

## SUBCHAPTER 30H – MEDIATED SETTLEMENT CONFERENCES

### SECTION .0100 – INITIATING MEDIATED SETTLEMENT CONFERENCES

#### 01 NCAC 30H .0101 PURPOSE OF MANDATORY SETTLEMENT CONFERENCES

Pursuant to G.S. 143-128 (f1) and 143-135.26(11), these Rules are promulgated to implement a system of settlement events which are designated to focus the parties' attention on settlement rather than on claim preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time prior to or during commencement of the dispute resolution process.

*History Note:* Authority G.S. 143-135.26 (10), (11); S.L. 2001-496, s. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

#### 01 NCAC 30H .0102 INITIATING THE DISPUTE RESOLUTION PROCESS

(a) Any party to a public construction contract governed by G.S. 143, Article 8 and identified in G.S. 143-128 (f1) and who is a party to a dispute arising out of the construction process in which the amount in controversy is at least fifteen thousand dollars (\$15,000) may submit a written request to the public owner for mediation of the dispute.

(b) Prior to submission of a written request for mediation to the public owner, the party requesting mediation:

- (1) If a prime contractor, it must first submit its claim to the Project Designer for review. If the dispute is not resolved through the Project Designer's instructions, then the dispute becomes ripe for mediation in the Formal Dispute Resolution Process, and the party may submit his written request for mediation to the public owner.
- (2) If the party requesting mediation is a subcontractor, it must first submit its claim to the prime contractor with whom it has a contract. If the dispute is not resolved through the Prime Contractor's informal involvement, then the dispute becomes ripe for mediation in the Formal Dispute Resolution Process, and the party may submit its written request for mediation to the public owner.
- (3) If the party requesting mediation is the Project Designer, then it must first submit its claim to the public owner to resolve. If the dispute is not resolved with the public owner's informal involvement, then the Project Designers' dispute is ripe for mediation in the Formal Dispute Resolution Process, and the Project Designer may submit its written request to the public owner for mediation.

*History Note:* Authority G.S. 143-135.26(10) and (11); S.L. 2001-496, Sec. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

### SECTION .0200 – SELECTION OF MEDIATOR

#### 01 NCAC 30H .0201 SELECTION OF MEDIATOR

(a) The parties may select a mediator certified pursuant to Paragraph (b) of this Rule. The requesting party shall file with the State Construction Office (hereinafter collectively referred to as the "SCO") if a State project or public owner, if a non-State project, a Notice of Selection of Mediator by Agreement within 10 days of the request; however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

(b) All mediators in the Formal Dispute Resolution Program shall be certified in accordance with the rules certifying mediators in Superior Court in North Carolina except when otherwise allowed by the SCO or public owner upon the request of the parties to the mediation. When selecting mediators, the parties may designate a

preference for mediators with a background in construction law or public construction contracting. Such preferences are not mandatory under these Rules.

(c) The parties may select a mediator who does not meet the certification requirements of these Rules. However, all mediators gain the consent of the SCO or public owner in accordance with these Rules to mediate any dispute.

(d) If the parties cannot agree upon the selection of a mediator, the party or party's attorney shall so notify the SCO or public owner and request, on behalf of the parties, that the SCO or public owner appoint a mediator. The request for appointment shall state that the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The request shall state whether any party prefers a certified attorney mediator, and if so, the SCO or public owner shall appoint a certified attorney mediator. If no preference is expressed, the SCO or public owner may appoint a certified attorney mediator or a certified non-attorney mediator.

*History Note:* Authority G.S. 143-135.26(10) and (11); S.L. 2001-496, Sec. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

#### **01 NCAC 30H .0202 MEDIATION AGREEMENT**

(a) Upon selection of the mediator, the parties shall enter into a mediation agreement. The mediation agreement shall include terms governing the time, place, and scope of the mediation. The agreement shall also include terms regarding the compensation, disqualification, and removal of the mediator.

(b) The deadline for completion of the mediation shall be 60 days after the execution of the mediation agreement. Parties are free to extend the mediation deadline by mutual agreement.

*History Note:* Authority G.S. 143-135.26 (10) and (11); S.L. 2001-496, Sec. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

#### **01 NCAC 30H .0203 APPOINTMENT OF MEDIATOR BY THE SCO** **01 NCAC 30H .0204 MEDIATOR INFORMATION DIRECTORY** **01 NCAC 30H .0205 DISQUALIFICATION OF MEDIATOR**

*History Note:* Authority G.S. 143-135.26(11); S.L. 2001-496, s. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Temporary Adoption Expired November 20, 2003.

### **SECTION .0300 – THE MEDIATED SETTLEMENT CONFERENCE**

#### **01 NCAC 30H .0301 WHERE CONFERENCE IS TO BE HELD**

Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the county where the project is located. The mediator shall be responsible for reserving a place for the conference and for giving notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

*History Note:* Authority G.S. 143-135.26(10) and (11); S.L. 2001-496, Sec. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

#### **01 NCAC 30H .0302 WHEN CONFERENCE IS TO BE HELD**

The deadline for completion of the mediation shall be not less than 30 days nor more than 60 days after the naming of the mediator.

*History Note:* Authority G.S. 143-135.26(10), (11); S.L. 2001-496, s. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

**01 NCAC 30H .0303 REQUEST TO EXTEND DEADLINE FOR COMPLETION**  
**01 NCAC 30H .0304 RECESSES**  
**01 NCAC 30H .0305 NO CAUSE FOR DELAY**

*History Note:* Authority G.S. 143-135.26(11); S.L. 2001-496, s. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Temporary Adoption Expired November 20, 2003.

