HOUSE BILL 820: Construction Contract Changes.

2021-2022 General Assembly

Committee:		**Date:**	May 11, 2021
Introduced by:	Reps. Arp, Stevens, Brody, Winslow	**Prepared by:**	Erika Churchill
Analysis of:	Third Edition		Staff Attorney

OVERVIEW: House Bill 820 would make changes to the design-build contracting process, to the attorneys fees provision for actions under the statutory lien process, and to make clarifications to the provisions related to the contracts void as against public policy, effective October 1, 2021.

CURRENT LAW and BILL ANALYSIS:

Design Build Contracting. – Prior to 2013, State law authorized four contracting methods for large building construction projects: single-prime, separate-prime (also referred to as multi-prime), dual-bidding (bidding both single- and separate-prime simultaneously), and construction management at risk. In 2013, the General Assembly authorized, statewide, the use of the design-build method and the design-build bridging method as a permissible means of construction contracting. The design-build method allows for a construction project that delivers both design, whether architectural or engineering or both, and construction services under one contract with a single point of responsibility. The design-build bridging construction method is a two-step process that differs from design-build in two ways:

- With design-build bridging, the unit contracts separately with an architect or engineer to design 35% of the project, referred to in the statute as the "design criteria," The unit then solicits proposals from design-build firms based on the design criteria package and contracts with a design-builder to complete the design and perform construction. The design criteria package acts as "bridging" documents between initial project concept and the design-build phase.
- With the design-build bridging method, fees and price estimates are solicited in the request for proposals for design-build services and the contract for these services is awarded based on the lowest responsive, responsible bidder standard of award.

A design-builder is currently defined as "an appropriately licensed person, corporation, or entity that, under a single contract, offers to provide or provides design services and general contracting services." G.S. 143-128.1B. Architectural and engineering services must be performed by licensed architects and engineers, and contractor services must be performed by a licensed general contractor. It is possible for one individual to hold both an engineering license and a general contractor license, usually a design-builder is a corporation, firm, or joint venture that employs both licensed design professionals and licensed general contractors, or a construction firm that subcontracts with an architect or engineer. The statutes require the design-builder to certify that each licensed designer and subconsultant who is a member of the design-build team was selected based on "demonstrated competence and qualifications" under the qualifications-based selection process of the Mini-Brooks Act (G.S. 143-64.31).

This bill analysis was prepared by the nonpartisan legislative staff for the use of legislators in their deliberations and does not constitute an official statement of legislative intent.

Section 1 would clarify that design-builders responding to a request for proposals must select their project team in one of two ways:

1. A list of the licensed contractors, licensed subcontractors, and design professionals whom the design-builder proposes to use for the project's design and construction.
2. A list of the licensed contractors and design professionals whom the design-builder proposes to use and an outline of the strategy the design-builder plans to use for seeking team members using the public bidding statutes.

Once identified, the identity of the key team members would need to be updated if they change.

The bill would also do the following:

- Specify that the governmental entity cannot require the design builder to provide the costs of the subcontractor work in the design criteria package.
- Requires the governmental entity to provide list of general conditions that the design-builder is to provide a fixed fee in their response.

Contracts Against Public Policy. – Any contract or agreement purporting 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 of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable, if the contract or agreement is relative to the design, planning, construction, alteration, repair or maintenance of any of the following:

- Building
- Structure
- Highway
- Road
- Appurtenance or appliance, including moving, demolition and excavating connected therewith

This prohibition does not prevent or prohibit a contract where a promisor agrees to 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.

This prohibition does not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer. This prohibition does not apply to any of the following:

1. Promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee.
2. Contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1.

Section 2 would add a provision that in lien waivers, releases, construction agreements, or design professional agreements purporting to require a promisor to submit a waiver or release of liens or claims as a condition of receiving interim or progress payments are void and unenforceable unless limited to the specific interim or progress payment actually received by the promisor in exchange for the lien waiver. Exempt are (i) lien waivers or releases for final payments and (ii) agreements to settle and compromise disputed claims after the claim has been identified by the claimant in writing.

Section 4 would allow for contracts that when the negligence of the promisee, the promisee's independent contractors, agents, employees or indemnitees is not a proximate cause of the damages sought to be enforced.

Attorneys Fees in Lien Law Actions. – Since 1991, G.S. 44A-35 authorized the presiding judge in statutory lien law or performance bond suit to allow a reasonable attorneys' fee to the attorney representing the prevailing party. If allowed, the attorneys' fee is taxed as part of the court costs and 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.

For this purpose only, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least 50% of the 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 50% of the amount sought in the claim defended. If an offer of judgment is served in accordance with 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.

Section 3 would provide that attorneys' fees must be calculated as part of the court costs of a final judgment or arbitration award. The court or arbitrator would determine the prevailing party by examining whose monetary position is closest to the amount of the judgment or award, based upon the principal amount in controversy as of the commencement of the proceeding. If a party serves an offer of judgment or written settlement offer within at least 30 days before the trial, arbitration, or hearing of the award, the last offer would be considered that party's monetary position for purposes of determining the amount in controversy.

The court or arbitrator may consider all facts and circumstances to determine the amount of attorneys' fees and expenses. A party may submit evidence by affidavit or declaration, other evidence, including live or deposition testimony, or expert testimony, however expert testimony is not required.

EFFECTIVE DATE: October 1, 2021 and applies to contracts entered into, amended or renewed on or after that date.