SENATE BILL 219:
Surveyor Lic.& Ed.Req's/Constr.Contract Rev's.

2021-2022 General Assembly

Committee:		**Date:**	January 18, 2022
Introduced by:	Sen. McInnis	**Prepared by:**	Bill Patterson
Analysis of:	ConferenceReport (S219-CRTG-3)		Staff Attorney

OVERVIEW: Senate Bill 219, as amended by S219-CRTG-3 ("Conference Report"), would:

- ***Modify practical experience requirements applicable to persons seeking licensure as a professional land surveyor and make other technical changes to Chapter 89C of the General Statutes;***
- ***Make changes to the design-build contracting process;***
- ***Clarify provisions related to contracts void as against public policy;***
- ***Modify the attorneys' fees provision for actions under the statutory lien process; and***
- ***Define the term "supplier" for purposes of the prohibition against a supplier of alcoholic beverages having an ownership interest in its wholesaler.***

(Specific changes to the bill made by the Conference Report are indicated in bold italics below.)

CURRENT LAW AND BILL ANALYSIS:

Section 1 – Surveyor Licensing Changes

In addition to other requirements for certification or licensure by the Board of Examiners for Engineers and Surveyors (Board), an applicant must have the following number of years of progressive practical experience depending on the applicant's educational attainment:

- To be certified as a land surveyor intern:
  - An applicant with an associate degree in surveying technology must have four years of experience, two years of which must have been under a practicing professional land surveyor.
  - An applicant with a high school diploma or equivalency certificate must have 10 years of experience, six years of which must have been under a practicing professional land surveyor.
- To be licensed as a professional land surveyor:
  - An applicant with a bachelor of science degree in surveying or other equivalent curricula who passed the first examination (Fundamentals of Surveying) on or before January 1, 2013, must have two years of experience, one year of which must be under a professional land surveyor; otherwise, both years of experience must be under a professional land surveyor.
  - An associate degree in surveying technology who passed the first examination on or before January 1, 2013, must have four years of experience, two years of which

must be under a professional land surveyor; otherwise, the applicant must have eight years of experience, four of which must be under a professional land surveyor.

- A high school diploma or equivalency certificate who passed the first examination on or before January 1, 2013, have seven years of experience, six of which must be under a professional land surveyor; otherwise, the applicant must have 16 years of experience, nine years of which must have been under a professional land surveyor.

Section 1.(a) of Senate Bill 219 would repeal the definition of "land surveyer intern" and would define the term "land surveyor apprenticeship" as a program of on-the-job learning allowing individuals to prepare for the land surveying profession through supervised experience combined with classroom instruction as approved by the Board. ***(The Conference Report removed a requirement of 480 hours of classroom instruction for the land surveyor apprenticeship.)***

Section 1.(b) would change the current experience requirements as follows:

- Provisions relating to the certification of a land surveyor intern would be repealed.
- Provisions applicable only to applicants who passed the first examination (Fundamentals of Surveying) on or before January 1, 2013, would be repealed.
- To be licensed as a professional land surveyor:
  - An applicant with a bachelor of science degree in surveying or other equivalent curricula would be required to have at least two years of progressive practical experience under a practicing professional land surveyor.
  - An applicant with an associate degree in surveying technology would be required to have at least five years of practical progressive experience under a practicing professional land surveyor.
  - An applicant with a high school diploma or equivalency certificate who has not completed a land surveyor apprenticeship would be required to have at least nine years of progressive practical experience under a practicing professional land surveyor.
  - An applicant with a high school diploma or equivalency certificate who has completed a land surveyor apprenticeship would be required to have at least seven years of progressive practical experience under a practicing professional land surveyor.

Sections 1.(c) would provide that the investigation of a licensee is confidential until the Board issues a citation to the licensee or takes any action authorized under Chapter 89C against a nonlicensee. In addition, Section 1.(d) would require the Board to review and promulgate rules establishing continuing education requirements for surveying apprenticeships and encourage the workforce development of the profession.

Section 1.(d) would remove references to an obsolete term ("warrant") in provisions relating to Board certification that expenses were properly and necessarily incurred in the discharge of its duties.

Section 1.(e) would authorize the Board to use email to send notices to licensees relating to expirations and renewals of licenses.

Section 1.(f) would provide that charges brought by any person against a licensee for fraud, deceit, gross negligence, incompetence, misconduct, or violations of requirements under Chapter 89C, rules of professional conduct, or rules adopted by the board may be submitted electronically for filing with the Board, and would not require such charges to be sworn to by the person or persons making them.

Section 1 would become effective July 1, 2022 ***(changed from December 1, 2021, by the Conference Report),*** and would apply to applications for licensure on or after that date.

Section 2 – Design-Build Contracts Changes

Prior to 2013, State law authorized four contracting methods for large building construction projects: single-prime, separate-prime (also referred to as multi-prime), dual-bidding (bidding both single- and separate-prime simultaneously), and construction management at risk. In 2013, the General Assembly authorized, statewide, the use of the design-build method and the design-build bridging method as a permissible means of construction contracting. The design-build method allows for a construction project that delivers both design, whether architectural or engineering or both, and construction services under one contract with a single point of responsibility. The design-build bridging construction method is a two-step process that differs from design-build in two ways:

- With design-build bridging, the unit contracts separately with an architect or engineer to design 35% of the project, referred to in the statute as the "design criteria," The unit then solicits proposals from design-build firms based on the design criteria package and contracts with a design-builder to complete the design and perform construction. The design criteria package acts as "bridging" documents between initial project concept and the design-build phase.
- With the design-build bridging method, fees and price estimates are solicited in the request for proposals for design-build services and the contract for these services is awarded based on the lowest responsive, responsible bidder standard of award.

