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## LEGAL BRIEFING LEGISLATIVE REVIEW FOR 2007 SESSION

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In the first half of the current legislative session, the General Assembly enacted several Bills of interest to the construction industry. Indeed some of the Bills will effect significant changes sweeping through virtually all aspects of the construction industry, while others will have a narrower focus and application. Additionally, there were a number of bills of interest to the construction industry that were introduced in 2007 but not passed and therefore automatically carry over to the second half of this 2007-2008 session of the General Assembly. The highlights of the 2007 legislative year Georgia are set forth below:

### **SIGNIFICANT LEGISLATION ENACTED:**

1. **“General Contractor Licensing” – (SB 115)**  
**[http://www.legis.ga.gov/legis/2007\\_08/versions/sb115\\_AP\\_18.htm](http://www.legis.ga.gov/legis/2007_08/versions/sb115_AP_18.htm)**

This multi-purpose legislation was introduced in order to address several areas of concern regarding implementation of the “General Contractor Licensing” process – and it was further amended several times as it worked through the legislative process. The Bill was signed by the governor on May 30, 2007, the last possible date, and became immediately effective immediately upon signature. With ABC’s support and input, the principle aspects of this Bill are:

- **Effective Date:** The effective date of the “general contractor” (and “residential contractor”) licensing requirements was **pushed back another 6 months, from January 1, 2008 to July 1, 2008**. This was primarily to allow the licensing board to catch up with the backlog of “exam exempt” applications, complete development of the license examination, and promulgate further regulations and requirements regarding “interstate reciprocity”. This will not affect the ongoing application review process already well under way regarding submitted applications, although for those seeking exam exemption on an “interstate reciprocity” basis (i.e. license holder in another state) or simply seeking to proceed with the “non-exam exempt” application process, the processes have not yet been fully defined and established by the board.

- **“Exam Exempt” Application Window Reopened – Briefly:** Assuming that the Bill is signed by the Governor, it will effect one last extension of the deadline for submission of the exam exempt applications based upon the “grandfathering” exemption. While the current statute had closed the door for submission of such applications on January 1, 2007, this Bill will have the effect of reopening that window, albeit very briefly, to July 1, 2007. [Actually, per the Note posted at the Secretary of State’s Licensing Board for Residential and General Contractors Web Site (<http://www.sos.state.ga.us/plb/contractors/default.htm>) such “*examination exemption*”

*applications will be accepted at this time provided that they are officially postmarked by the United States Postal Service no later than July 2, 2007.”] So, for the procrastinators that got caught short at the end of last, there will be one more chance to seek avoidance of the examination requirement based upon prior experience.*

- **License Examination Status and Requirements:** Although this legislation did not directly bear upon or modify the application process or requirements for those applicants not qualifying on an “exam exempt” basis, the time frame for taking and passing the General Contractors Test administered on behalf of the Board, through the PSI, Inc. testing service, has also been extended by six months due to the extension of the effective date of the licensing requirements to July 1, 2008. PSI is also preparing and administering the license examination for the residential license process. And, the Board is now taking “GC license” applications from contractors not seeking exam exemption. The exam is currently available to applicants, but such candidates must first be pre-qualified by the Board as “eligible” to take the examination based upon the submitted license application establishing that the candidate has met all other criteria and requirements for licensing. The posting on the Board’s web site describes the process for such “Georgia Board for Residential and General Contractors Testing Process” as follows:

*“1. Candidates seeking licensure may download the examination application at [www.sos.state.ga.us/cgi-bin/plbforms.asp?board=49](http://www.sos.state.ga.us/cgi-bin/plbforms.asp?board=49)*

*2. Candidates must complete the appropriate examination application and submit it to the Board office along with a fee and supporting documents.*

*3. Board office notifies PSI of the candidates eligible for testing while also notifying individual applicants of eligibility.*

*5. Once approved for examination eligibility, the candidate will register with PSI.*

*6. Candidates may take their test at any of the three existing PSI testing locations found in Atlanta, Macon or Tifton or any other location that PSI has established in neighboring states. [Although the PSI web site (see below) indicates that the exam can be administered “on line” the Board’s published information has not yet corroborated this]*

