

TEMPORARY RULE
RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors

RULE CITATION: 21 NCAC 50 .0415

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - Failure to meet G.S. 150B-21.1(a) criteria
- ☒ Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA

COMMENT:

Staff recommends objection for lack of statutory authority. The State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors has filed one temporary rule, seeking to amend 21 NCAC 50 .0415, in response to a recent Session Law, SL 2021-122. The Session Law makes changes to G.S. 87-1.1, expanding a general contractor licensure exception that was previously limited to public building projects.

*The agency relies on SL 2021-122 as their authority to not only cap the total amount of work to be performed by **general** contractors at 25% of the total bid price, but to cap the total amount of work to be performed by **electrical** contractors at 25% of the total bid price.*

In their response to technical change requests, the agency argues that references to “general contracting work” bid by plumbing, heating, and fire sprinkler contractors pursuant to G.S. 87-1.1 includes all electrical work and all plumbing, heating, and fire sprinkler work. The agency’s explanation is provided at the end of this opinion.

The Session Law provided that the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors, among others, “may adopt rules to implement the provisions of this act.” Notably, no changes were made to item (2), leaving the Board’s authority to set the percentage of general contracting work within a bid unchanged.

SL 2021-122 does not grant the Board authority to adopt rules limiting the total amount of electrical contracting work in a bid. Based upon the language of G.S. 87-1, 87-1.1, and 87-10, staff does not believe that the term "general contracting work" as used in 87-1.1(2) can be read so broadly as to encompass electrical, plumbing, heating, and fire sprinkler work. Therefore, staff recommends objection for lack of statutory authority.

Agency Response:

GS 87-1.1, as amended by Session Law 2021-122, is contained in Article 1 of GS 87 that regulates General Contractors. However, GS 87-1.1 sets out certain exemptions that permit Article 2 contractors (Plumbing, Heating and Fire Sprinkler Contractors) to act as General Contractors without the need for a General Contractor's license, subject to meeting the required conditions. Accordingly, when the language in GS 87-1.1 refers to "general contracting work" that includes all work an Article 2 contractor is bidding pursuant to the statute, including work that falls within the classifications of Articles 2 and 4.

Section 2 of the Session Law grants specific rule making authority to implement all of the provisions of the Session Law which includes that ability to limit the percentages of the "total bid price" of all work being bid regardless of whether that work will be performed by a general contractor, Article 2 contractor or Article 4 contractor.

Under GS 87-1(a), General Contractor is defined to include "any person or firm or corporation who for a fixed price, commission, fee, or wage, undertakes to bid upon ... the construction of any building, highway, public utilities, grading or any improvement or structure.." The work of Article 2 and Article 4 contractors falls within that definition in the context of GS 87-1.1. See below for the full language of the statute and the session law.

Relevant law:

SESSION LAW 2021-122

SENATE BILL 316

AN ACT TO ALLOW FOR CERTAIN EXEMPTIONS FOR PLUMBING, HEATING, FIRE SPRINKLER, AND ELECTRICAL CONTRACTORS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 87-1.1 reads as rewritten:

"§ 87-1.1. Exception for licensees under Article 2 or 4.

G.S. 87-1 shall not apply to a licensee under Article 2 or 4 of this Chapter of the General Statutes, G.S. 87-43 shall not apply to a licensee under Article 2 of this Chapter of the General Statutes, and G.S. 87-21(a)(5) shall not apply to a licensee under Article 4 of this Chapter of the General Statutes when the licensee is bidding and contracting directly with the owner of a public building project ~~if~~ if all of the following apply:

- ~~(i)(1) a~~ (i)(1) A licensed general contractor performs all work that falls within the classifications in G.S. 87-10(b) and the State Licensing Board of General Contractor's ~~rules; and rules.~~
- ~~(ii)(2) the~~ (ii)(2) The total amount of the general contracting work so classified does not exceed a percentage of the total bid price pursuant to rules established by the Board; and the Board.
- ~~(iii)(3) a~~ (iii)(3) A licensee with the appropriate license under Article 2 or Article 4 of this Chapter performs all work that falls within the classifications in Article 2 and Article 4 of this Chapter."

Brian Liebman
Commission Counsel

SECTION 2. The State Licensing Board for General Contractors; State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors; and State Board of Examiners of Electrical Contractors may adopt rules to implement the provisions of this act.

SECTION 3. This act becomes effective October 1, 2021.