A design-builder is currently defined as "an appropriately licensed person, corporation, or entity that, under a single contract, offers to provide or provides design services and general contracting services." G.S. 143-128.1B. Architectural and engineering services must be performed by licensed architects and engineers, and contractor services must be performed by a licensed general contractor. It is possible for one individual to hold both an engineering license and a general contractor license, usually a design-builder is a corporation, firm, or joint venture that employs both licensed design professionals and licensed general contractors, or a construction firm that subcontracts with an architect or engineer. The statutes require the design-builder to certify that each licensed designer and subconsultant who is a member of the design-build team was selected based on "demonstrated competence and qualifications" under the qualifications-based selection process of the Mini-Brooks Act (G.S. 143-64.31).

Under current law the requirements of Article 8 of Chapter 143 (Public Contracts) do not apply to contracts by a public entity with a construction manager at risk executed pursuant to G.S., 143-128.1 (Construction management at risk contracts).

Section 2 would clarify that design-builders responding to a request for proposals must select their project team in one of two ways:

1. A list of the licensed contractors, licensed subcontractors, and design professionals whom the design-builder proposes to use for the project's design and construction.
2. A list of the licensed contractors and design professionals whom the design-builder proposes to use and an outline of the strategy the design-builder plans to use for seeking team members using the public bidding statutes. If this option is used, the design-builder would be permitted to self-perform some of the work with its employees. ***As amended by the Conference Report,*** a design-builder using this option would not be permitted to enter into negotiated contracts with first-tier subcontractors.

Once identified, the identity of the key team members would be required to be updated if they change.

Section 2 would also do the following:

- Specify that the governmental entity cannot require the design builder to provide the costs of the subcontractor work in the design criteria package.
- Requires the governmental entity to provide list of general conditions for which the design-builder is to provide a fixed fee in their response.

The Conference Report would delete Section 2.(c) of the bill, which would have expanded an exemption from the requirements of Article 8 of Chapter 143.

Section 2 would become effective March 1, 2022 ***(changed from December 1, 2021, by the Conference Report)***, and would apply to contracts entered into, amended, or renewed on or after that date.

Section 3 – Contracts Void as Against Public Policy

Any contract or agreement purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable, if the contract or agreement is relative to the design, planning, construction, alteration, repair or maintenance of any of the following:

- Building
- Structure
- Highway
- Road
- Appurtenance or appliance, including moving, demolition and excavating connected therewith

This prohibition does not prevent or prohibit a contract where a promisor agrees to indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees.

This prohibition does not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer. This prohibition does not apply to any of the following:

1. Promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee.
2. Contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1.

Section 3 would add a provision that in lien waivers, releases, construction agreements, or design professional agreements purporting to require a promisor to submit a waiver or release of liens or claims as a condition of receiving interim or progress payments are void and unenforceable unless limited to the specific interim or progress payment actually received by the promisor in exchange for the lien waiver. Exempt are (i) lien waivers or releases for final payments and (ii) agreements to settle and compromise disputed claims after the claim has been identified by the claimant in writing.

Section 3 would become effective March 1, 2022 ***(changed from December 1, 2021, by the Conference Report)***, and would apply to liens attached on or after that date.

Section 4 - Attorneys' Fees in Actions to Enforce Statutory Liens

Since 1991, G.S. 44A-35 authorized the presiding judge in statutory lien law or performance bond suit to allow a reasonable attorneys' fee to the attorney representing the prevailing party. If allowed, the attorneys' fee is taxed as part of the court costs and payable by the losing party upon a finding that there was an

unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense.

For this purpose only, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least 50% of the monetary amount sought in a claim or is a party defendant or third party defendant against whom a claim is asserted which results in a judgment of less than 50% of the amount sought in the claim defended. If an offer of judgment is served in accordance with Rule 68, a "prevailing party" is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer.

Section 4 would provide that attorneys' fees must be calculated as part of the court costs of a final judgment or arbitration award. The court or arbitrator would determine the prevailing party by examining whose monetary position is closest to the amount of the judgment or award, based upon the principal amount in controversy as of the commencement of the proceeding. If a party serves an offer of judgment or written settlement offer within at least 30 days before the trial, arbitration, or hearing of the award, the last offer would be considered that party's monetary position for purposes of determining the amount in controversy.

The court or arbitrator may consider all facts and circumstances to determine the amount of attorneys' fees and expenses. A party may submit evidence by affidavit or declaration, other evidence, including live or deposition testimony, or expert testimony, however expert testimony is not required.

Section 4 would become effective March 1, 2022 ***(changed from December 1, 2021, by the Conference Report)***, and would apply to any claim arising on or after that date.

Section 5 – Meaning of Term "Supplier" for Purposes of Chapter 18B Prohibition

Under Chapter 18B of the General Statutes (Regulation of Alcoholic Beverages), a supplier or an officer, director, employee or affiliate of a supplier is prohibited from having an ownership interest in a wholesaler except as expressly authorized under that Chapter.

Section 5*, added to the bill by the Conference Report*, would provide that for purposes of this prohibition, the term "supplier" means a manufacturer, bottler, importer, or owner of one or more brands of malt beverages, unfortified wine, or fortified wine distributed by its wholesaler. The term would not include a wholesaler that (i) possesses a wine importer permit or a malt beverages importer permit or (ii) is an importer in another state, provided such malt beverages, unfortified wine, or fortified wine are transferred to it through an unaffiliated and independent third party.

EFFECTIVE DATE: Except as otherwise provided, this act is effective when it becomes law.

Erika Churchill and Chris Saunders, staff attorneys with the Legislative Analysis Division, substantially contributed to this summary.