it appropriate, the governmental entity may
6 invite some or all responders to interview with the governmental entity.

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

12 (f) The design-builder shall provide a performance and payment bond to the
13 governmental entity in accordance with the provisions of Article 3 of Chapter 44A of the General
14 Statutes. The design-builder shall obtain written approval from the governmental entity prior to
15 changing key personnel as listed in sub-subdivision (c)(8)a. of this section after the contract has
16 been awarded."

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

18 **"§ 143-128.1B. Design-build bridging contracts.**

19 (a) Definitions for purposes of this section:

20 (1a) Costs of the subcontractor work. – The sum total amount of all first-tier
21 subcontract packages bid or proposed to be bid under subsection (f) of this
22 section.

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

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

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

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

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

40 (5g) General conditions. – A specific list compiled by the government entity that
41 identifies the tools, resources, and equipment not directly related to the actual
42 construction activities, but that are required to complete the project and for
43 which the design-builder is to be compensated. As examples, this term shall
44 include at least all of the following: on-site construction office and storage
45 trailers; electrical and other utility services during construction; on-site
46 construction superintendent, construction supervisors, and clerical staff; trash
47 collection; security; and other temporary measures. This term shall not include
48 any of the following:

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

50 b. Design services of a design professional.

51 c. The costs of the subcontractor work.

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

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

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

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

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

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

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

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

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

30 (b1) The governmental entity, as a criterion in subsection (b) of this section, shall not
31 require the design-builder to provide the costs of the subcontractor work in the design criteria
32 package. The design-builder may be required to disclose such cost after the contract has been
33 executed.

34 (c) On or before entering into a contract for design-build services under this section, the
35 governmental entity shall select or designate a staff design professional, or a design professional
36 who is independent of the design-builder, to act as its design criteria design professional as its
37 representative for the procurement process and for the duration of the design and construction. If
38 the design professional is not a full-time employee of the governmental entity, the governmental
39 entity shall select the design professional on the basis of demonstrated competence and
40 qualifications as provided by G.S. 143-64.31. The design criteria design professional shall
41 develop design criteria in consultation with the governmental entity. The design criteria design
42 professional shall not be eligible to submit a response to the request for proposals nor provide
43 design input to a design-build response to the request for proposals. The design criteria design
44 professional shall prepare a design criteria package equal to thirty-five percent (35%) of the
45 completed design documentation for the entire construction project. The design criteria package
46 shall not include the costs of the subcontractor work and shall include all of the following:

47 (1) Programmatic needs, interior space requirements, intended space utilization,
48 and other capacity requirements.

49 (2) Information on the physical characteristics of the site, such as a topographic
50 survey.

51 (3) Material quality standards or performance criteria.

