

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 1382

SPONSOR: Commerce, Economic Opportunities, and Consumer Services Committee, Regulated Industries Committee, and Senator Clary

SUBJECT: Unlicensed Contractors

DATE: April 23, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Favorable/CS</u>
2.	<u>Greenbaum</u>	<u>Roberts</u>	<u>JU</u>	<u>Favorable</u>
3.	<u>Kruse</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable/CS</u>
4.	_____	_____	<u>GO</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute provides that any general construction or electrical and alarm system contract entered into by an unlicensed contractor on or after October 1, 1990, is unenforceable by the unlicensed contractor in law or equity, defines unlicensed contractor, and provides exceptions. If a contract is unenforceable, an unlicensed contractor may not seek enforcement of a lien or bond under such unenforceable contract. The committee substitute does not affect the ability of parties in contract with unlicensed contractors to enforce their rights, does not affect any lien or bond remedies, and does not affect the obligations of a surety who has provided a bond on behalf of an unlicensed contractor.

The committee substitute places a cross-reference in the lien law to provisions that describe when a contractor is unlicensed, which will assist a party in determining if a contractor may maintain a lien against such party. The committee substitute clarifies that a general contractor may do structural pool work, but must subcontract all other types of pool work. The committee substitute adds language which makes clear that a general contractor may perform all of the same services as an underground utility contractor on public and private property. The committee substitute also adds townhouses to the areas of specialty contracting that may be performed by unlicensed persons under the supervision of a licensed contractor and provides that such supervision does not require a direct contract. Additionally, the committee substitute provides criteria for when a business organization proposing to act as a construction or electrical and alarm system contractor does not have to utilize a qualifying agent to obtain authorization to engage in contracting and also provides when a certified contractor employed by a business organization under this section is not required to post bond. The committee substitute exempts certain persons licensed under the fire prevention and control law from regulation under the

contracting law and provides an exemption from the provisions of the committee substitute to a specific case in the Circuit Court of Palm Beach County, Florida.

The committee substitute also provides for retroactive application of certain provisions and for severability of any provision found invalid.

This committee substitute substantially amends the following sections of the Florida Statutes: 489.103, 489.113, 489.117, 489.119, 489.128, 489.521, 489.532, and 713.02.

II. Present Situation:

General Construction and Electrical and Alarm System Contractors

Contractors must fulfill certain requirements to conduct business, including examination, registration, certification, and licensure. These requirements are found in ch. 489, F.S. Parts I and II of ch. 489, F.S., govern general construction contractors and electrical and alarm system contractors, respectively.

As a matter of public policy, proper licensure is required to operate as a general construction contractor or an electrical or alarm system contractor. The law discourages improper licensure through various methods. Two examples are found in s. 489.128, F.S., and s. 489.532, F.S., regarding general construction or electrical and alarm system contractors, which state that contracts entered into on or before October 1, 1990, and performed in full or in part by contractors who fail to obtain or maintain a license are unenforceable in law. Section 489.128, F.S., provides that these contracts may not be enforced in equity either, but s. 489.532, F.S., leaves it to the discretion of the court to determine if the contract should be enforced in equity.

In order for a business to begin operation as a general construction or electrical and alarm system contractor, certain requirements must be met prior to providing services. In particular, under s. 489.119(2), F.S., business organizations proposing to enter into construction contracts as a partnership, corporation, business trust, or other legal entity, or in any name other than the applicant's legal name or a fictitious name where the applicant is doing business as a sole proprietorship, must apply for a certificate of authority through a qualifying agent. A primary qualifying agent is defined in s. 489.105(4), F.S., as a person who possesses the requisite skill, knowledge, and experience, and has the responsibility, to supervise, direct, manage, and control the contracting activities of the business organization with which he or she is connected; who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the building permit; and whose technical and personal qualifications have been determined by investigation and examination. Section 489.521(2)(b), F.S., regarding electrical and alarm system contractors, requires business organizations, other than sole proprietorships, to show that the proposed qualifying agent is legally qualified to act for the business organization in all matters connected with its electrical or alarm system contracting business and that he or she has authority to supervise electrical or alarm system contracting undertaken by the business organization. Once a determination is made that the business

organization's proposed qualifying agent has qualified, the business organization is authorized to engage in the contracting business.¹

