

# 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/SB 1382

SPONSOR: Committee on Regulated Industries and Senator Clary

SUBJECT: Unlicensed contractors.

DATE: March 21, 2003

REVISED: \_\_\_\_\_

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

## I. Summary:

The committee substitute amends ss. 489.128 and 489.532, F.S., to make unenforceable in law or equity contracts that are entered into on or after October 1, 1990, by a contractor who fails to obtain or maintain a license under parts I and II of ch. 489, F.S. It defines when a person or business organization is unlicensed for purposes of this section.

The committee substitute provides for the affect of a contract rendered unenforceable under the bill on the lien, or bond remedies of parties. The committee substitute amends the provisions in s. 489.117, F.S., relating to specialty contractor services by persons not required to register or certify under s. 489.105(3)(d)-(o), F.S.

The committee substitute amends the provisions in ch. 489.119, F.S., to provide conditions, including bond and disclosure requirements, for business organizations proposing to engage in contracting without applying for a certificate of authority through a qualifying agent.

The committee substitute provides for the retroactive application of sections 1, 2, 3, and 4, and further provides for the affect of invalidity. The committee substitute would take affect upon becoming a law.

This bill substantially amends the following sections of the Florida Statutes: 489.117, 489.119, 489.128, 489.521, 489.532, 713.02, and 713.06.

## II. Present Situation:

Section 489.128, F.S., is in Part I of ch. 489, F.S., which relates to construction contractors. The current s. 489.128, F.S., provides that as a matter of public policy a contract entered into and

performed by a contractor who fails to obtain or maintain a license in accordance with Part I of ch. 489, F.S., is unenforceable in law or in equity.

Section 713.02, F.S., addresses the lien rights of persons not in privity of contract. Section 713.02(7), F.S., provides that no lien shall exist against a contractor, subcontractor, or sub-subcontractor unless he or she is licensed within the jurisdiction in which he or she is doing business.

Section 489.532, F.S., is in Part II of ch. 489, F.S., which relates to electrical and system alarm contractors. The current s. 489.532, F.S., provides that as a matter of public policy that a contract entered into and performed by a contractor who fails to obtain or maintain a license in accordance with Part II of ch. 489, F.S., is unenforceable in law. The current s. 489.532, F.S., authorizes the court to extend the prohibition to equitable remedies.

As required by s. 489.119, F.S.:

If the applicant proposes to engage in contracting as a business organization, including any 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, the business organization must apply for a certificate of authority through a qualifying agent and under the fictitious name, if any.

Chapter 489, F.S., regulates several contractor specialties, including electrical and system alarm contractors, general contractors, sheet metal contractors, and roofing contractors. Chapter 489, F.S., provides specific requirements for each specialty contractor, including examination, registration, certification, or licensure.

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.

Sections 489.105(3)(d)-(o), F.S., define the following specialty contractors: sheet metal contractor, roofing contractor, class A air-conditioning contractor, class B air-conditioning contractor, class C air-conditioning contractor, mechanical contractor, commercial pool/spa contractor, residential pool/spa contractor, swimming pool/spa servicing contractor, plumbing contractor, underground utility and excavation contractor, and solar contractor.

Section 489.127, F.S., prohibits any person from engaging in the business of a contractor, from advertising, and from falsely holding himself or herself out as a licensed, registered, or certified contractor.

Section 489.128, F.S., was amended in s. 35, ch. 2000-372, L.O.F., to read in its current form by deleting the following sentence: “However, in the event the contractor obtains or reinstates his license, the provisions of this section shall no longer apply.”

In *The Palms v. Magil Construction Florida, Inc.*, 785 So.2d 597 (Fla. 3<sup>rd</sup> DCA 2001), the court considered the retroactive application of the 2000 amendment to s. 489.128, F.S. In *The Palms*, the contractor brought suit after the owner terminated the contract. The Legislature amended s. 489.128, F.S., while the suit was pending. 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.

### III. Effect of Proposed Changes:

**Section 1** amends s. 489.128, F.S., to make unenforceable in law or equity contracts that are entered into on or after October 1, 1990. The bill provides that an individual is unlicensed if the individual fails to obtain or maintain a license required under part I of ch. 489, F.S. which relates to construction contractors.

The committee substitute contains the following additional provisions:

- A business organization is unlicensed if it fails to obtain or maintain a primary or secondary qualifying agent in accordance with part I of ch. 489, F.S.
- Failure to have an occupational license certificate issued under the authority of ch. 205, or a certificate of authority as required by ss. 489.119 and 489.127, F.S., shall not render a business organization unlicensed.
- A contractor shall only be considered unlicensed if he or she was unlicensed on the date of the original contract. If the contract does not establish that date the contractor shall be considered unlicensed if he was unlicensed on the first date the contractor provided labor, services, or materials under the contract.
- If a contract is rendered unenforceable under this section no lien or bond shall exist in favor of the unlicensed contractor. It provides that this section shall only affect the rights of the unlicensed contractor, and shall not affect the obligations of a surety.
- The section does not affect the rights of parties other than the unlicensed contractor to enforce the contract, lien, or bond remedies.
- The fact that the principal or indemnitor is unlicensed under this section shall not be used as a defense to any claim on a bond or indemnity agreement.

**Section 2** amends s. 489.532, F.S., to make unenforceable in law or equity contracts that are entered into on or after October 1, 1990. The bill provides that an individual is unlicensed if the

individual fails to obtain or maintain a license required under part II of ch. 489, F.S. which relates to electrical and system alarm contractors.

