

# Suing Contractors or Designers when you have no contract with them: the North Carolina law on state projects

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Can a contractor on a North Carolina state construction project be sued by someone with whom he has no contract? What about designers—can they be sued by contractors on state projects? The answer to both questions is a resounding yes.

## **Multi-prime contracts**

First, a little background on state “multi-prime contracts” is in order:

In North Carolina, the state entity who is the owner of the construction project must bid the project pursuant to one of several designated ways. One common method sometimes required of public bidding is the “multi-prime” contract, in which the State has at least 4 separate contracts, for:

- (1) Heating, ventilating, and air conditioning
- (2) Plumbing and gas fittings
- (3) Electrical wiring and installations
- (4) General construction relating to erection, alteration, or repair on public property

N.C. Gen. Stat. §[143-128\(a\)](#).

The purpose of the multi-prime statute is two-fold:

1. It encourages lower bids by preventing pass-through cost mark-ups to the state; and
2. It allows smaller specialty contractors to enter bidding directly with state without having to have a working relationship with a general contractor, thereby opening up state jobs to a wider array of potential contractors

## **Contractual Privity**

Now that you understand multi-prime contracts, you should be aware of the legal concept of contractual privity. In general, contractual privity is required to sue another entity on a construction project—that is, you have to be in a contractual relationship with the party you are suing. There are exceptions to this rule. For example, you can be sued in negligence for property and personal damage by a party that you do not have a contract with. (See my post discussing the [architect’s liability for economic loss](#) resulting from

breach of architect's common-law duty of due care). In addition, the state legislature has provided the ability for contractors to sue one another, or other entities involved in the construction project, without having to sue the owner or deal with the [State Construction Office](#).

### ***NC statute on liability:***

Each separate contractor shall be directly liable to the State of North Carolina, or to the county, municipality, or other public body **and to the other separate contractors** for the full performance of all duties and obligations due respectively under the terms of the separate contracts and in accordance with the plans and specifications, which shall specifically set forth the duties and obligations of each separate contractor. For the purpose of this section, **"separate contractor" means any person, firm or corporation who shall enter into a contract with the State**, or with any county, municipality, or other public entity to erect, construct, alter or repair any building or buildings, or parts of any building or buildings. N.C. Gen. Stat. §[143-128\(b\)](#). [Emphasis added].

This statute has been interpreted over the past decade to allow essentially any party to sue any other party directly on state construction projects.

### **Contractor-to-Contractor lawsuits**

One of the first cases to deal with the statute allowing contractors to sue each other is [Bolton Corp. v. T.A. Loving Co.](#), 94 N.C. App. 392, 380 S.E.2d 796, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 496 (1989). In that case, which involved the construction of an 8 story library on the [UNC-CH campus](#), a HVAC prime contractor, Bolton, sued the project expeditor, TA Loving, for Loving's breach of its contract with the State. Bolton brought the claim on both its own behalf and on behalf of its subcontractor.

The court allowed the suit, not based on tort, but based on the multi-prime statute (N.C. Gen. Stat. §[143-128](#)). The court held that a prime contract can be sued directly by another prime contractor working on a state construction project:

We interpret N.C.G.S. § 143-128 to mean that a prime contractor may be sued by another prime contractor working on a construction project for economic loss foreseeably resulting from the first prime contractor's failure to fully perform "all duties and obligations due respectively under the terms of the separate contracts.

### **Contractor-to-Architect/Engineer lawsuits**

A specific case from the Middle District Court of North Carolina (federal court), interpreting state law, further extended this liability to architects and engineers on state multi-prime projects. [RPR & Associates v. O'Brien/Atkins Associates, P.A.](#), 24 F. Supp. 2d 515 (M.D.N.C. 1998).

In that case, which involved the [George Watts Hill Alumni Center](#) at UNC-Chapel Hill, the court held that an architect and consulting engineer could be held accountable to contractors who rely on their work on North Carolina construction projects based on [the same statute](#) as that imposing liability on multi-prime contractors on one another.

The issue in the *RPR* case was whether the statute applied to architects and engineers, since they are not “prime contractors” under the North Carolina multi-prime contracting statute. The *RPR* court held that for purposes of the statute, design professionals were “separate prime contractors” such that they could be sued directly by prime contractors on state jobs.

While this case is now over a decade old, it still surprises many design professionals who incorrectly assume that since they are not one of the enumerated prime contractors that they are not subject to statutory liability to the prime contractors.

### **Subcontractor-to-other prime lawsuits**

In 2004 the Court of Appeals dealt with the issue of a subcontractor making a direct claim against a prime contractor other than the contractor for which the sub performed its work. *Pompano Masonry Corporation v. HDR Architecture, Inc.*, 165 N.C. App. 401, 598 S.E.2d 608 (2004).

That case involved the Biological Science Research Center at [UNC-CH](#). HDR was the “project expeditor” under a separate contract with UNC, responsible for preparing the project schedule and coordinating work between the prime contractors.

Metric Constructors served as the prime general contractor, and Pompano Masonry was a subcontractor to Metric. Pompano sued HDR directly as the project expeditor, and the court allowed the case to proceed, holding that subcontractors to prime contractors could sue other prime contractors directly.

The court held that HDR could be sued directly by a subcontractor to which it had no contract for economic injury resulting from its alleged negligent performance of its duties as project expeditor. Citing its earlier decision in *Davidson*, the court held that liability exists due to the “working relationship” and “community of interests” despite the fact there was no contractual privity between Pompano and HDR.

### **Conclusion**

The moral of the story with regard to this series of cases? Never assume that you cannot be sued by someone because you don’t know them, you have no contract with them, you are a licensed professional, or they are on a different “tier” than you on the project. You have duties to all parties on a construction project, and the multi-prime statute in North Carolina gives yet another arrow in the litigator’s arsenal which could be pointed at your chest.

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