*7. Information regarding the examination itself can be found by visiting PSI’s website at [www.psiexams.com](http://www.psiexams.com) or calling PSI at 1-800-733-9267.*

*8. [Candidate Information Bulletin](#)*

*9. Board office will notify candidates of exam results.”*

ABC is currently pursuing participation in the examination preparation process that is to be administered through PSI. The precise content and format of the examination is not currently yet available other than as described by the PSI literature, although the statute prescribes generally the subject matter to be addressed in the exam [including to “ascertain the particular applicant's ability to make a practical application of his or her knowledge of the profession of commercial general contracting; the applicant's qualifications in reading plans and specifications; his or her knowledge of building codes, estimating costs, construction, ethics, contracting, and other similar matters pertaining to the general contracting business; his or her knowledge as to the responsibilities of a general contractor to the public and to owners, subcontractors, and suppliers; and his or her knowledge of the requirements of the laws of this state relating to

*general contractors, construction, workers' compensation, insurance, surety bonding, and liens.”]*

- **“General Contractor” Definition:** The definition of a “contractor” subject to the licensing requirements was amended to expressly include “a person who installs industrialized buildings”.

- **“Specialty Contractor” Clarification:** Under the existing statute, “specialty trade” contractors are excluded from application of the general contractor licensing requirements, however the definition, intention and application of this exclusion were far from clear. In a continuing effort to clarify the line between “general contracting,” requiring licensure, and “specialty trade” contracting, not requiring licensure, this Bill struck and deleted the portion of the prior definition of “*specialty trade*” contracting which limited its application to that “*which does not entail the delegation or assignment to, or engagement of any other persons or entities, other than direct employees, to supervise, manage, or oversee the performance of any portion of the work undertaken*”. So, apparently, merely subcontracting of an otherwise appropriate “specialty trade” contracting scope will not, in itself, subject the contractor to general contractor licensing requirements. Additionally, this provision was amended by inclusion of language allowing that the “*board shall by rule or policy by January 1, 2008 identify specialty contractors or other criteria to determine eligibility under this exemption*” – better late than never. Finally, it expressly included the further clarification already applicable to the five statutorily licensed “specialty trade” contractors (i.e. electrical, plumbing, HVAC, low voltage, and utility) stating that the “*specialty contractor otherwise exempted from license requirements under this chapter may perform work for an owner which would otherwise require a license under this chapter where the total scope of the work to be performed is predominantly of the type for which such specialty contractor is duly recognized as exempt under this subpart by the board; provided that such other work involved is incidental to and an integral part of the exempt work performed by the specialty contractor and does not exceed the greater of \$10,000.00 or 25 percent of the total value at the time of contracting of the work to be performed.*”

With its newly clarified “authority described below and its mandate to clarify whether and to what extent specialty trade contractors are covered by or exempted from the GC licensing requirements, the Board has convened a subcommittee charged with this clarification – but it is premature to predict the form or substance of any such clarification of the criteria for application of this GC licensing process on various types of specialty trade contractors.

- **Board Authority:** The Bill expressly expands and clarifies the Board’s authority in several important respects, including:

- **Interpretation:** The board is authorized to “*provide interpretation and guidance regarding the implementation and application of*” board adopted policies and procedures. Further, the board is expressly directed to interpret and promulgate rules regarding definition of “specialty contractors” falling within the exclusion from the general contractor licensing requirements. These guidelines are currently under development by the Board and its staff.

- **Subcategories:** the board is expressly empowered to establish and define appropriate categories of “*general contractor licensure based upon financial criteria.*”

- **“Qualifying Agent” Clarifications:** The procedures and criteria for licenses application by a “qualifying agent” for a business organization were amended and clarified in several respects, including:

○ **Definition of “Qualifying Agent”:** to require only authority over activities “within the State of Georgia”.

○ **Exemption from Examination Requirements:** to provide that a person holding a license (or the promise of a license from the Board pending actual issuance once the license requirements become effective) as *either* an *individual* or as a *qualifying agent for a business organization* can act as a qualifying agent for another business organization without examination.