Subcontracting and Exceptions

Even after a business has received proper authorization to engage in the contracting business, a general contractor employed by a business may not complete all types of work, but must subcontract out certain types of projects. A contractor must subcontract all electrical, mechanical, plumbing, roofing, sheet metal, swimming pool, and air-conditioning work, unless the contractor holds a state certificate or registration in that respective trade category.² However, a general contractor is not required to subcontract structural swimming pool work.³ Also, a general contractor, on new site development work, site redevelopment work, mobile home parks, and commercial properties, is not required to subcontract the construction of the main sanitary sewer collection system, the storm collection system, and the water distribution system, not including the continuation of utility lines from the mains to the buildings.⁴

Exemptions

Some contractors are not subject to the regulations set forth in part I of ch. 489, F.S. Examples of exemptions include:

- Contractors who work on bridges, roads, streets, highways, or railroads, and services incidental thereto;
- Any employee of a certificateholder or registrant who is acting within the scope of the license held by that certificateholder or registrant and with the knowledge and permission of the licenseholder;
- An officer appointed by a court when he or she is acting within the scope of his or her office as defined by law or court order; and
- Any person who only furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of the contractor.⁵

Specialty Contractors

Section 489.117, F.S., provides for the registration of specialty contractors. Section 489.117(4)(e), F.S., provides that “[a]ny person who is not required to obtain registration or certification pursuant to s. 489.105(3)(d)-(o), F.S., may perform specialty contracting services for the construction, remodeling, repair, or improvement of single-family residences without obtaining a local professional license if such person is under the supervision of a certified or registered general, building, or residential contractor.”

¹ Section 489.521(3)(d), F.S.

² Section 489.113(3), F.S.

³ Section 489.113(3)(c), F.S.

⁴ Section 489.113(3)(d), F.S.

⁵ Section 489.103(1)-(2), (4), and (12), F.S.

Liens

When payment is not received for services, s. 713.02, F.S., addresses various types of lien rights available. However, s. 713.02(7), F.S., provides that no lien shall exist in favor of a contractor, subcontractor, or sub-subcontractor unless he or she is licensed within the jurisdiction in which he or she is doing business.

Retroactive Application of Law

The general rule courts follow is that, in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities, and duties is presumed to apply prospectively.⁶ The Florida Supreme Court has addressed retroactive application of statutes. The court follows an analysis with two interrelated inquiries. The first inquiry is one of statutory construction, which asks whether there is clear evidence of legislative intent to apply the statute retrospectively. If the legislation clearly expresses intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.⁷ If a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases, absent clear legislative intent favoring retroactive application. This analysis is not necessary where the language of a statute contains an express command that the statute is retroactive.⁸

When the language expressly states that it applies retroactively, the courts review a statute on the basis only of whether it is constitutionally permissible. A court must determine whether substantive or procedural rights are affected by the retroactive application of the new statute. In *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla.1994), the Supreme Court stated that “substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights.” A substantive, vested right is “an immediate right of present enjoyment, or a present, fixed right of future enjoyment.” A retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations.⁹

In 2001, a Florida court interpreted the possible retroactive application of a 2000 amendment to s. 489.128, F.S.¹⁰ In this case, a contractor brought suit after the owner terminated the contract. The Legislature amended s. 489.128, F.S., while the suit was pending by removing a provision in the statute that provided a contractor with the ability to cure his or her unlicensed status. At issue was whether s. 489.128, F.S., could be applied retroactively without the deleted provision that allowed the contractor to cure its unlicensed status. The court held that the 2000 amendment changed the contractor’s substantive rights because it removed the contractor’s previously existing right to cure. The 2000 amendment, therefore, did not operate retroactively.

⁶ *Metropolitan Dade County v. Chase Federal Housing Authority Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

⁷ *Id.* at 499.

⁸ *Id.* at 500.

⁹ *Id.* at 503.

¹⁰ *The Palms v. Magil Construction Florida, Inc.*, 785 So. 2d 597 (Fla. 3rd DCA 2001).