In the General Assembly read three times and ratified this the 23rd day of August, 2021.

§ 87-1. "General contractor" defined; exceptions.

(a) For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee, or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or more, or undertakes to erect a North Carolina labeled manufactured modular building meeting the North Carolina State Building Code, shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.

(b) This section shall not apply to the following:

- (1) Persons, firms, or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments.
- (2) Any person, firm, or corporation who constructs or alters a building on land owned by that person, firm, or corporation provided (i) the building is intended solely for occupancy by that person and his family, firm, or corporation after completion; and (ii) the person, firm, or corporation complies with G.S. 87-14. If the building is not occupied solely by the person and his family, firm, or corporation for at least 12 months following completion, it shall be presumed that the person, firm, or corporation did not intend the building solely for occupancy by that person and his family, firm, or corporation.
- (3) Any person engaged in the business of farming who constructs or alters a building on land owned by that person and used in the business of farming, when the building is intended for use by that person after completion. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1; 1949, c. 936; 1953, c. 810; 1971, c. 246, s. 1; 1975, c. 279, s. 1; 1981, c. 783, s. 1; 1989, c. 109, s. 1; c. 653, s. 1; 1991 (Reg. Sess., 1992), c. 840, s. 1; 2011-376, s. 1.)

§ 87-10. Application for license; examination; certificate; renewal.

(a) Anyone seeking to be licensed as a general contractor in this State shall submit an application. Before being entitled to an examination, an applicant shall:

- (1) Be at least 18 years of age.
- (2) Possess good moral character as determined by the Board.
- (3) Provide evidence of financial responsibility as determined by the Board.
- (4) Submit the appropriate application fee.

(a1) The Board shall require an applicant to pay the Board or a provider contracted by the Board an examination fee not to exceed one hundred dollars (\$100.00). In addition, the Board shall require an applicant to pay the Board a fee not to exceed one hundred twenty-five dollars (\$125.00) if the application is for an unlimited license, one hundred dollars (\$100.00) if the application is for an intermediate license, or seventy-five dollars (\$75.00) if the application is for a limited license. The fees accompanying any application or examination shall be nonrefundable. The holder of an unlimited license shall be entitled to act as general contractor without restriction as to value of any single project; the holder of an intermediate license shall be entitled to act as general contractor for any single project with a value of up to one million dollars (\$1,000,000), excluding the cost of land and any ancillary costs to improve the land; the holder of a limited license shall be entitled to act as general contractor for any single project with a value of up to five hundred

thousand dollars (\$500,000), excluding the cost of land and any ancillary costs to improve the land. The license certificate shall be classified in accordance with this section.

(b) An applicant shall identify an individual who has successfully passed an examination approved by the Board who, for purposes of this section, shall be known as the "qualifier" or the "qualifying party" of the applicant. If the qualifier or the qualifying party seeks to take an examination, the examination shall establish (i) the ability of the applicant to make a practical application of the applicant's knowledge of the profession of contracting; (ii) the qualifications of the applicant in reading plans and specifications, knowledge of relevant matters contained in the North Carolina State Building Code, knowledge of estimating costs, construction, ethics, and other similar matters pertaining to the contracting business; (iii) the knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction, and liens; and (iv) the applicant's knowledge of requirements of the Sedimentation Pollution Control Act of 1973, Article 4 of Chapter 113A of the General Statutes, and the rules adopted pursuant to that Article. If the qualifier or qualifying party passes the examination, upon review of the application and all relevant information, the Board shall issue a license to the applicant to engage in general contracting in the State of North Carolina, which may be limited as follows:

- (1) Building contractor, which shall include private, public, commercial, industrial and residential buildings of all types.
- (1a) Residential contractor, which shall include any general contractor constructing only residences which are required to conform to the residential building code adopted by the Building Code Council pursuant to G.S. 143-138.
- (2) Highway contractor.
- (3) Public utilities contractors, which shall include those whose operations are the performance of construction work on the following subclassifications of facilities:
 - a. Water and sewer mains, water service lines, and house and building sewer lines as defined in the North Carolina State Building Code, and water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations, and pumping stations.
 - b. Water and wastewater treatment facilities and appurtenances thereto.
 - c. Electrical power transmission facilities, and primary and secondary distribution facilities ahead of the point of delivery of electric service to the customer.
 - d. Public communication distribution facilities.
 - e. Natural gas and other petroleum products distribution facilities; provided the General Contractors Licensing Board may issue license to a public utilities contractor limited to any of the above subclassifications for which the general contractor qualifies.
- (4) Specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission pursuant to the laws of the State of North Carolina.