- 1 (4) Special material requirements.
 2 (5) Provisions for utilities.
 3 (6) Parking requirements.
 4 (7) The type, size, and location of adjacent structures.
 5 (8) Preliminary or conceptual drawings and specifications sufficient in detail to
 6 allow the design-builder to make a proposal which is responsive to the request
 7 for proposals.
 8 (9) Notice of any ordinances, rules, or goals adopted by the governmental entity.
 9 (10) The list of general conditions prepared by the governmental entity for which
 10 the design-builder is to provide a fixed fee in accordance with sub-subdivision
 11 (10)a. of subsection (d) of this section.
 12 (11) The form of the contract to be entered into by the successful design-builder to
 13 whom the project is awarded pursuant to subsection (e) of this section. The
 14 form of the contract may, upon discretion of the governmental entity, allow
 15 for multiple phases, termination for convenience and rights arising therefrom,
 16 and the subsequent setting of guaranteed maximum prices.
 17 (12) A statement directing each design-builder to submit in its response to the
 18 request for qualifications an explanation of its proposed plan for its good-faith
 19 compliance with G.S. 143-128.2.
- 20 (d) A governmental entity shall issue a public notice of the request for proposals that
 21 includes, at a minimum, general information on each of the following:
- 22 (1) The project site.
 23 (2) The project scope.
 24 (3) The anticipated project budget.
 25 (4) The project schedule.
 26 (5) The criteria to be considered for selection and the weighting of the selection
 27 criteria.
 28 (6) Notice of any rules, ordinances, or goals established by the governmental
 29 entity, including goals for minority- and women-owned business participation
 30 and small business entities.
 31 (7) The thirty-five percent (35%) design criteria package prepared by the design
 32 criteria design professional.
 33 (8) Other information provided by the owner to design-builders in submitting
 34 responses to the request for proposals for the project.
 35 (9) A statement providing that each design-builder shall submit in its request for
 36 proposal response an explanation of its project team selection, which shall
 37 consist of a list of the licensed contractor and ~~licensed~~ design professionals
 38 whom the design-builder proposes to use for the project's design and
 39 construction.
 40 (10) A statement providing that each design-builder shall submit in ~~its request for~~
 41 ~~proposal~~ a separate sealed envelope with all envelope, contemporaneously
 42 with the response to the request for proposals, the design-builder's fixed fees,
 43 excluding the costs of the subcontractor work, for designing and constructing
 44 the project in accordance with requirements set forth by the government
 45 entity's criteria and the terms and conditions set forth in the form of the
 46 contract under subdivision (11) of subsection (c) of this section for each of the
 47 following: following, listed separately by item:
 48 a. ~~The design-builder's price for providing the general conditions of the~~
 49 ~~contract identified in the request for proposal.~~
 50 b. ~~The design-builder's proposed fee for general construction~~
 51 ~~services.~~ services not otherwise provided for in this subdivision.

1 c. The design-builder's fee for design services necessary to
2 complete the project.

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

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

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

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

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

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

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

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

33 **"§ 22B-5. Waiver of liens or claims as a condition of progress payment invalid.**

34 Provisions in lien waivers, releases, construction agreements (as defined in G.S. 22B-1(f)(1)),
35 or design professional agreements (as defined in G.S. 22B-1(f)(5)) purporting to require a
36 promisor to submit a waiver or release of liens or claims as a condition of receiving interim or
37 progress payments due from a promisee under a construction agreement or design professional
38 agreement are void and unenforceable unless limited to the specific interim or progress payment
39 actually received by the promisor in exchange for the lien waiver. This section does not apply to
40 (i) lien waivers or releases for final payments or (ii) agreements to settle and compromise
41 disputed claims after the claim has been identified by the claimant in writing regardless of
42 whether the promisor has initiated a civil action or arbitration proceeding."

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

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

46 **"§ 44A-35. Attorneys' fees.**

47 (a) In any suit brought or defended under the provisions of Article 2 or Article 3 of this
48 Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing
49 the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by
50 the losing party upon a finding that there was an unreasonable refusal by the losing party to fully

1 ~~resolve the matter which constituted the basis of the suit or the basis of the defense.~~ costs with the
2 ~~final judgment or arbitration award.~~

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

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

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

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

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

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

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

20 (5) The relative economic circumstances of the parties.

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

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

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

28 (9) The timing of settlement offers.

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

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

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

35 (f) For purposes of this section, "prevailing party" is ~~a the party plaintiff or third party~~
36 ~~plaintiff who obtains a judgment of at least fifty percent (50%) of the whose monetary amount~~
37 ~~sought in a claim or is a party defendant or third party defendant against whom a claim is asserted~~
38 ~~which results in a judgment of less than fifty percent (50%) of the amount sought in the claim~~
39 ~~defended. Notwithstanding the foregoing, in the event an offer of judgment is served in~~
40 ~~accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in~~
41 ~~an amount more favorable than the last offer or is an offeror against whom judgment is rendered~~
42 ~~in an amount less favorable than the last offer.~~ position at the commencement of the trial,
43 arbitration, or hearing is closest to the amount of the judgment or arbitration award. The court or
44 arbitrator shall determine the prevailing party based upon the principal amount in controversy
45 between the parties as of the commencement of the trial, arbitration, or hearing resulting in a
46 judgment or arbitration award, considering all relevant facts and circumstances."

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

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

50 **"§ 22B-1. Certain indemnity and defend agreements invalid.**

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

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

19"

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

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