

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Community Affairs Committee

BILL: CS/SB 674 & 1422

INTRODUCER: Regulated Industries Committee and Senators Constantine and Baker

SUBJECT: Construction Contract

DATE: April 9, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Rhea	RI	Fav/CS
2.	Wolfgang	Yeatman	CA	Favorable
3.			JU	
4.			BI	
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
 B. AMENDMENTS..... Technical amendments were recommended
 Amendments were recommended
 Significant amendments were recommended

I. Summary:

The committee substitute (CS) requires owners of property acting as their own contractor and providing direct, onsite supervision of all work not performed by licensed contractors to read and sign a disclosure statement before a permit is issued by the local permitting agency. The CS specifies what statements are to be included in the disclosure statement.

The CS prescribes conditions under which certain individuals will be insulated from being deemed unlicensed under the construction contracting law and the electrical/alarm system contracting law. Specifically, the CS provides that an individual shall not be considered unlicensed if the scope of work to be performed under the contract does not require a state license.

This CS amends sections 489.103, 489.128, and 489.532, Florida Statutes.

II. Present Situation:

Overview

The Department of Business and Professional Regulation (department) provides support functions to the Construction Industry Licensing Board (CILB), including processing of licensure applications, investigation of disciplinary cases, and prosecution of disciplinary matters. Licensure and regulation of construction contractors is governed by part I of ch. 489, F.S. The CILB is responsible for licensing and regulating state construction contractors.

The department provides support functions to the Electrical Contractor's Licensing Board (ECILB), similar to the functions listed above. Licensure and regulation of electrical contractors is governed by part II of ch. 489, F.S. The ECILB is responsible for licensing and regulating state electrical contractors.

CILB Licensure

Contractors either must be certified, i.e., licensed by the state to contract statewide, or registered, i.e., licensed by a local jurisdiction and registered by the state to contract work within the geographic confines of the local jurisdiction only.

Section 489.105(3)(a)-(c), F.S., requires licensure for general contractors, building contractors, and residential contractors. Section 489.105(3)(d)-(o), F.S., requires licensure for persons who perform the following categories of construction: sheet metal, roofing, air-conditioning, mechanical, swimming pool/spa, plumbing, underground utility and excavation, and solar contracting.

Section 489.105(3), F.S., defines the term "contractor" to mean the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others.

Section 489.116, F.S., prohibits a licensee from engaging in contracting unless the status of his or her license is "active." The statute provides that a contractor may not bid or offer to perform construction services without being licensed. If a licensee fails to renew his or her license, it becomes delinquent. A delinquent status licensee must apply with the Department of Business and Professional Regulation for active status in order to engage in contracting.

Section 489.117, F.S., provides that a contractor either must be registered or certified before commencing business as a contractor.

Counties and municipalities also may issue local professional licenses for certain specialty services that are not specifically defined in s. 489.105(3), F.S. These local licenses for specialty

services do not require state registration or certification. Each county and municipality may require different local professional licenses.¹

Section 489.119(2), F.S., provides that an applicant who 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, must be the "qualifying agent" for the business organization. The name of the business organization must appear on the contractor's license, and the business organization must obtain from the board a certificate of authority, which is also known by the department as a "qualified business license."

The "scope of work" for which licensure is required is specified in statute by definition. Each definition of the various professions is known as the "practice act" for that profession and establishes the guidelines for the individual practitioners.

ECILB Licensure

To engage in electrical or alarm system contracting on a statewide basis, a person must establish his or her competency and qualifications to be certified under part II of ch. 489, F.S. To establish competency, a person shall pass the appropriate exam administered by the department. A person who wants to engage in such contracting on other than a statewide basis shall be registered. A person who is not certified or registered shall not engage in the business of contracting in Florida.²

CILB Licensure Exemptions

Section 489.103, F.S., provides for certain licensure exemptions. Section 489.103(7), F.S., exempts property owners when acting as their own contractor and providing direct, on-site supervision of all work performed not by licensed contractors, when building or improving farm outbuildings or one-family or two-family residences for the owner's occupancy and use, or improving commercial buildings for the owner's occupancy or use, provided the property is not offered for sale or lease. The work performed on commercial buildings may not exceed \$75,000.

Section 489.103(7)(b), F.S., exempts from licensure property owners who repair or replace wood shakes or asphalt or fiberglass shingles on one-family, two-family, or three-family residences for the occupancy or use of the owner or owner's tenant and not offered for sale within one year when the property has been damaged by natural causes from an event recognized as an emergency situation designated by executive order issued by the Governor declaring the existence of a state of emergency as a result and consequence of a serious threat posed to the public health, safety, and property in this state.

