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LEGISLATURE MAKES SIGNIFICANT CHANGES TO NC CONSTRUCTION LAW – BE AWARE OR BEWARE!

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On January 26, 2022, Governor Roy Cooper signed Session Law 2022-1 amending and revising various portions of the North Carolina General Statutes applicable to construction projects in the state. The relevant sections of this legislation take effect on March 1, 2022. In sum, the changes: (1) clarify and update the statutory provisions relevant to the design-build contracting process; (2) render void and unenforceable provisions in construction and design-professional agreements requiring waivers of liens or claims as a condition for progress payments, unless limited to the progress payment actually received in exchange for the waiver; and (3) modify the attorneys' fees provision applicable in statutory lien actions. This Alert explains S.L. 2022-1 in greater detail and equips owners, developers and general contractors with an understanding of how this legislation may affect their future business and legal matters.

Design Build Contracting Changes

Section 2 of Session Law 2022-1 modifies the design-build contracting process in several ways. First, it clarifies sections 143-128.1A and 143-128.1B of the General Statutes by adding definitions for "design-professionals," "first-tier subcontractors," "licensed contractors," "licensed subcontractors," "unlicensed subcontractors," "costs of the subcontractor work," "general conditions" and "key personnel."^[1] It also updates the project-team selection process to require design-builders responding to requests for proposals to select their project team by one of two methods outlined in the legislation.^[2] Additionally, these revisions require that the owner be notified of any changes in project team key personnel.^[3] The new law also changes the requirements for design-criteria packages used in design build bridging contracts, including instructing the public owner that it cannot require the design-builder to provide the costs of subcontractor work in such packages. Finally, the Session Law rewrites the requests-for-proposals public notice provision to require the public owner to provide a list of general conditions items for which the design-builder is to provide a fixed fee in their response.^[4] Given these fairly comprehensive updates, developers and general contractors should pay close attention to the requirements imposed by Section 2's revisions when bidding on their next design-build project.^[5]

Lien Waiver Changes

The next significant change included in the Session Law limits the enforceability of lien waivers in North Carolina. Pursuant to Section 3 of the Session Law, Article 1 of Chapter 22B of the General Statutes now includes a new provision, section 22B-5, titled "Waiver of liens or claims as a condition of progress payment invalid."^[6] This amendment states that "[p]rovisions in lien waivers, releases, construction agreements . . . or design professional

agreements . . . require[ing] a promisor to submit a waiver or release of liens or claims as a condition of receiving interim or progress payments . . . 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."^[7] Exempt from this provision, however, are (1) lien waivers or releases for final payments and (2) agreements to settle and compromise disputed claims after the claim has been identified by the claimant in writing.^[8] Depending on how courts interpret Section 3 in the future, it could potentially limit the effectiveness of certain unconditional lien waivers and claim releases that are commonly obtained by owners, developers and contractors during the course of a project. As such, when entering into future construction or design-professional agreements, construction professionals seeking lien waivers or claim releases should ensure that they do not run afoul of the new law's prohibitions. Applicability of this lien waiver limitation is likely to be tested in future litigation as contract drafters attempt to plumb the limits of the statute's application.

Recovery of Attorneys' Fees in Construction Lien Disputes

Finally, Section 4 of the Session Law changes the rules regarding the recoverability of attorneys' fees in construction lien disputes. It modifies section 44A-35 of the General Statutes, the attorneys' fees provision applicable to statutory lien actions involving personal or real property, by specifying the method that the court or arbitrator shall use to determine which party is the "prevailing party" entitled to attorneys' fees. Under the new method, the prevailing party is the party whose monetary position is closest to the amount of the judgment or award when compared with the amount in controversy as measured at the commencement of the proceeding.^[9] Additionally, under the new law, if a party serves an offer of judgment or written settlement offer at least 30 days before the trial or arbitration, the last offer is considered the party's monetary position for purposes of determining the amount in controversy.^[10] The new Session Law also adds arbitrators to the list of officials specifically empowered to award attorneys' fees and provides that attorneys' fees will be taxed as part of the court costs listed in a final judgment or arbitration award involving a lien claim.^[11] It requires the court or arbitrator to consider all facts and circumstances in the proceeding when determining the amount of attorneys' fees and expenses to be awarded to the prevailing party. This section of the Session Law also adds a provision permitting parties to submit certain types of evidence to support an award of attorneys' fees.^[12] These revisions should bring more certainty to the process of seeking attorneys' fees in lien arbitration or litigation matters.

Summary of Changes

Taken together, the amendments and revisions in this new Session Law, which take effect on March 1, 2022, make substantial changes to several key areas of North Carolina construction law, the full scope and impact of which remain to be fleshed out as courts interpret and apply these provisions in future cases. At the very least, this legislation alters the design-build contracting process in several significant ways, changes the law applicable to "form" contractual payment lien waivers and claim releases, and updates the manner in which attorneys' fees are awarded in lien actions. Session Law 2022-1's enactment is a reminder to owners, developers, general contractors and their legal counsel to pay careful attention to legislative developments impacting their projects and practices.

Readers are encouraged to contact any of the authors of this Alert with questions or for more information regarding the impact of this new legislation and how it may affect their business.

Law360 subscribers can view a further expanded article [here](#).

[1] See S.L. 2022-1 §§ 2.(a), 2.(b).

[2] See *id.* § 2.(a).

[3] See *id.*; S.Rep 219-2021, at 3.

[4] See S.L. 2022-1 § 2.(b).

[5] These updates do not apply to NCDOT design-build projects which are governed by N.C. Gen. Stat. § 136-28.11 and the regulations promulgated thereunder.

[6] See *id.* § 3.(a).

[7] *Id.*

[8] See *id.*; S.Rep. 219-2021, at 4.

[9] See S.L. 2022-1, § 3.(a); S.Rep. 219-2021, at 5.

[10] See S.L. 2022-1, § 4.(a); S.Rep. 219-2021, at 5.

[11] See S.L. 2022-1, § 4.(a).

[12] See S.L. 2022-1, § 4.(a); S.Rep. 219-2021, at 5.

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