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2. **“Residential Contractor Licensing” – (HB 224)**  
[http://www.legis.ga.gov/legis/2007\\_08/versions/hb224\\_AP\\_8.htm](http://www.legis.ga.gov/legis/2007_08/versions/hb224_AP_8.htm)

This legislation has all appearances of a political favor, in that its essential purpose was to expand the number of members of the residential contractor division of the State Licensing Board for Residential and General Contractor Licensing by one additional member to a total of eight. This results in an expansion of the full board to 15 members, from the original 14 member board, with the remaining 7 members serving in the general contractor division. The new additional member is to be one of five members of that division that are residential contractors. The Bill was signed by the governor on May 29, 2007, and became immediately effective immediately upon signature.

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3. **Construction Contract “Indemnity” and “Hold Harmless” Provisions – Public Policy Limitations Reaffirmed – (HB 136)**  
[http://www.legis.ga.gov/legis/2007\\_08/sum/hb136.htm](http://www.legis.ga.gov/legis/2007_08/sum/hb136.htm)

This bill was signed into law by the governor on May 18, 2007 and becomes effective on July 1, 2007. Georgia, like over half of the other states, had enacted a statute which rendered “broad form” indemnity” and “hold harmless” clause in construction contracts void and unenforceable as a matter of public policy. Thus, Georgia Code Section 13-8-2(b), which has been on the books for over 15 years, provided that one contracting party cannot contractually require the other party to indemnify it and hold it harmless from claims arising out of the indemnified party’s “sole negligence” – the public policy being that one should not be able to contract away its liability for the consequences of its sole negligence – a perfectly sensible proposition.

However, the problem that evolved regarding application of this pronouncement was that Georgia courts had evolved a unique “common law” exception from application of this statute where a contractual duty to indemnify is coupled with a contractual obligation to insure such indemnification obligation - the judicial rationale being that such contractual provisions evidence a mutual intention to shift the risk to an insurance company and not to the other contracting party. This has proven problematic since while the insurance requirement would effectively render this “anti-broad form” indemnity statute a nullity, in many situations insurance coverage for the full scope of the contractual indemnity obligation was simply not commercially available and procurable.

This Bill was intended to close this judicial loophole in application of the existing statutory preclusion against “broad form” indemnity obligations – and to revive the original public policy purpose and effect of the basic statute. Accordingly, the amendment makes clear that any such contractual insurance obligation, whether by way of insurance coverage of the duty to indemnify or direct insurance coverage by way of an “additional insured” requirement, will not allow avoidance of the “anti-broad form” statute. Under the amended language, any effort by one contracting party to directly or indirectly, through insurance coverage, require the other party to bear the cost of defense and liability risk for claims arising out of the sole negligence of the indemnified (or additionally insured) party is again void and against public policy.

However, in recognition of industry trends and practices, the amendment exempts from operation of this status any requirements regarding workers compensation and any contractually required “project specific” insurance in which there is a clear mutual intention to shift liability to a single insurer, such as OCIP, CCIP and OCP type coverages.

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4. **Revisions to Public Procurement Law– (SB 146)**  
[http://www.legis.ga.gov/legis/2007\\_08/versions/sb146\\_AP\\_8.htm](http://www.legis.ga.gov/legis/2007_08/versions/sb146_AP_8.htm)

The governor signed this bill into law on May 30, 2007, and it will become effective on July 1, 2007. In an effort to address and remedy concerns regarding application of the Public Works Procurement law passed in 2000, and based upon industry, governmental and public interest input, this Bill sought to tighten up the existing public procurement practices to avoid or minimize abuse and manipulation of the public contracting and procurement process. Among the major aspects of this Bill are:

- Requirement for disclosure on a pre-bid and pre-proposal basis of all anticipate federal, state or local permits and easements required for the work to proceed and an indication of whether they have been obtained or an indication of the status and schedule of issuance or procurement.
- Requirement for disclosure of whether an award will be based on the “base bid” or the “base bid plus alternates” and establish a corresponding definition of “Alternate Bids” and “Base Bid”.
- Clarification of procurement advertising requirements, including internet advertisement.
- Requirement of clear advance notification of any “prequalification” requirements, limitations and procedures.
- Requirement of clear advance notice of any mandatory pre-bid or pre-proposal conferences.
- Clarification and limitation on the public owner’s right to reject all bids or proposals for any reason or to reject a particular bid or proposal only where it is “nonresponsive or not responsible”.

