2019 Legislative Summary: Public Purchasing and Contracting

Norma R. Houston
UNC School of Government
August 17, 2019

While the North Carolina General Assembly has not yet adjourned the 2019 session, several bills affecting local government purchasing and contracting have been enacted and are summarized below. This summary will be updated if additional legislation affecting public purchasing and property disposal is enacted prior to adjournment.

Public Bills

Construction Contracts Indemnification Changes and Design Contracts Duty-to-Defend Prohibition

Chapter 22B of the North Carolina General Statutes prohibits certain contract provisions by making those provisions void and unenforceable as a matter of public policy. The restrictions in Chapter 22B apply to all contracts, including those with a governmental entity as well as those between private parties. Within Chapter 22B is a statute that prohibits what can be described as "self-indemnification" in construction contracts. GS 22B-1 prohibits any provision in a construction contract that requires one party to indemnify another party against the other party's negligence. Simply put, this means that a contractor cannot require a local government to indemnify the contractor, for the contractor's own negligence and vice versa. This does not mean that the local government cannot require the contractor to indemnify it for the contractor's negligence and vice versa, which can be described as "cross-indemnification" (as opposed to self-indemnification). Cross-indemnification provisions are permissible and common in contracts, including those entered into by local governments.

GS 22B-1 was amended by House Bill 871 (S.L. 2019-92) adding five new subsections (b)-(f) that:

(1) revise the scope of cross-indemnification provisions in construction and design services contracts;

(2) prohibit duty-to-defend provisions in design services contracts;

(3) preserve certain indemnification obligations;

(4) exempt certain agreements from the requirements of the statute; and

(5) define terms used in the statute.

These changes became effective August 1, 2019, and apply to all contracts entered into, amended, or renewed on or after that date. Local governments should consult with their

attorneys to ensure that existing contract provisions are compliant with the new law.

Revised Indemnification (new 22B-1(b)):
This new provision makes cross-indemnification provisions in construction and design services contracts void and unenforceable unless fault on the part of the the promisor (the party that agreed to indemnify and hold harmless the other party) is a proximate cause of the loss, damage, or expense suffered by the promisee (the other party to the contract) that is indemnified under the contract. This provision applies to the promisor and its derivative parties, which include subcontractors, agents, employees or other individuals or entities, for which the promisor may be responsible as a result of any statutory, tort, or contractual duty. Fault on the part of the promisor is defined as a breach of contract; negligent, reckless, or intentional acts or omissions that constitute a tort under statutory or common law; or violations of applicable statutes or regulations.

What does this mean? The new statutory language does not prohibit cross-indemnification provisions in construction and design services contracts. However, such provisions are not enforceable unless fault by the promisor or its derivative parties is a proximate cause of the loss, damage, or expense suffered by the other party to the contract. In other words, an indemnification or hold-harmless provision in a construction or design services contract cannot require a contractor or design professional to indemnify a local government unless fault on the part of the contractor or design professional is a proximate cause of damages or losses suffered by the local government. Similarly, an indemnification or hold-harmless provision in a construction or design services contract cannot require a local government to indemnify a contractor or design professional unless fault on the part of the local government is a proximate cause of the damages suffered by the contractor or design professional.

The revision to the indemnification provisions applies to all contracts for construction and repair work as well as contracts with design professionals. For purposes of GS 22B-1, a design professional is defined as persons or entities that hold licenses as architects (Chapter 83A), landscape architects (Chapter 89A), engineers and land surveyors (Chapter 89C), geologists (Chapter 89E), and soil scientists (Chapter 89F). A contract with any of these design professionals to provide services for which licensure is required is now subject to the new indemnification revision.

Duty-To-Defend Prohibited in Design Services Contracts (new GS 22B-1(c)):
This new provision prohibits duty-to-defend provisions in contracts with design professionals or construction contracts that include design services. A duty-to-defend provision requires one party to defend another party in a legal challenge brought by a third party such as a lawsuit, mediation, or arbitration. For example, if an architect and a local government are named in a lawsuit involving the design of a public facility, a duty-to-defend provision in the architect's contract would require the architect to provide legal defense for himself as well as the local government. Under the new statutory provision, the contract with the architect cannot require him to provide legal representation for the local government; the

local government must provide its own legal defense.

The duty-to-defend prohibition applies to all contracts with design professionals for any work that requires licensure for that design profession. As with the indemnification revision discussed above, design professionals are defined for purposes of GS 22B-1 as persons or entities that hold licenses as architects (Chapter 83A), landscape architects (Chapter 89A), engineers and land surveyors (Chapter 89C), geologists (Chapter 89E), and soil scientists (Chapter 89F). A contract with any of these design professionals to provide services for which licensure is required are now subject to the duty-to-defend prohibition.

The prohibition also applies to construction contracts that include design professional services. These contracts include design-build contracts (GS 143-128.1A), design-build bridging contracts (GS 143-129.1B), and public private partnership contracts (GS 143-128.1C). The prohibition does not apply to construction contracts that do not include design services as part of the construction contract, which is the case with most regular construction contracts, and it does not apply to construction management at-risk contracts (GS 143-128.1) since the local government, not the CMR, contracts directly with the project designer.

