Article 3.

Model Payment and Performance Bond.

§ 44A-25. Definitions.

Unless the context otherwise requires in this Article:

(1) "Claimant" includes any individual, firm, partnership, association or corporation entitled to maintain an action on a bond described in this Article and shall include the "contracting body" in a suit to enforce the performance bond.

(2) "Construction contract" means any contract for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highways.

(3) "Contracting body" means any department, agency, or political subdivision of the State of North Carolina which has authority to enter into construction contracts.

(4) "Contractor" means any person who has entered into a construction contract with a contracting body.

(5) "Labor or materials" shall include all materials furnished or labor performed in the prosecution of the work called for by the construction contract regardless of whether or not the labor or materials enter into or become a component part of the public improvement, and further shall include gas, power, light, heat, oil, gasoline, telephone services and rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the work called for in the construction contract.

(6) "Subcontractor" means any person who has contracted to furnish labor or materials to, or who has performed labor for, a contractor or another subcontractor in connection with a construction contract. (1973, c. 1194, s. 1.)

§ 44A-26. Bonds required.

(a) When the total amount of construction contracts awarded for any one project exceeds three hundred thousand dollars ($300,000), a performance and payment bond as set forth in (1) and (2) is required by the contracting body from any contractor or construction manager at risk with a contract more than fifty thousand dollars ($50,000); provided that, for State departments, State agencies, and The University of North Carolina and its constituent institutions, a performance and payment bond is required in accordance with this subsection if the total amount of construction contracts awarded for any one project exceeds five hundred thousand dollars ($500,000). In the discretion of the contracting body, a performance and payment bond may be required on any construction contract as follows:

(1) A performance bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such bond shall be solely for the protection of the contracting body that is constructing the project.

(2) A payment bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the prompt payment for all labor or materials for which a contractor or subcontractor is liable. The payment bond shall be solely for the protection of the persons furnishing materials or

performing labor for which a contractor, subcontractor, or construction manager at risk is liable.

(b) The performance bond and the payment bond shall be executed by one or more surety companies legally authorized to do business in the State of North Carolina and shall become effective upon the awarding of the construction contract. (1973, c. 1194, s. 1; 1983, c. 818; 1987 (Reg. Sess., 1988), c. 1108, s. 10; 1995, c. 367, s. 3; 2001-496, s. 7; 2010-148, s. 1.)

§ 44A-27. Actions on payment bonds; service of notice.

(a) Subject to the provision of subsection (b) hereof, any claimant who has performed labor or furnished materials in the prosecution of the work required by any contract for which a payment bond has been given pursuant to the provisions of this Article, and who has not been paid in full therefor before the expiration of 90 days after the day on which the claimant performed the last such labor or furnished the last such materials for which he claims payment, may bring an action on such payment bond in his own name, to recover any amount due him for such labor or materials and may prosecute such action to final judgment and have execution on the judgment.

(b) Any claimant who has a direct contractual relationship with any subcontractor but has no contractual relationship, express or implied, with the contractor may bring an action on the payment bond only if he has given written notice of claim on payment bond to the contractor within 120 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. The contractor shall, in response to a written request served by any claimant in accordance with the provisions of subsection (c) of this section, send a copy of the payment bond required by this Article to the claimant making the request within seven calendar days after receipt of such request. Subject to the exception set forth in subsection (e) of this section, unless the contractor has failed to satisfy its obligation to timely furnish a copy of the payment bond to a claimant upon proper request by the claimant, the claim of such a claimant shall not include labor or materials provided more than 75 days prior to the claimant's service, in accordance with subsections (c) and (d) of this section, of its written notice of public subcontract to the contractor.

(c) The notices required by and any requests for copy of payment bond referenced by subsection (b) of this section, shall be served by certified mail, or by signature confirmation as provided by the United States Postal Service, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business or to such agent identified in the contractor's project statement referenced in subdivision (1) of subsection (f) of this section or served in any manner provided by law for the service of summons.

(d) The form of the notice of public subcontract to be served pursuant to subsection (b) of this section shall be substantially as follows:

"NOTICE OF PUBLIC SUBCONTRACT

(1) Name and address of the subcontractor giving notice of public subcontract:

(2) General description of the real property on which the labor was or is to be performed or the material was or is to be furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):

(3) General description of the subcontractor's contract, including the names and addresses of the parties thereto:

(4) General description of the labor and material performed and furnished thereunder:

Dated: _____

_____

Subcontractor"

(e) Notwithstanding subsections (b), (c), and (d) of this section, the obligation to provide a notice of public subcontract shall not apply to claims of twenty thousand dollars ($20,000) or less and, for any claim exceeding twenty thousand dollars ($20,000), shall apply only to that portion of the claim in excess of twenty thousand dollars ($20,000).

(f) In connection with any construction contract for which a bond is required by G.S. 44A-26(a), all of the following shall apply:

(1) The contractor shall provide to each subcontractor that it engages to perform labor or furnish materials in the performance of the construction contract a contractor's project statement containing all of the following information:
   a. The name of the project.
   b. The physical address of the project.
   c. The name of the contracting body.
   d. The name of the contractor.
   e. The name, phone number, and mailing address of an agent authorized by the contractor to accept service of the requests for payment bond, the notice of public subcontract, and the notice of claim on payment bond referenced in subsection (b) of this section.
   f. The name and address of the principal place of business of the surety issuing the payment bond required by G.S. 44A-26(a) for the construction contract.

(2) Each subcontractor shall provide each subcontractor that it engages to perform labor or furnish materials in the performance of the construction contract a copy of the contractor's project statement.