5. **Clarification of NPDES “Certification” of “All Persons” Requirements for Soil Erosion and Sedimentation Control– (HB 463)**  
[http://www.legis.ga.gov/legis/2007\\_08/versions/hb463\\_HB\\_463\\_AP\\_13.htm](http://www.legis.ga.gov/legis/2007_08/versions/hb463_HB_463_AP_13.htm)

The Bill was signed by the governor and immediately became effective on May 14, 2007. was in response to an EPD regulation and its application which essentially required that the NPDES certification requirements apply not only to the NPDES Permittee (the prime contractor) but also to “all persons involved in land disturbance activity on the site” (including graders; utility contractors, plumbers, electricians, etc. under contract with the prime contractor). This requirement caught many specialty trade contractors off guard, since they had not yet procured the required educational requirements and certification. This had resulted in the shut down of several projects due to the uncertified status of one or more of such “other” trade contractors. In addition to a number of technical and editorial amendments, the central thrust of this Bill was the inclusion of the following limiting language stating, in pertinent part, that:

*“(2) On or after the effective date of this subsection, for each site on which land-disturbing activity occurs, each entity or person acting as either a primary, secondary, or tertiary permittee, as defined in the state general permit, shall have as a minimum one person who is in responsible charge of erosion and sedimentation control activities on behalf of said entity or person and meets the applicable education or training certification requirements developed by the commission present on site whenever land-disturbing activities are conducted on that site. A project site shall herein be defined as any land disturbance site or multiple sites within a larger common plan of development or sale permitted by an owner or operator for compliance with the state general permit.*

*(3) Persons or entities involved in projects not requiring a state general permit but otherwise requiring certified personnel on site may contract with certified persons to meet the requirements of this chapter.*

*(4) If a state general permittee who has operational control of land-disturbing activities for a site has met the certification requirements of paragraph (1) of subsection (b) of this Code section, then any person or entity involved in land-disturbing activity at that site and operating in a subcontractor capacity for such permittee shall have until December 31, 2007, to meet those educational requirements specified in paragraph (4) of subsection (b) of Code Section 12-7-19 and shall not be required to meet any educational requirements that exceed those specified in said paragraph.*

While the “general permittee” (the prime general contractor) will still be required to meet the certification requirements under “paragraph (1)” (namely, a “fundamentals seminar (Level 1) . . . which provides sufficient training to all participants as to the applicable laws, requirements, processes, and latest means and methods recognized by this state to effectively control erosion and sedimentation”), for those operating in a “subcontractor” capacity under such a “general permittee” will only be required – after December 31, 2007, to meet the educational requirements under “paragraph (4)” (namely, an “awareness seminar (Level 1) . . . which does not exceed two hours in duration and which provides information regarding the erosion and sediment control practices and processes in the state and which will include an overview of the systems, laws, and roles of the participants.”).

Thus, while not relieving the “other persons” including all subcontractors, of the ultimate obligations to comply with educational and certification requirements, the Bill will defer such application until the end of 2007 and then reduce the level of education required, as long as there is a duly certified person employed by the prime contractor in charge of the site.

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6. **Infrastructure Development Districts – (SB 200)**  
([http://www.legis.state.ga.us/legis/2007\\_08/sum/sb200.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb200.htm))

This bill was signed by the governor on the last possible day, May 30, 2007. Continuing the trend toward increased usage of “privatization” or “public-private” partnerships in development and construction of essentially public buildings and facilities, this Bill provides an alternative approach for local governments to finance required infrastructure design, development and construction through creation of residential infrastructure development districts or “private cities.” This approach is used in many other states to transfer the cost of new infrastructure to those who are to primarily benefit from the infrastructure, rather than current citizens and taxpayers. In effect, it requires that persons and businesses electing to reside in a particular subdivision designated as a development district must agree to pay for any infrastructure developments necessitated by that subdivision by way of private assessment. These assessments will be used to fund the design, development, construction and maintenance activities for such projects and systems including water/sewer management.