III. Effect of Proposed Changes:

Sections 1 and 2 of the committee substitute are almost identical, except that section 1 (amending s. 489.128, F.S.) relates to general construction contracts and section 2 (amending s. 489.532, F.S.) relates to electrical and alarm system contracts. Both sections provide that contracts entered into on or after October 1, 1990, by an unlicensed contractor are unenforceable in law or equity by the unlicensed contractor. This provision appears to modify existing law, which may not allow any party to enforce a contract with an unlicensed contractor, to allow the option to any party other than the unlicensed contractor to enforce the contract with the unlicensed contractor. Also, this change may have the practical effect of preventing, for example, a homeowner from claiming a contract is unenforceable with a general contractor because one of the subcontractors to the general contract was unlicensed.

Additionally, these sections provide that an individual is considered unlicensed if the individual does not have a license required concerning the scope of the work to be performed under the contract. A business organization is considered unlicensed if it does not have a primary or secondary qualifying agent concerning the scope of the work to be performed under the contract. These sections also provide two exceptions to what may be considered unlicensed activity:

- A business organization is not unlicensed for failure to have an occupational license certificate issued under the authority of ch. 205, F.S., or a certificate of authority as required by ss. 489.119 and 489.127, F.S. (Section 2 does not contain the references to s. 489.119, F.S., and s. 489.127, F.S.)
- A contractor is considered unlicensed only if the contractor was unlicensed on the effective date of the original contract or, if the effective date is not stated, the date the last party to the contract executed it. If the contract does not establish such a date, the contractor shall be considered unlicensed only if the contractor was unlicensed on the first date the contractor provided labor, services, or materials under the contract.

This provision allows the parties to look at a fixed point in time to determine if the person was unlicensed at that time. Current law looks to performance of the contract to determine if a person was unlicensed.

Under the language of the committee substitute, if a contract is rendered unenforceable, no lien or bond shall exist in favor of the unlicensed contractor for any labor, services, or materials provided under the contract or amendment to the contract. The language of the committee substitute provides that it does not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies. The committee substitute also states that it does not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor. Additionally, the committee substitute provides that the fact the principal or indemnitor is unlicensed under this section may not be used as a defense to any claim on a bond or indemnity agreement.

Section 3 amends s. 713.02(7), F.S., to provide that no lien shall exist in favor of any contractor, subcontractor, or sub-subcontractor who is unlicensed as provided in s. 489.128, F.S., or s. 489.532, F.S. This cross-reference provides clarification to determine when a contractor is unlicensed.

Section 4 amends s. 489.113(3), F.S., by clarifying that, although a general contractor may not be required to subcontract structural swimming pool work, all other swimming pool work must be subcontracted to an appropriately licensed, certified, or registered swimming pool contractor. This section also clarifies that a general contractor may perform the same services as an underground utility and excavation contractor on public and private property. Under current law, some confusion existed as to whether the general contractor could perform the same work as the underground utility and excavation contractor on public property.

Section 5 amends s. 489.117, F.S., to allow a person to perform specialty contracting services on a townhouse, as defined in the Florida Building Code, without obtaining a local professional license, only if that person is not required to obtain registration or certification under s. 489.105(3)(d)-(o), F.S., and only if such person is supervised by a certified or registered general, building, or residential contractor. The committee substitute states that supervision does not require the existence of a direct contract between the certified or registered general, building, or residential contractor and the person performing specialty contracting services. Current law does not reference a townhouse, as defined under the Florida Building Code, as a single-family residence.

Section 6 adds new subsection (8) to s. 489.119, F.S., to provide that a business organization that proposes to engage in contracting is not required to apply for or obtain authorization to engage in contracting if:

- The business organization employs one or more registered or certified contractors who are responsible for obtaining permits and supervising all of the business organization's contracting activities;
- The business organization only engages in contracting activities on property owned and operated by the business organization, or by its parent, subsidiary, or affiliated entities; and
- The business organization, or its parent entity, if it is a wholly owned subsidiary, maintains a minimum net worth of \$20 million.

This provision is an exception to current law which requires a business to utilize a qualifying agent to obtain a certificate of authority prior to providing services.

The committee substitute further provides that a business organization engaging in contracting as provided in this section must report to the Construction Industry Licensing Board the name and license number of each registered or certified contractor employed by it to supervise its contracting activities. The business organization is not required to post a bond or otherwise evidence any financial or credit information except as necessary to demonstrate that it has complied with the requirements to engage in contracting.

A registered or certified contractor employed by a business organization to supervise its contracting activities is not required to post a bond or otherwise evidence any personal financial or credit information so long as the individual performs contracting activities exclusively on behalf of a business organization meeting all requirements specified in the committee substitute.

