

**RESOLUTION ADOPTING THE RULES IMPLEMENTING MEDIATED
SETTLEMENT CONFERENCES IN
CITY OF HENDERSONVILLE CONSTRUCTION PROJECTS**

WHEREAS, N.C. Gen. Stat. § 143-128(f1) requires that for any building construction project in the formal bidding range the City have in place a dispute resolution procedure involving mediation for disputes of at least \$15,000.00; and

WHEREAS, City Council wishes to adopt such a policy; and

WHEREAS, a proposed policy entitled “RULES IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN CITY OF HENDERSONVILLE CONSTRUCTION PROJECTS” has been presented to the City Council for consideration; and

WHEREAS, as written, the proposed policy, applies to any City contract which, by its terms, makes it applicable;

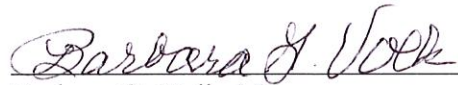
NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Hendersonville, North Carolina that resolves that the policy entitled “RULES IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN CITY OF HENDERSONVILLE CONSTRUCTION PROJECTS” is adopted as presented.

Adopted the City Council of the City of Hendersonville, North Carolina this 7th day of January 2021.

ATTEST:




Angela L. Reece, City Clerk



Barbara G. Volk, Mayor

Approve as to Form:



Angela S. Beeker, City Attorney

RULES IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN
CITY OF HENDERSONVILLE CONSTRUCTION PROJECTS

Adopted: January 7, 2021

RULE 1. INITIATING MEDIATED SETTLEMENT CONFERENCES

A. Purpose of Mandatory Settlement Conferences. 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.

B. Applicability/Initiating the Dispute Resolution Process

1. Applicability. These Rules Implementing Mediated Settlement Conferences in City of Hendersonville Construction Projects ("Rules") shall apply to any party to a contract related to a City of Hendersonville construction project involving the erection, construction, alteration or repair of a building as required by N.C.G.S. § 143-128(g). These Rules shall also apply to any party to a contract, involving any other City construction project, which by its terms incorporates these Rules. As used herein "party to a contract" shall include, but not be limited to, contractors, subcontractors, and design professionals and their subcontractors.
2. Initiating the Dispute Resolution Process. Any party to a contract who is a party to a dispute arising out of the construction process in which the amount in controversy is at least \$15,000 may submit a written request to the City Representative for mediation of the dispute. As used herein, the "City Representative" shall refer to the person(s) designated as the City Representative for the purposes of these Rules, or if no one is so designated, "City Representative" shall refer to the person(s) designated as project manager, project liaison, or notice agent(s) for the City in the contract between the City and prime contractor or Project Designer. Disputes of less than \$15,000 are not subject to these Rules.

Prior to submission of a written request for mediation to the City Representative, the party(ies) requesting mediation,

- a. If a prime contractor, must have first submitted its claim to the Project Designer (Architect, Engineer or other as designated by the City) for review. If the dispute is not resolved through the Project Designer's instructions, then the dispute becomes eligible for mediation in this dispute resolution process, and the party may submit their written request for mediation to the City Representative.
- b. If the party requesting mediation is the Project Designer, then it must first submit its claim to the City Representative to resolve. If the dispute is not resolved with the City Representative's involvement, then the Project Designer's dispute is eligible for mediation in this dispute resolution process, and the Project Designer may submit its written request to the City Representative for mediation.
- c. If the party requesting mediation is a subcontractor, it must first have submitted its claim for mediation to the prime contractor or design professional with whom it has a contract. If the

dispute is not resolved through the prime contractor's or design professional's involvement, then the dispute becomes eligible for mediation in this dispute resolution process, and the party may submit its written request for mediation to the City Representative.

3. If a matter or issue arises in the dispute resolution process that is not addressed by these Rules, the rules of procedure governing the Superior Court Mediation Program shall be used as a guide.

RULE 2. SELECTION OF MEDIATOR

A. Selection of Certified Mediator by Agreement of the Parties. The parties may select a certified mediator pursuant to these Rules by agreement within 21 days of requesting mediation. The requesting party shall file with the City Representative 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 the other parties have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

B. Nomination and City Representative Approval of a Non-Certified Mediator. The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the City Representative is otherwise qualified by training or experience to mediate the action.

If the parties select a non-certified mediator, the requesting party shall file with the City Representative a Nomination of Non-Certified Mediator within 10 days of the request. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The City Representative shall rule on said nomination, shall approve or disapprove of the parties' nomination and shall notify the parties of its decision.

C. Appointment of Mediator by the City Representative. If the parties cannot agree upon the selection of a mediator, either the party or party's attorney shall notify the City Representative and request, on behalf of the parties, that the City Representative appoint a mediator. The request for appointment must be filed within 10 days after request to mediate and 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 City Representative shall appoint a certified attorney mediator. If no preference is expressed, the City Representative may appoint a certified attorney mediator or a certified non-attorney mediator.