(3) No agreement entered into between a contractor and a subcontractor or between a subcontractor and its subcontractor shall be enforceable against the lower tier party until the contractor's project statement has been provided to the lower tier party. (1973, c. 1194, s. 1; 1987, c. 569; 2001-177, s. 1; 2001-487, s. 100; 2012-175, s. 11; 2013-16, s. 6.)

§ 44A-28. Actions on payment bonds; venue and limitations.

(a) Every action on a payment bond as provided in G.S. 44A-27 shall be brought in a court of appropriate jurisdiction in a county where the construction contract or any part thereof is to be or has been performed.

(b) No action on a payment bond shall be commenced after the expiration of the longer period of one year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final settlement was made with the contractor. (1973, c. 1194, s. 1.)

§ 44A-29. Limitation of liability of a surety.

No surety shall be liable under a payment bond for a total amount greater than the face amount of the payment bond. A judgment against any surety may be reduced or set aside upon motion by

the surety and a showing that the total amount of claims paid and judgments previously rendered under such payment bond, together with the amount of the judgment to be reduced or set aside, exceeds the face amount of the bond. (1973, c. 1194, s. 1.)

§ 44A-30. Variance of liability; contents of bond.

(a) No act of or agreement between a contracting body, a contractor or a surety shall reduce the period of time for giving notice under G.S. 44A-27(b) or commencing action under G.S. 44A-28(b) or otherwise reduce or limit the liability of the contractor or surety as prescribed in this Article.

(b) Every bond given by a contractor to a contracting body pursuant to this Article shall be conclusively presumed to have been given in accordance herewith, whether or not such bond be so drawn as to conform to this Article. This Article shall be conclusively presumed to have been written into every bond given pursuant thereto. (1973, c. 1194, s. 1.)

§ 44A-31. Certified copy of bond and contract.

(a) Any person entitled to bring an action or any defendant in an action on a payment bond shall have a right to require the contracting body to certify and furnish a copy of the payment bond and of the construction contract covered by the bond. It shall be the duty of such contracting body to give any such person a certified copy of the payment bond and the construction contract upon not less than 10 days' notice and request. The contracting body may require a reasonable payment for the actual cost of furnishing the certified copy.

(b) A copy of any payment bond and of the construction contract covered by the bond certified by the contracting body shall constitute prima facie evidence of the contents, execution and delivery of such bond and construction contract. (1973, c. 1194, s. 1.)

§ 44A-32. Designation of official; violation a misdemeanor.

Each contracting body shall designate an official thereof to require the bonds described by this Article. If the official so designated shall fail to require said bond, he shall be guilty of a Class 1 misdemeanor. (1973, c. 1194, s. 1; 1993, c. 539, s. 407; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 44A-33. Form.

(a) A performance bond form containing the following provisions shall comply with this Article: the date the bond is executed; the name of the principal; the name of the surety; the name of the contracting body; the amount of the bond; the contract number; and the following conditions:

"KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL AND SURETY above named, are held and firmly bound unto the above named Contracting Body, hereinafter called the Contracting Body, in the penal sum of the amount stated above for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

"THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into a certain contract with the Contracting Body, numbered as shown above and hereto attached:

"NOW THEREFORE, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Contracting Body, with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and

agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

"IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body."

Appropriate places for execution by the surety and principal shall be provided.

(b) A payment bond form containing the following provisions shall comply with this Article: the date the bond is executed; the name of the principal; the name of the surety; the name of the contracting body; the contract number; and the following conditions:

"KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL and SURETY above named, are held and firmly bound unto the above named Contracting Body, hereinafter called the Contracting Body, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

"THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into a certain contract with the Contracting Body, numbered as shown above and hereto attached;

"NOW THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

"IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body."

Appropriate places for execution by the surety and principal shall be provided. (1973, c. 1194, s. 1.)

§ 44A-34. Construction of Article.

The addition of this Article shall not be construed as making the provisions of Articles 1 and 2 of Chapter 44A of the General Statutes apply to public bodies or public buildings. (1973, c. 1194, s. 3.)

§ 44A-35. Attorneys' fees.

(a) In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge or arbitrator may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs with the final judgment or arbitration award.

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

(c) If a party serves (i) an offer of judgment in accordance with G.S. 1A-1, Rule 68, or (ii) a written settlement offer, so that the offer is received at least 30 days before the commencement of

the trial, arbitration, or hearing resulting in a judgment or award resolving all matters in controversy between the parties, the last offer shall be deemed to be that party's monetary position for purposes of determining the amount in controversy.

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

(1) The amount in controversy and the results obtained.
(2) The reasonableness of the time and labor expended, and the billing rates charged, by the attorneys.
(3) The novelty and difficulty of the questions raised in the action.
(4) The skill required to perform properly the legal services rendered.
(5) The relative economic circumstances of the parties.
(6) Settlement offers made prior to the commencement of the trial, arbitration, or hearing.
(7) Offers of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure and whether judgment finally obtained was more favorable than such offers.
(8) Whether a party unjustly exercised superior economic bargaining power in the conduct of the action or withheld payment of undisputed amounts.
(9) The timing of settlement offers.
(10) The extent to which the party seeking attorneys' fees prevailed in the action.
(11) The amount of attorneys' fees awarded in similar cases.

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

(f) For purposes of this section, "prevailing party" is the party whose monetary position at the commencement of the trial, arbitration, or hearing is closest to the amount of the judgment or arbitration award. The court or arbitrator shall determine the prevailing party based upon the principal amount in controversy between the parties as of the commencement of the trial, arbitration, or hearing resulting in a judgment or arbitration award, considering all relevant facts and circumstances. (1991 (Reg. Sess., 1992), c. 1010, s. 3; 1993 (Reg. Sess., 1994), c. 763, s. 1; 2022-1, s. 4(a).)

§§ 44A-36 through 44A-39. Reserved for future codification purposes.