It is important to note that the duty-to-defend prohibition became effective August 1, 2019, and applies all contracts entered into, amended, or renewed on or after that date. If a contract with a design professional was entered into prior to August 1, 2019 and is amended or renewed on or after that date, the prohibition is triggered and any duty-to-defend provisions in the contract is now void.

Indemnification Obligations Preserved (new GS 22B-1(d)):

This new provision preserves indemnity obligations where fault is found. Despite the revisions to indemnification provisions and the prohibition against duty-to-defend in design services contracts, if fault by a contractor or designer is found to be a proximate cause of the damages or losses suffered by a local government that is a party to the contract, an indemnification or hold harmless provision can still require the contractor or designer to pay attorney fees, litigation or arbitration expenses, and court costs as well as actual damaged suffered. For example, if a city and its architect are sued, the city cannot require the architect to defend it but must defend itself; however, if fault by the architect is found to be a proximate cause of the damages or losses suffered by the city, the city may pursue recovery of the legal expenses and costs it incurred if the indemnification provision in its contract with the architect provides for this.

Insurance Contracts, Workers' Comp, Liens, and Bonds Exempted (new GS 22B-1(e)):

This new provision (which modifies existing language in the statute) exempts from the provisions of GS 22B-1 the following types of agreements and claims: insurance contracts, workers' compensation, other agreements issued by an insurer, and lien and bond claims brought under Chapter 44A of the General Statutes. While liens cannot be filed against units of government, local governments may bring performance bond claims and subcontractors may bring

payment bond claims under Article 3 of Chapter 44A.

Definitions (new GS 22B-1(f)):
This provision contains definitions of the terms used in the statute as referred to above.

Community College Construction Contract Disputes

Section 2 of S.L. 2019-39, which modifies the dispute resolution process for State construction contract claims (which only apply to construction projects with state agencies, not local governments), also changes the dispute resolution process for community college construction contract payment disputes governed under G.S. 143-135.6

Under current law, if a contractor disputes the amount of payment still owed him on a community college construction project, the contractor may follow the same administrative dispute procedures available for contractors on State construction projects. If the contractor is dissatisfied with the determination of the Director of the Office of State Construction, the contractor may then bring legal action in Wake County Superior Court. The legislation amends G.S. 143-135.6 by deleting the requirement that the contractor bring legal action in Wake County Superior Court, and instead provides that community college contractor payment disputes may follow the same procedures as those for State construction projects, which among other administrative remedies allows contractors to bring legal action in either Wake County or the superior court in the county in which the work was performed. The legislation becomes effective January 1, 2020 and applies to verified claims submitted on or after that date.

Falsely Claiming General Contractor Licensure

Section 6 of the 2019 Building Code Regulatory Reform Act (S.L. 2019-174) amends G.S. 87-13 which defines and imposes penalties for the unauthorized practice of general contracting. This statute prohibits an individual not properly licensed as a general contractor from submitting bids or entering into contracts for construction or repair work for which licensure is required. A violation of this statute is punishable as a Class 2 misdemeanor. In addition to the prohibitions already contained in the statute, the legislation adds falsely claiming or suggesting in connection with any business activities regulated by the General Contractors Licensing Board that a person, firm, or corporation is licensed as a general contractor. This new prohibition is effective October 1, 2019.

General Contractor Continuing Education Requirements

S.L. 2019-72 enacts a new statute, G.S. 87-10.2, which requires licensed general contractors to complete eight hours of continuing education annually. Of the eight hours, two hours must include a mandatory course approved by the General Contractors' Licensing Board, and the remaining six hours must include elective programs approved by the Board. The time frame for satisfying the continuing education requirement runs from January 1st through November 30th of each year. The requirement becomes effective January 1, 2020.

Electrical Contractors Employed by Local School Systems May Perform Work on Public School

S.L. 2019-78 amends the licensure statutes for electrical contractors (G.S. 87-43.1 and G.S. 87-43.2) and the construction contracting statute for public schools (G.S. 115C-524) to clarify that an employee of a public school system who holds an electrical contractor's license under Article 4 of Chapter 87 of the General Statutes may perform maintenance and repair electrical work on public school facilities under the individual's license when doing the work at the direction of appropriate school officials (public schools already have similar authority with regard to employees holding plumbing, heating, and fire sprinkler licensure under Article 2 of Chapter 87). This legislation became effective June 27th, 2019.

Information Technology Procurement Changes

Section 1 of HB 217[1] amends G.S. 143B-1350 authorizing the Department of Information Technology to enter into multiple award schedule contracts for information technology. Multiple award schedule contracts is a contracting system under which an agency may award contracts to multiple vendors who offer similar goods and services. While local governments are not authorized to enter into multiple award schedule contracts, they are authorized to purchase directly from DIT contracts under the state contract exception to competitive bidding requirements specifically designated for DIT contracts (G.S. 143-129(e)(7)). Thus, this expanded contracting authority for DIT may make available more options for information technology purchases by local governments under the DIT contract exception. This legislation becomes effective when it becomes law.

[1] As of the date of this summary, HB217 has been presented to the Governor but has not yet become law.