(b1) Public utilities contractors constructing house and building sewer lines as provided in sub-subdivision a. of subdivision (3) of subsection (b) of this section shall, at the junction of the public sewer line and the house or building sewer line, install as an extension of the public sewer line a cleanout at or near the property line that terminates at or above the finished grade. Public utilities contractors constructing water service lines as provided in sub-subdivision a. of subdivision (3) of subsection (b) of this section shall terminate the water service lines at a valve, box, or meter at which the facilities from the building may be connected. Public utilities contractors constructing fire service mains for connection to fire sprinkler systems shall terminate those lines at a flange, cap, plug, or valve inside the building one foot above the finished floor. All fire service mains shall comply with the NFPA standards for fire service mains as incorporated into and made applicable by Volume V of the North Carolina Building Code.

(c) If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees. If an applicant is a copartnership, a corporation, or any other combination or organization, the examination may be taken by one or more of the responsible managing officers or members of the personnel of the applicant.

(c1) If the qualifier or qualifying party shall cease to be connected with the licensee, then the license shall remain in full force and effect for a period of 90 days. After 90 days, the license shall be invalidated, however the licensee shall be entitled to return to active status pursuant to all relevant statutes and rules promulgated by the Board. However, during the 90-day period described in this subsection, the licensee shall not bid on or undertake any additional contracts from the time such qualifier or qualifying party ceased to be connected with the licensee until the license is reinstated as provided in this Article.

(d) Repealed by Session Laws 2017-10, s. 2.13(a), effective October 1, 2017, and applicable to applications for licensure submitted on or after that date.

(d1) The Board may require a new application if a qualifier or qualifying party requests to take an examination a third or subsequent time.

(e) A license shall expire on the first day of January following its issuance or renewal and shall become invalid 60 days from that date unless renewed, subject to the approval of the Board. Renewal applications shall be submitted with a fee not to exceed one hundred twenty-five dollars (\$125.00) for an unlimited license, one hundred dollars (\$100.00) for an intermediate license, and seventy-five dollars (\$75.00) for a limited license. Renewal applications shall be accompanied by evidence of continued financial responsibility and evidence of satisfactory completion of continuing education as required by G.S. 87-10.2. Renewal applications received by the Board on or after the first day of January shall be accompanied by a late payment of ten dollars (\$10.00) for each month or part after January.

(f) After a license has been invalid for four years, a licensee shall not be permitted to renew the license, and the license shall be deemed archived. If a licensee wishes to be relicensed subsequent to the archival of the license, the licensee shall fulfill all requirements of a new applicant as set forth in this section. Archived licensed numbers shall not be renewed. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; c. 429, s. 3; 1941, c. 257, s. 1; 1953, c. 805, s. 2; c. 1041, s. 3; 1971, c. 246, s. 3; 1973, c. 1036, ss. 1, 2; c. 1331, s. 3; 1975, c. 279, ss. 2, 3; 1979, c. 713, s. 2; 1981, c. 739, ss. 1, 2; 1985, c. 630, ss. 2, 3; 1989, c. 431; 1993, c. 112, ss. 1, 2; c. 553, s. 26; 1999-123, s. 1; 1999-379, s. 7; 1999-427, s. 1; 2001-140, s. 1; 2001-296, s. 1; 2005-381, ss. 1, 2, 3; 2006-241, s. 1; 2007-247, s. 3; 2011-376, s. 5; 2017-10, s. 2.13(a); 2019-72, s. 2.)

21 NCAC 50.0415 is proposed as a temporary rule as follows:

21 NCAC 50.0415 PROPOSAL, BID, ESTIMATE, PERFORMANCE UNDER G.S. 87-1.1

If a building project is bid or performed pursuant to G.S. 87-1.1,

(1) the total amount of work to be performed by all licensed general contractors shall not exceed 25% of the total bid price;

(2) the total amount of work to be performed by all licensed contractors issued a license by the State Board of Examiners of Electrical Contractors under Article 4 of Chapter 87 of the North Carolina General Statutes shall not exceed 25% of the total bid price.

Authority S.L. 2021-122; G.S. 87-1.1; G.S. 87-18