SENATE BILL 219: Surveyor Licensure & Education Requirements/Construction Contract Revisions.

2021-2022 General Assembly

Committee:		**Date:**	March 16, 2022
Introduced by:		**Prepared by:**	Bill Patterson
Analysis of:	S.L. 2022-1		Staff Attorney

OVERVIEW: Session Law 2022-1 does the following:

- ***Modifies practical experience requirements applicable to persons seeking licensure as a professional land surveyor and makes technical changes to Chapter 89C of the General Statutes.***
- ***Makes changes to the design-build contracting process.***
- ***Clarifies provisions related to contracts that are deemed to be void as against public policy.***
- ***Modifies the procedure for awarding attorneys' fees in actions to enforce statutory liens.***
- ***Defines the term "supplier" for purposes of a provision prohibiting a supplier of alcoholic beverages from having an ownership interest in its wholesaler.***

The act has various effective dates. Please see the full summary for more detail.

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

Section 1.(a) of the act repeals the definition of "land surveyer intern" and defines 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.

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

- Repeals provisions relating to the certification of a land surveyor intern.
- Repeals provisions applicable only to applicants who passed the first examination (Fundamentals of Surveying) on or before January 1, 2013.
- Requires the following experience to be licensed as a professional land surveyor:
  - An applicant with a bachelor of science degree in surveying or other equivalent curricula is 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 is 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 is 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 is required to have at least seven years of progressive practical experience under a practicing professional land surveyor.

Sections 1.(c) provides 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, the section requires 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) removes 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) authorizes the Board to use email to send notices to licensees relating to expirations and renewals of licenses.

Section 1.(f) provides 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 can be submitted electronically for filing with the Board, and does not require such charges to be sworn to by the person or persons making them.

Section 1 becomes effective July 1, 2022, and applies 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 the statewide 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." 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.

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 statutory requirements.

Section 2 provides that if a governmental entity does not specify in its request for qualifications one of the following two team selection options that is to be used by the design builder, the design builder's response to the request must designate which of these two options it will use:

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. Once identified, the identity of the key team members must be updated if they change.

Under either option a design-builder is permitted to self-perform some of the work with its employees. Under the second option a design-builder is not permitted to enter into negotiated contracts with first-tier subcontractors.

The section also:

- Specifies 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 a list of general conditions for which the design-builder is to provide a fixed fee in their response.

Section 2 became effective March 1, 2022, and applies 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 provides that 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 they are limited to the specific interim or progress payment actually received by the promisor in exchange for the lien waiver. This provision does not apply to (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 became effective March 1, 2022, and applies to liens attached on or after that date.

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

Since 1991, G.S. 44A-35 has 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, to be 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 removes the requirement that attorneys' fees be awarded only upon a finding that the losing party unreasonably refused to fully resolve the matter and directs the court or arbitrator to 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 will be considered that party's monetary position for purposes of determining the amount in controversy.

In determining the amount of reasonable attorneys' fees and expenses, the court or arbitrator can consider all relevant facts and circumstances, including, without limitation:

- The amount in controversy and result obtained.
- The reasonableness of the time and labor expended, and the billing rates charged, by the attorneys.
- The novelty and difficulty of the questions raised in the action.
- The skill required to perform properly the legal services rendered.
- The relative economic circumstances of the parties.
- Settlement offers made prior to commencement of trial, arbitration, or hearing.
- Whether judgment finally obtained was more favorable than any offers of judgment made pursuant to Rule 68 of the North Carolina Rules of Civil Procedure.
- Whether a party unjustly exercised superior economic bargaining power in the conduct of the action or withheld payment of undisputed amounts owed.
- The timing of settlement offers.
- The extent to which the party seeking attorneys' fees prevailed in the action.
- The amount of attorneys' fees awarded in similar cases.

A party can submit evidence relating to an award of attorneys' fees by affidavit or declaration, and the arbitrator or court can admit other evidence, including live or deposition testimony, or expert testimony. Parties can submit expert testimony to support an award but must not be required to do so.

Section 4 became effective March 1, 2022, and applies 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 provides 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 does not include a wholesaler that:

1) Possesses a wine importer permit or a malt beverages importer permit; or
2) 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 became effective January 26, 2022.

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