The committee substitute contains the following additional provisions:

- A business organization is unlicensed if it fails to obtain or maintain a primary or secondary qualifying agent in accordance with part II of ch. 489, F.S.
- Failure to have an occupational license certificate issued under the authority of ch. 205, F.S., shall not render a business organization unlicensed. This section does not provide the exception contained in section 1 for failure to have a certificate of authority as required by ss. 489.119 and 489.127, F.S.
- A contractor shall only be considered unlicensed if he or she was unlicensed on the date of the original contract. If the contract does not establish that date the contractor shall be considered unlicensed if he was unlicensed on the first date the contractor provided labor, services, or materials under the contract.
- If a contract is rendered unenforceable under this section no lien or bond shall exist in favor of the unlicensed contractor. It provides that this section shall only affect the rights of the unlicensed contractor, and shall not affect the obligations of a surety.
- The section does not affect the rights of parties other than the unlicensed contractor to enforce the contract, lien, or bond remedies.
- The fact that the principal or indemnitor is unlicensed under this section shall not be used as a defense to any claim on a bond or indemnity agreement.

**Section 3** repeals s. 713.02(7), F.S., which provides that no lien shall exist against a contractor, subcontractor, or sub-subcontractor unless he or she is licensed within the jurisdiction in which he or she is doing business.

**Section 4** amends s. 713.06, F.S., eliminates the lien rights to *real property* of a materialman or laborer not in privity with the owner, subcontractor, or sub-subcontractor, who complies with part I of ch. 713, F.S., for the labor, services, or materials furnished to *improve the real property* in accordance with his or her contract. The bill eliminates the lien rights as regards the labor, services, or materials furnished in accordance with the direct contract.

The bill eliminates the lien rights to the *owner's real property* of a materialman or laborer not in privity with the owner, subcontractor, or sub-subcontractor, who complies with part I of ch. 713, F.S., for the labor, services, or materials furnished to *improve public property* in accordance with his or her contract. The bill eliminates the lien rights as regards the labor, services, or materials furnished in accordance with the direct contract.

Only those persons specified under this section may have the lien.

**Section 5** amends s. 489.117, F.S., to provide that a person who is not required to register or certify under s. 489.105(3)(d)-(o), may perform specialty contracting services on a townhouse as defined in the Florida Building Code without obtaining a local professional license if such person is supervised by certified or registered general building, or residential contractor. Current law does not reference a town house, as defined under the Florida Building Code, as a single-family residence. The bill also includes persons who are under the direct or indirect supervision of a certified or registered general building, or residential contractor as persons who can provide the required supervision.

**Section 6** amends s. 489.119, F.S., to provide that a business organization proposing to engage in contracting is not required to apply for a certificate of authority through a qualifying agent if it satisfies each of the following conditions:

- The business organization must employ 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 can only engage in contracting activities on property owned and operated by the business organization, or by its parent, subsidiary, or affiliated entities.
- The business entity, or its parent entity, if it is a wholly owned subsidiary, must maintain a minimum net worth of \$20 million dollars. A business organization is not required to post a bond.

The provisions of section 6 relate to business organizations proposing to engage in contracting construction contracting under part I of ch. 489, F.S.

The bill provides that a business organization engaging in contracting without a certificate of authority as provided in this section must report to the Board the name and license number of each registered or certified contractor employed by it to supervise its contracting activities.

**Section 7** amends s. 489.521, F.S., to provide that a business organization proposing to engage in contracting is not required to apply for a certificate of authority through a qualifying agent. The provisions of section 7 relate to business organizations proposing to engage in electrical and alarm system contracting under part II of ch. 489, F.S. The requirements for business organizations that propose to engaged in electrical and alarm system contracting under part II of ch. 489, F.S., are substantially the same as the requirements set forth for business organizations under section 6 of the bill.

**Section 8** provides for the retroactive application of sections 1, 2, 3, and 4. The bill further provides that if the retroactive application of any such section is held invalid, the invalidity shall not affect the retroactive application of the other sections.

In *Romine v. Florida Birth Related Neurological Injury Compensation Association*, 2003 WL 327530 (Fla. 5<sup>th</sup> DCA 2003), the Fifth District recently set forth the rule regarding the retroactive application of amendments to statutes. As discussed by the *Romine* court, two issues arise when

determining whether an amendment to a statute may be retroactively applied. The first issue is whether to apply as a matter of statutory construction the legal presumption that statutes, in the absence of clear legislative intent, should apply prospectively. The second issue is whether retroactive application is constitutionally permissible if the legislature has clearly expressed an intent that the statute applies retrospectively.

Section 489.128(2), F.S., provides for retroactive application of the section, but as stated in *Romine*:

Courts will not permit the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties, even when the Legislature expressly states that a statute is to have retroactive application.

The retroactive application of a previous amendment to s. 489.128, F.S., was rejected in *The Palms v. Magil Construction Florida, Inc.*, 785 So. 597 (Fla. 3<sup>rd</sup> DCA 2001), because the amendment changed the contractor's substantive rights by removing the contractor's previously existing right-to-cure its unlicensed status.

The bill may change existing substantive rights of parties. As regards to contracts with persons who have failed to obtain or maintain licensure under Part II of chapter 489, F.S., the bill eliminates the right to enforce contracts in equity, and the grant of discretion to the court to extend the enforcement prohibition to equitable remedies.

The bill may also change substantive rights by providing that if a contract is rendered unenforceable under this section no lien or bond shall exist in favor of the unlicensed contractor. Substantive rights may also be changed by the provision that a business organization is unlicensed if it fails to obtain or maintain a primary or secondary qualifying agent in accordance with ch. 489, F.S.

**Section 9** 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.

**Section 10** 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.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may affect the contract, lien, or bond remedies of parties to a construction contract in which the contractor has failed to obtain or maintain licensure under ch. 489, F.S.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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

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