## **SECTION .0400 – DUTIES OF PARTIES AND OTHER PARTICIPANTS IN FORMAL DISPUTE RESOLUTION PROCESS**

### **01 NCAC 30H .0401 ATTENDANCE**

- (a) All parties to the dispute originally presented to the Designer or Prime Contractor for initial resolution shall attend the mediation. Failure of a party to a construction contract dispute to attend the mediation shall result in the public owner's withholding of monthly payment to that party until such party attends the mediation.
- (b) Only physical attendance, and not attendance by telephone or other electronic means, shall constitute attendance. Any attendee on behalf of a party must have authority from that party to bind it to any agreement reached as a result of the mediation.
- (c) Attorneys on behalf of parties may attend the mediation but are not required to do so.
- (d) Sureties or insurance company representatives are not required to attend the mediation unless any monies paid or to be paid as a result of any agreement reached as a result of mediation require their presence or acquiescence. If such agreement or presence is required, then authorized representatives of the surety or insurance company must attend the mediation.

*History Note:* Authority G.S. 143-135.26(10), (11); S.L. 2001-496, s. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

### **01 NCAC 30H .0402 FINALIZING AGREEMENT**

If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel, insurance carriers and bonding companies, if any.

*History Note:* Authority G.S. 143-135.26(10), (11); S.L. 2001-496, s. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

### **01 NCAC 30H .0403 PAYMENT OF FEE**

The mediation fee shall be paid in accordance with G.S. 143-128 (f1).

*History Note:* Authority G.S. 143-135.26(10), (11); S.L. 2001-496, s. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

### **01 NCAC 30H .0404 FAILURE TO COMPENSATE MEDIATOR**

- (a) Any party's failure to compensate the mediators shall subject that party to a withholding of said amount of money from the party's monthly payment by the public owner.
- (b) If the public owner is a party to the mediation and it fails to compensate the mediator, it shall be subject to a civil cause of action from the mediator.

*History Note:* Authority G.S. 143-135.26(10) and (11); S.L. 2001-496, Sec. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

## **SECTION .0500 – AUTHORITY AND DUTIES OF MEDIATORS**

### **01 NCAC 30H .0501 AUTHORITY OF MEDIATOR**

- (a) Control of Conference. The mediator shall be in control of the conference and the procedures to be followed.
- (b) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications with a participant may occur shall be disclosed to all other participants at the conclusion of the communications.
- (c) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

*History Note:* Authority G.S. 143-135.26(10), (11); S.L. 2001-496, s. 14(b);  
Temporary Adoption Eff. July 1, 2002;  
Eff. August 1, 2004;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.

### **01 NCAC 30H .0502 DUTIES OF MEDIATOR**

- (a) The mediator shall define and describe the following at the beginning of the conference:
  - (1) The process of mediation;
  - (2) The difference between mediation and other forms of conflict resolution;
  - (3) The costs of the mediated settlement conference;
  - (4) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their legal rights if they do not reach settlement;
  - (5) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
  - (6) Whether and under what conditions communications with the mediator shall be held in confidence during and after the conference;
  - (7) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(1);
  - (8) The duties and responsibilities of the mediator and the participants; and
  - (9) That any agreement reached shall be reached by mutual consent.
- (b) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.
- (c) Declaring Impasse. It is the duty of the mediator to determine that an impasse exists and that the conference shall end.
- (d) Reporting Results of Conference. The mediator shall report to the SCO or public owner within 10 days of the conference whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state the nature of said agreement. The mediator's report shall inform the SCO or public owner of the absence of any party to have been absent from the mediated settlement conference without permission. The SCO or public owner may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.
- (e) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the deadline of completion set by the rules. Deadlines for completion of the conference shall be observed by the mediator unless said time limit is changed by a written order of the SCO or public owner.

*History Note:* Authority G.S. 143-135.26(10), (11); S.L. 2001-496, s. 14(b);

*Temporary Adoption Eff. July 1, 2002;*  
*Eff. August 1, 2004;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018.*

#### **SECTION .0600 – COMPENSATION OF THE MEDIATOR**

##### **01 NCAC 30H .0601      COMPENSATION OF THE MEDIATOR**

*History Note:      Authority G.S. 143-135.26(11); S.L. 2001-496, Sec. 14(b);*  
*Temporary Adoption Eff. July 1, 2002;*  
*Temporary Adoption Expired November 20, 2003.*

#### **SECTION .0700 – MEDIATOR CERTIFICATION**

##### **01 NCAC 30H .0701      MEDIATOR CERTIFICATION**

*History Note:      Authority G.S. 143-135.26(11); S.L. 2001-496, s. 14(b);*  
*Temporary Adoption Eff. July 1, 2002;*  
*Temporary Adoption Expired November 20, 2003.*

#### **SECTION .0800 – RULE MAKING**

##### **01 NCAC 30H .0801      RULE MAKING**

*History Note:      Authority G.S. 143-135.26(11); S.L. 2001-496, s. 14(b);*  
*Temporary Adoption Eff. July 1, 2002;*  
*Temporary Adoption Expired November 20, 2003.*

#### **SECTION .0900 – DEFINITIONS**

##### **01 NCAC 30H .0901      DEFINITIONS**

*History Note:      Authority G.S. 143-135.26(11); S.L. 2001-496, s. 14(b);*  
*Temporary Adoption Eff. July 1, 2002;*  
*Temporary Adoption Expired November 20, 2003.*

#### **SECTION .1000 – TIME LIMITS**

##### **01 NCAC 30H .1001      TIME LIMITS**

*History Note:      Authority G.S. 143-135.26(11); S.L. 2001-496, s. 14(b);*  
*Temporary Adoption Eff. July 1, 2002;*  
*Temporary Adoption Expired November 20, 2003.*