The proposed constitutional amendment for this Infrastructure Development District legislation is set forth in Senate Proposal **SR 309**  
(@ [http://www.legis.state.ga.us/legis/2007\\_08/sum/sr309.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sr309.htm))

This is the companion of the SB 200 which directs the placement of the corresponding State Constitutional Amendment on the ballot in 2007 regarding implementation of SB 200. SB 200 shall become effective on January 1, 2009; provided and conditional upon ratification of a resolution at the November, 2008, state-wide general election that amends the Constitution so as to authorize the General Assembly to provide by general law for the creation and comprehensive regulation of infrastructure development districts. If such resolution is not so ratified, this Act shall not become effective and shall stand repealed in its entirety on January 1, 2009.

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7. **State Construction Projects Contractor Suspension for Delayed Performance – (HB 202)**  
([http://www.legis.state.ga.us/legis/2007\\_08/sum/hb202.htm](http://www.legis.state.ga.us/legis/2007_08/sum/hb202.htm))

This Bill, passed by the General Assembly but vetoed by the governor, would have provided that a contractor on any state public works construction project or any GDOT construction or maintenance project that “is found to be more than 25% behind in the performance” of such contract, “shall not be eligible to bid on any additional state public works projects” until the delayed project is “brought current or completed”. Such suspension, however, can only arise “based upon a final determination . . . that such delay was due to the fault of such contractor” and, further, that such determination was pursuant to the contractual and legal rights of the contractor. In this regard, the Bill provides that:

*“The determination of whether such contractor is behind in its performance and the cause of such delay shall be made in accordance with all applicable contract terms and provisions, including the requirements for determination of the contract time of performance, the contractor’s right to request a time extension, resolution of any controversy or dispute involving the time of performance, mediation, and all subsequent procedures or processes available under*

or allowed by the contract, to finally resolve any such controversy. Before such final determination is applied against a contractor, the determination may be appealed de novo to the applicable court."

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**8. Utilities Relocation By GDOT – and Liabilities Of Utilities to Affected Contractors – (SB 19)**

[http://www.legis.state.ga.us/legis/2007\\_08/sum/sb19.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb19.htm)

This Bill was signed by the governor on May 11, 2007, and will go into effect on July 1, 2007. It provides for consideration and payment by GDOT for relocation of existing utility installations necessary for the construction of its construction projects. The utilities affected must respond to GDOT within specified time frames concerning GDOT's plans to relocate the utilities. The failure of the utility to respond within these time frames subjects them to potential direct liability for costs, penalties and delay damages to any affected contractor, as stated below: *"...[T]he owner of the utility may be responsible for and liable to the department or its contractors for documented damages resulting solely from failure on the part of the utility to comply with requirements of the submitted and approved work plan under the control of the utility. If the utility owner fails to provide a work plan or fails to complete the removal, relocation, or adjustment of its facilities in accordance with the work plan approved by the department, then the utility owner may be liable to the contractor for delay costs incurred by the contractor and approved by the department which are caused by or which grow out of the failure of the utility owner to carry out and complete its work in accordance with the approved work plan or in a timely and reasonable manner if a work plan or revised work plan was not submitted. Upon notification in writing by the department or its contractors that the utility is liable for damages or delay costs, the utility company shall have 45 days from receipt of such letter to either pay the amount of the damages or delay costs to the department or its contractors or to request mediation as provided in subsection (d) of this Code section."*

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**9. Increase in Dollar Amount of Contracts GDOT Can Let Without Competitive Bidding or Bonding Requirements – (HB 192)**

[http://www.legis.ga.gov/legis/2007\\_08/versions/hb192\\_AP\\_7.htm](http://www.legis.ga.gov/legis/2007_08/versions/hb192_AP_7.htm)

This Bill signed into law by the governor and effective as of July 1, 2007, increases the threshold from \$50,000 to \$100,000 for GDOT construction contracts that can be negotiated without competitive bid or proposal and let without otherwise required performance and payment bonds

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**SIGNIFICANT LEGISLATION OF INTEREST STILL PENDING**

10. **Certificate of Insurance and Insurance Coverage – and Limitations Withholding of Payment for Non-Conformity – (HB 138)**  
([http://www.legis.ga.gov/legis/2007\\_08/versions/hb138\\_LC\\_36\\_0423\\_a\\_2.htm](http://www.legis.ga.gov/legis/2007_08/versions/hb138_LC_36_0423_a_2.htm))

This effort, initiated and driven by insurance interests, seeks to provide a process for the rejection of construction contracts when contractors, subcontractors, low tier subcontractors, or materialmen do not provide required insurance coverage or nonconforming insurance certificates and to prohibit rejection of work completed or material supplied or withholding of payment due to lack of conforming insurance following acceptance of – or failure to timely reject - a policy or certificate of insurance. While there were certain beneficial aspects of the Bill, the inability to satisfactorily address the legitimate concerns of all interested parties resulted in the Bill being left in committee at the instance of the sponsors to allow further dialog and reconciliation efforts in the recess between Sessions.

