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Proceed With Caution

10 Big Changes to Bidding, Performing & Making Verified Claims on NCDOT Projects

By *Matthew C. Bouchard* | (919) 719-8565 | mattbouchard@lewis-roberts.com | [@MattBouchardEsq](https://twitter.com/MattBouchardEsq)

Lewis & Roberts represents a number of highway/heavy contractors, all of whom know that doing business with the North Carolina Department of Transportation ("NCDOT" or the "Department") requires careful attention to the agency's "Standard Specifications for Roads and Structures." NCDOT's Standard Specs contain both front-end "General Requirements" (what would be called "General Conditions" on virtually any other public or private construction contract) and back-end standards for all aspects of highway work – from earthwork, pipe culverts, subgrade and asphalt pavements to signing, materials, pavement markings and electronic signalization.



As our highway/heavy clients also know, the NCDOT's Standard Specs are regularly revised every 4-6 years. Last year, NCDOT issued the [2012 version of its highway construction bible](#), updating the 2006 version. This article focuses on what we consider to be the ten most significant changes to NCDOT's front-end "General Requirements." As you will see below, these ten revisions affect how contractors obtain, perform and make claims on NCDOT work.

1. Section 102-2(B): Prequalification for Purchase Order Contractors

Contractors and subcontractors wishing to bid NCDOT work have been subject to prequalification under previous versions of the Standard Specs. Now, and for the first time, "Purchase Order Contractors" will need to submit to NCDOT's prequalification process. In



accordance with N.C. Gen. Stat. § 136-28.1, a "Purchase Order Contract" or "POC" is an agreement under \$1.2 million let by NCDOT's Division Offices and specific central units, typically for such projects as small construction, maintenance and repair. If you regularly bid such work, and have not already been placed on the Prequalified Bidders' List as a Contractor, you will need to seek prequalification. Otherwise, your POC bid will be considered non-responsive and rejected.

2. Section 102-14: Licensing Requirements on Federal Aid Projects

The 2012 Standard Specs broaden bidding competition for projects receiving funding, in whole or in part, under the Federal Highway Administration's Federal Aid Program (Title 23 of the U.S. Code). Specifically, bidders for Federal Aid Projects who are submitting bids of \$30,000 or more are no longer required to be licensed in North Carolina at the time of bidding. However, a general contracting license must be obtained within 60 days of bid opening; otherwise, the contract may be awarded to another bidder, or all bids rejected.

For state-funded projects, the standard remains as before: where the bid is for \$30,000 or more, the prime contractor must have a license from the N.C. Licensing Board for General Contractors at the time of bidding.

3. Section 102-15: New Ground for Bidder Disqualification

Subsection (T) has been added, making the "[f]ailure to make prompt payment in accordance with Article 109-4" a ground for disqualification from the Prequalified Bidders' List. This provision arguably increases the risk of engaging in payment disputes with downstream subcontractors.

4. Section 103-2: Consequences of Bid Omissions

Under new subsection 103-2(A)(4)(a), and for state funded projects, if a bidder fails to include a price for mobilization, "the bid shall be deemed irregular and may be rejected." The use of "irregular," as opposed to "non-responsive," is important here, as it allows – but does not require – NCDOT to reject the bid.

However, under new subsection 103-2(A)(4)(b), and for federally funded projects, the omission of a lump sum price for mobilization, or the omission of any unit bid price, is absolutely fatal: "the bid will be considered nonresponsive and will not be considered for award."

5. Section 104-7: Notice Required for Extra Work Performance

New language clarifies that extra work performed without the Engineer's consent "will be considered incidental to the work of the contract." Translation: work not pre-approved by the Engineer will not be treated as an extra, and therefore not compensated. The best practice is to



always seek a supplemental agreement before performing work you consider to be outside the scope of the original undertaking.

6. Section 107-15: Liability Insurance Provisions Greatly Expanded

This provision is greatly expanded from the 2006 Standard Specs, requiring, among other things, an ACORD-form certificate of insurance evidencing CGL coverage "in the amount of \$5,000,000 per occurrence and general aggregate[.]" The State of North Carolina must be named as an additional insured on the policy. The enhanced provision also requires contractors to maintain adequate worker's comp and vehicle liability coverage throughout contract performance.

7. Section 107-25: Hazmat Handling Provisions Greatly Expanded

The 2012 Standard Specs add four new paragraphs to the previous Hazmat provision. Among other things, the new language requires contractors to "employ a fully experienced and prequalified geoenvironmental firm to oversee and document the disposal of contaminated material removed from within the project right of way," increases reporting burdens, establishes requirements regarding where hazardous materials may be disposed, imposes qualifications for on-site personnel responsible for hazardous material removal and requires compliance with a host of federal and state rules and regulations.

8. Section 108-2: New Progress Schedule Requirements

For the first time, the 2012 Standard Specs outline specific items that must be contained in the contractor's proposed progress schedule. These items include: (1) a time scale diagram with major work activities and milestone dates clearly labeled; (2) a cash curve corresponding to the milestones and work activities; and (3) a written narrative explaining the sequence of the work, the controlling operations, intermediate completion dates, milestones, project phasing, anticipated work schedule and estimated resources. Also important to note: "A detailed Critical Path Method (CPM) schedule shall not be submitted to replace the progress schedule details" now required.

The new scheduling requirements virtually ensure that detailed as-planned schedules will be created on every project. That will facilitate proving delay and impact claims.

These new scheduling requirements undoubtedly place increased burdens on contractors performing NCDOT work. But we urge contractors to view the glass as half full, at least from a claim perspective. We have handled a number of delay/inefficiency claims against NCDOT, and speaking from experience, having detailed as-planned scheduling information is invaluable in establishing the impact of as-built impediments to work progress. The new scheduling requirements virtually ensure that such detailed as-planned schedules will be created on every project, facilitating the claims process.



9. 109-4(B): Flexibility in Withholding Retainage from Subcontractors

The 2006 Standard Specs permit contractors to withhold 3% retainage on periodic payments to subcontractors. The 2012 Standard Specs go one step further, allowing the retainage to be increased to a maximum 10% "where the Contractor and any subcontractor have supplied to the Engineer a satisfactorily executed mutual agreement for an increased amount." A subcontract containing a clause establishing retainage between 3% and 10% would presumably be sufficient.

10. 109-10: NCDOT Can Issue Final Estimate Before Receipt of Close-Out Documents

Under the 2006 Standard Specs, NCDOT had to wait for a series of documents – including, without limitation, Consent of Surety for final payment and the Contractor's affidavit certifying that all downstream payment obligations have been met – prior to issuing the final estimate. No longer. Under the 2012 Standard Specs, "If the Contractor fails to submit the required documentation within the timeframe specified by the Department, the Department may consider the Contractor to be nonresponsive and may process the final estimate."

Since the issuance of the final estimate triggers the 60-day deadline for submitting Verified Claims, this new language arguably provides NCDOT with increased flexibility in controlling the timing of the claims process. If you have claims to assert but receive NCDOT's final estimate before submitting your close-out documents, contact your lawyer immediately to ensure timely submission of your Verified Claim.

This article is adapted from a post originally published on Matt Bouchard's blog, "N.C. Construction Law, Policy & News," which can be found at www.nc-construction-law.com.

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