

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2021

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HOUSE BILL 820  
Committee Substitute Favorable 5/11/21

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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- 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 one of  
27 the following project team selection options shall be used, or if not specified,  
28 the response shall consist of either of the following: following project team  
29 selection options:
- 30 a. A list of the licensed contractors, licensed subcontractors, and ~~licensed~~  
31 design professionals whom the design-builder proposes to use for the  
32 project's design and construction. If this project team selection option,  
33 the design-builder may self-perform some or all of the work with  
34 employees of the design-builder and, without bidding, also enter into  
35 negotiated subcontracts to perform some or all of the work with  
36 subcontractors, including, but not exclusively with, those identified in  
37 the list. In submitting its list, the design-builder may, but is not  
38 required to, include one or more unlicensed subcontractors the  
39 design-builder proposes to use. If this project team selection option is  
40 used, the design-builder may, at its election and with or without the  
41 use of negotiated subcontracts, accept bids for the selection of one or  
42 more of its first-tier subcontractors.
- 43 b. ~~An~~ A list of the licensed contractors and design professionals whom  
44 the design-builder proposes to use for the project's design and  
45 construction and an outline of the strategy the design-builder plans to  
46 use for open contractor and subcontractor selection based upon the  
47 provisions of Article 8 of Chapter 143 of the General Statutes. If this  
48 project team selection option is used, the design-builder may also  
49 self-perform some or all of the work with employees of the  
50 design-builder but shall not enter into negotiated contracts with  
51 first-tier subcontractors.

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

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

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

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

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

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

27 **"§ 143-128.1B. Design-build bridging contracts.**

28 (a) Definitions for purposes of this section:

29 (1a) Costs of the subcontractor work. – The sum total amount of all first-tier  
30 subcontract packages bid or proposed to be bid under subsection (f) of this  
31 section.

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

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

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

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

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

49 (5g) General conditions. – A specific list compiled by the government entity that  
50 identifies the tools, resources, and equipment not directly related to the actual  
51 construction activities, but that are required to complete the project and for

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

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

8 b. Design services of a design professional.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 "**§ 22B-5. Waiver of liens or claims as a condition of progress payment invalid.**

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

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

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

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

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

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

7 **"§ 44A-35. Attorneys' fees.**

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

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

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

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

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

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

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

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

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

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

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

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

39           (9) The timing of settlement offers.

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

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

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

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

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

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

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

10 **"§ 22B-1. Certain indemnity and defend agreements invalid.**

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

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

29 ...."

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

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