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11. **“Career Academies Act” – (SB 68)**  
([http://www.legis.state.ga.us/legis/2007\\_08/sum/sb68.htm](http://www.legis.state.ga.us/legis/2007_08/sum/sb68.htm))

The "Career Academies Act of 2007" promotes vocational training and careers, such as construction, and provides funding by the State Board of Technical and Adult Education for career academies established as charter schools.

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12. **Lien Law Amendments –**  
**SB 63 - Property; provide for definition of single-family residential real estate; exemption to certain liens**  
([http://www.legis.ga.gov/legis/2007\\_08/fulltext/sb63.htm](http://www.legis.ga.gov/legis/2007_08/fulltext/sb63.htm))  
**SB 64 - Liens; wrong real estate; provide for a special designation**  
**SB 64 - Liens; wrong real estate; provide for a special designation**  
([http://www.legis.ga.gov/legis/2007\\_08/fulltext/sb64.htm](http://www.legis.ga.gov/legis/2007_08/fulltext/sb64.htm))  
**SB 65 - Property; single family residential real estate; contract to perform work; provide requirements**  
([http://www.legis.ga.gov/legis/2007\\_08/fulltext/sb65.htm](http://www.legis.ga.gov/legis/2007_08/fulltext/sb65.htm))  
**SR 636 - Senate Comprehensive Lien Law Study Committee Resolution**  
([http://www.legis.ga.gov/legis/2007\\_08/fulltext/sr636.htm](http://www.legis.ga.gov/legis/2007_08/fulltext/sr636.htm))

These three “companion” Bills were introduced by Senator Seabaugh, but were essentially tabled for later discussion between the sessions. Even though a Senate Resolution, **SR 636**, sponsored by Senators Mitch Seabaugh and Dan Weber seeking creation of a “Senate Comprehensive Lien Law Study Committee” and a “Lien Law Advisory Committee” was not passed last session, it is still likely that these and other lien related issues will be addressed by a study committee constituted to more fully and comprehensively explore any potential areas of amendment of the existing “patch work quilt” comprising our Georgia mechanics and materialmen’s lien law. In addition to the issues raised by these Bills, among the issues likely to be addressed are (1) expedited removal of facially defective lien claims and (2) assessment of attorneys fees and damages for filing of a facially or otherwise clearly defective claim of lien. The Georgia Court of Appeals described the lien law over two decades ago - before it really became complicated - as a confusing "thicket" of conflicting requirements. See, *Adair Mortgage*

*Co. v. Allied Concrete Enterprise*, 144 Ga. App. 354, 241 S.E. 2d 267 (1977). This effort will have to be closely monitored by the construction industry to avoid even more confusion and complication.

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13. **“Career Academies Act” – (HB 611)**  
[http://www.legis.state.ga.us/legis/2007\\_08/sum/hb611.htm](http://www.legis.state.ga.us/legis/2007_08/sum/hb611.htm)

This Bill is to modify the statute regarding the State Construction Industry Licensing Board so as to provide for changes to the restrictions of “Class I” licenses for electrical contracting. It would expand the work scope permitted under the restricted Class I license to encompass electrical contracting “involving multifamily structures of not more than two levels or single family dwellings of up to three levels. In addition, the structures shall have single-phase electrical installations which do not exceed ~~200~~ 400 amperes at the service drop or the service lateral.”

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**[For more information, contact David R. Hendrick, Esq. or William D. Flatt, Esq. at Hendrick, Phillips, Salzman & Flatt, P.C., Suite 1800, 230 Peachtree Street, N.W., Atlanta, GA. 30303, (404) 522-1410, [drh@hpsf-law.com](mailto:drh@hpsf-law.com)]**

**[JUNE 2007 REVISIONS – v.6]**