D. Mediator Information Directory. To assist the parties in the selection of a mediator by agreement, the parties are free to utilize the list of certified mediators maintained by Henderson County for the Superior Court Mediation Settlement Conference Program.

E. Disqualification of Mediator. Any party may request replacement of the mediator by the City Representative for good cause. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

- A. Where Conference is to be Held. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the City of Hendersonville. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.
- B. 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.
- C. Request to Extend Deadline for Completion. A party, or the mediator, may request that the City Representative extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the City Representative.

The City Representative may grant the request by setting a new deadline for completion of the conference or deny the request to extend the deadline.
- D. Recesses. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.
- E. **The mediated settlement or the matter subject of the mediation conference shall not be cause for the delay of the construction project which is the focus of the dispute.**

RULE 4. DUTIES OF PARTIES AND OTHER PARTICIPANTS IN THE DISPUTE RESOLUTION PROCESS

- A. Attendance.
 - 1. All parties to the dispute originally presented to the Designer or Prime Contractor or County for initial resolution must attend the mediation. Failure of a party to attend the mediation may result in the City's withholding of monthly payment to that party until such party attends the mediation, or if the party is a subcontractor the withholding of the subcontractor's payment by the contractor or design professional if the subcontractor's contract so provides.
 - 2. Attendance shall constitute physical attendance, not by telephone or other electronic means. 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.
 - 3. Attorneys on behalf of parties may attend the mediation but are not required to do so.
 - 4. 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.
- B. Finalizing Agreement. If an agreement is reached in the conference, parties to the agreement shall reduce the terms to writing and sign it along with their counsel, if counsel is present.

- C. Mediation Fee. The mediation fee shall be divided equally among the parties to the dispute, unless otherwise agreed to as part of the mediation. If the City is a party to the dispute, the City shall pay its equal share of the mediator's fee based on the number of parties to the dispute, or 1/3 of the mediator's fee, whichever is greater as required by N.C.G.S. § 143-128(f1) in which case the remaining parties shall equally divide the remaining 2/3 of the mediator's fee.
- D. Failure to compensate mediator. Any party's failure to compensate the mediators in accordance with these Rules shall subject that party to a withholding of said amount of money from the party's monthly payment by the City of Hendersonville, or if the party is a subcontractor the withholding of the subcontractor's payment by the contractor or design professional if the subcontractor's contract so provides.

RULE 5. AUTHORITY AND DUTIES OF MEDIATOR

A. Authority of Mediator.

1. Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.
2. Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.
3. 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.

B. Duties of Mediator

1. The mediator shall define and describe the following at the beginning of the conference:
 - a. The process of mediation;
 - b. The difference between mediation and other forms of conflict resolution;
 - c. The costs of the mediated settlement conference;
 - d. 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;
 - e. The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
 - f. Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - g. The inadmissibility of conduct and statements as provided by N.C.G.S. 7A-38.1(1);
 - h. The duties and responsibilities of the mediator and the participants; and
 - i. That any agreement reached will be reached by mutual consent.
2. Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.
3. Declaring Impasse. It is the duty of the mediator to timely determine that an impasse exists and

that the conference should end.

4. Reporting Results of Conference. The mediator shall report to the City Representative 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 City Representative of the absence of any party known to the mediator to have been absent from the mediated settlement conference without permission. The City Representative may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.
5. 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 these Rules. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order from the City Representative.

RULE 6. COMPENSATION OF THE MEDIATOR

- A. By Agreement. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator provided that the provision of N.C.G.S. 143-128(f1) are observed.
- B. By Appointment. When the mediator is appointed by the City Representative, the parties shall compensate the mediator for mediation services at the rate in accordance with the rate charged for Superior Court mediation. The parties shall also pay to the mediator a one-time per case administrative rate in accordance with the rate charged for Superior Court mediation, which is due upon appointment.

RULE 7. MEDIATOR CERTIFICATION.

All certified mediators shall be properly certified in accordance with the rules certifying mediators in Superior Court in North Carolina. (Except when otherwise allowed by the City Representative 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 requirements, while preferred, are not mandatory under these Rules.

All mediators chosen must demonstrate either they are certified in accordance with these Rules Implementing Scheduled Mediated Settlement Conference in Superior Court or must gain the consent of the City Representative to mediate any dispute in accordance with these Rules.

RULE 8. RULE AMENDMENTS.

These Rules are subject to amendment by the City of Hendersonville City Council at any time the City deems it appropriate. Further, these Rules may be modified or waived for a particular project by the City Manager, provided that the City contract(s) related to the project reflect such modification or waiver.

RULE 9. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended by the mediator for good cause shown. If a mediator has not yet been appointed, if the mediator has disqualified him/herself, or if the City Representative is in the process of replacing the mediator as allowed by these Rules, the City Representative shall decide all waivers or extensions of time for good cause shown.