Section 7 adds subsection (10) to s. 489.521, F.S., relating to electrical and alarm system contracting, to provide that a business organization proposing to engage in contracting is not required to apply for or obtain authorization to engage in contracting if certain requirements are met. The requirements in this section for business organizations that propose to engage in electrical and alarm system contracting are identical to the requirements set forth for business organizations under section 6 of the committee substitute.

Section 8 states that the sections of the committee substitute amending sections 489.128, 489.532, and 713.02, F.S., are intended to be remedial in nature and to clarify existing law. The sections of the committee substitute that amend sections 489.128, 489.532, and 713.02, F.S., are sections 1, 2, and 3. Sections 1 and 2, regarding general contractors and electrical and alarm contractors, make unenforceable contracts entered into by an unlicensed contractor on or after October 1, 1990; while section 3 amends s. 713.02(7), F.S., regarding lien rights, to add a cross-reference to sections 489.128, F.S., and 489.532, F.S., which determine when a person is unlicensed. The committee substitute provides for the retroactive application of those sections to all actions, including any action on a lien or bond claim, initiated on or after, or pending as of, the effective date of this act. The committee substitute further provides that if the retroactive application of any provision of those sections is held invalid, the invalidity shall not affect the retroactive application of other provisions in those sections amending sections 489.128, 489.532, and 713.02, F.S., or the retroactive application of that provision to other persons or circumstances.

Since the committee substitute clearly states that it is to have retroactive effect, Florida courts would review this section on the basis only of whether it was constitutionally permissible. A court would have to determine whether substantive or procedural rights are affected by the retroactive application of the new statute. In *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994), the Supreme Court stated that “substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights.” A substantive, vested right is “an immediate right of present enjoyment, or a present, fixed right of future enjoyment.”¹¹ A retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations.¹² If the committee substitute were to become law, a court might be asked to determine if substantive vested rights are affected. Some provisions of the committee substitute may trigger questions about vested rights. Section 489.532, F.S., currently gives courts the discretion to enforce in equity contracts performed by unlicensed contractors. The committee substitute removes this discretion, which has the practical effect of eliminating a possible remedy to unlicensed electrical and alarm system contractors who may be in a pending contract dispute. Additionally, the committee substitute removes an unlicensed contractor’s ability to make a claim on a bond. To the extent a court found that these provisions affected substantive vested rights, it might limit the retroactive application.

Section 9 states that notwithstanding the sections of the act providing for retroactive application of amendments to sections 489.128, 489.532, and 713.02, F.S., it is the intention of the Legislature that this act shall not apply to Case No. CA 02-5113 AB, currently pending in the

¹¹ *Romine v. Florida Birth Related Neurological Injury Compensation Assoc.*, 2003 WL 327530, 5 (Fla. 5th DCA 2003).

¹² *Metropolitan Dade County*, supra note 6, at 503.

Circuit Court in and for Palm Beach County, Florida, or any related cause of action arising out of this case, or the underlying facts of this case, now or in the future.

Section 10 provides an exemption from the provisions of ch. 489, F.S., to any person licensed under s. 633.061(1)(d), F.S., when performing work authorized by such license. Section 633.061, F.S., governs licenses for installing or maintaining fire suppression equipment, and Class D licenses under paragraph (1)(d) relate to those who service, repair, recharge, hydrotest, install, or inspect all types of preengineered fire extinguishing systems.

Section 11 provides that if any provision of this act is held invalid, the invalidity shall not affect the application of any other provision in this act which can be given effect without the invalid provision or application and provides for severability of this act from an invalid section.

Section 12 provides that this act will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

See “Retroactive Application of Law” discussion in “Present Situation” above and in Section 8 of the “Effect of Proposed Changes.”

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

An unlicensed contractor may not be able to enforce a contract, but a party to the contract with the unlicensed contractor may be able to enforce the contract. A party to a contract with an unlicensed contractor whose contract is also linked to other contracts may not be able to claim that all of the related contracts are unenforceable because of the possible unenforceability of the contract with the unlicensed contractor. Contractors may have a clearer understanding of what the term “unlicensed” means and will know at what point in time in the contracting process their license must be in place to avoid being considered

unlicensed. Also, companies that meet the committee substitute's criteria will not have to utilize a qualifying agent to conduct business if a company is performing work on its own property.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
