

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



**Byron Saintsing** leads a practice group focused on matters involving [construction law](#), commercial and business litigation, representation of [equipment lessors](#), charter schools, and education law, and commercial creditor bankruptcy. Byron has written and lectured on many topics pertaining to construction and equipment leasing, including editing materials on North Carolina's adoption of Article 2A of the Uniform Commercial Code.

## New Changes to North Carolina Construction Law

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New legislation in North Carolina makes changes to various laws governing [construction](#) projects. The changes affect design-build projects, lien waivers requested from subcontractors, and a lien claimant's ability to obtain an award of attorney's fees.

### Design-Build Projects

There are significant changes to the design-build statutes related to government entities' projects. First, there are new definitions for the terms *design-build professionals*, *first-tier subcontractors*, *licensed contractors*, *licensed subcontractors*, *unlicensed subcontractors*, *costs of subcontractor work*, *general conditions*, and *key personnel*.

Second, design-builders now must select their proposed project team by one of two methods. Under the first method, a design-builder may submit a list of licensed contractors, licensed subcontractors, and design professionals. Under the second method, a design-builder may submit just a list of the licensed contractors and design professionals and an outline of the design-builder's strategy for open subcontractor selection in accordance with applicable North Carolina law.

Last, the design-builder must keep the owner informed of any change in key personnel for the project. Also, public owners must provide a list of general conditions during the RFI process. Design-build professionals and contractors will want to be familiar with these changes before bidding on new design-build projects.

### Lien Waivers

Suppliers and subcontractors are often presented with one-sided lien waivers that they must sign to receive compensation. These lien waivers often come in the form of a "Final Lien Waiver," whereby the supplier or subcontractor must waive any and all rights to file a mechanics lien against a project – even when the supplier or subcontractor is still working on the project. The new provision bans that abusive practice and is favorable towards subcontractors and suppliers. With this change in the law, lien waivers presented to suppliers and subcontractors must be limited to the progress payment

they are receiving unless (1) the payment is the final payment or (2) the payment is resolving a dispute.

Unless one of these two exceptions applies, a lien waiver will not be valid unless accompanied by actual payment in the amount payment set forth on the partial or conditional lien waiver.

### **Attorney's Fees on Lien Claims**

This new law significantly changes the mechanic's lien statute's attorney fees provision. Prior to this change, in order to obtain attorney's fees as part of a lien claim, it was necessary to (1) recover more than half of the claim that you had asserted (or if you were being sued, then the recovery was less than 50% of the claim being brought against you) and (2) show that the opposing side unreasonably refused to settle the case. Proving that an opposing party unreasonably refused to settle a case was a high burden for a lien claimant to meet. With the change in the law, a prevailing party is a party at the end of the case, after being decided by a judge, jury, or arbitrator, whose financial position ends up being closest to their position at the beginning of the case. Essentially, this entails taking a snapshot of each party's respective positions at the outset of the case and a shot of where they wound up at the end of the case. Whoever ends up closest to their initial position in the case is the prevailing party. This change takes away the arbitrary 50% threshold and focuses more on who actually won or lost the case.

Once the prevailing party is determined, a court or arbitrator can look at a whole host of factors under the new law in assessing the amount of attorney's fees to award. There is no longer a single requirement to show that the opposing side unreasonably refused to settle the case. However, settlement offers exchanged between the parties remain one of many consideration factors. Therefore, whether the parties acted reasonably in trying to settle the case is still a factor to be considered.

The new law regarding attorney's fees can also provide subcontractors and suppliers with a better ability to collect their attorney's fees when litigating lien claims. For example, subcontractors or suppliers often feel that they simply cannot afford to exercise their lien rights because of the sheer economics and costs of litigation. On the other hand, owners and general contractors may often be more financially able to litigate disputes than smaller subcontractors or suppliers. The new attorney's fees provision provides some "leveling of the playing field" when it comes to the economics of filing mechanic's lien claims and litigating construction disputes.

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