To qualify for an exemption, the property owner must personally appear and sign the building permit application and must satisfy local permitting agency requirements, if any, proving that the

¹ See, s. 26-91, *Pinellas County Municipal Code*, which requires local licenses for tile and marble installation, irrigation systems, veneer installation, carpentry, and painting.

² Section 489.516(1) and (2), F.S.

owner has a complete understanding of their obligations. The local permitting agency must provide the person applying for an owner-builder permit with a disclosure statement in substantially the following form:

State law requires construction to be done by licensed contractors. You have applied for a permit under an exemption to that law. The exemption allows you, as the owner of your property, to act as your own contractor with certain restrictions even though you do not have a license. You must provide direct, onsite supervision of the construction yourself. You may build or improve a one-family or two-family residence or a farm outbuilding. You may also build or improve a commercial building, provided your costs do not exceed \$75,000. The building or residence must be for your own use or occupancy. It may not be built or substantially improved for sale or lease. If you sell or lease a building you have built or substantially improved yourself within 1 year after the construction is complete, the law will presume that you built or substantially improved it for sale or lease, which is a violation of this exemption. You may not hire an unlicensed person to act as your contractor or to supervise people working on your building. It is your responsibility to make sure that people employed by you have licenses required by state law and by county or municipal licensing ordinances. You may not delegate the responsibility for supervising work to a licensed contractor who is not licensed to perform the work being done. Any person working on your building who is not licensed must work under your direct supervision and must be employed by you, which means that you must deduct F.I.C.A. and withholding tax and provide workers' compensation for that employee, all as prescribed by law. Your construction must comply with all applicable laws, ordinances, building codes, and zoning regulations.³

Unlicensed Contracting Unenforceable

Under existing statutory provisions, ss. 489.128(1) and 489.532(1), F.S., as a matter of public policy, contracts entered into on or after October 1, 1990, by unlicensed construction contractors are unenforceable in law or in equity by the unlicensed contractor.⁴

Section 489.128(1)(a), F.S., provides that contracts entered into by unlicensed contractors are unenforceable in law or equity by the unlicensed contractor. The statute provides that a business organization is unlicensed if it does not have a primary or secondary qualifying agent in accordance with this section concerning the scope of the work to be performed under the contract. The statute also provides that if no state or local license is required for the scope of work to be performed under the contract, the individual shall not be considered unlicensed.

Section 489.128(1)(b), F.S., provides that an individual or business organization shall not be considered unlicensed for failing to have a business tax receipt issued under the authority of

³ Section 489.103, F.S.

⁴ *Boatwright Const., LLC v. Tarr*, 958 So. 2d 1071 (Fla. 5th DCA 2007); *Full Circle Dairy, LLC v. McKinney*, 467 F.Supp 2d1343 (MD Fla. 2006), finding that the statute prohibiting unlicensed contractors from seeking relief did not violate the Florida Constitution's access to courts provision because of the Legislature's overriding necessity to regulate the construction industry.

ch. 205, F.S. A business organization shall not be considered unlicensed for failing to have a certificate of authority as required by ss. 489.119 and 489.127, F.S.

Section 489.128(1)(c), F.S., provides that a contractor shall be considered unlicensed only if the contractor was unlicensed on the effective date of the original contract for the work, if stated in the contract, or, if not stated, the date the last party to the contract executed it, if that is stated in the contract. 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 upon which the contractor provided labor, services, or materials under the contract.

Section 489.532(1)(a), F.S., provides that contracts entered into by unlicensed contractors are unenforceable in law or equity by the unlicensed contractor. The statute provides that a business organization is unlicensed if it does not have a primary or secondary qualifying agent in accordance with this section concerning the scope of the work to be performed under the contract. The statute also provides that if no state or local license is required for the scope of work to be performed under the contract, the individual shall not be considered unlicensed.

Section 489.532(1)(b), F.S., provides that an individual or business organization shall not be considered unlicensed for failing to have a business tax receipt under the authority of ch. 205, F.S.

Section 489.532(1)(c), F.S., provides that a contractor shall be considered unlicensed only if the contractor was unlicensed on the effective date of the original contract for the work, if stated in the contract, or, if not stated, the date the last party to the contract executed it, if that is stated in the contract. 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 upon which the contractor provided labor, services, or materials under the contract.

III. Effect of Proposed Changes:

Owner-Builder Disclosure Statement

The CS amends the language in s. 489.103(7)(b), F.S., to clarify the language that creates an exception for a home owner acting as a contractor in a declared emergency.

The CS requires owners of property acting as their own contractor and providing direct, onsite supervision of all work not performed by licensed contractors to read and sign a disclosure statement before a permit is issued by the local permitting agency. The CS amends the disclosure statement and provides a new statement that lists 12 paragraphs of clauses all stated in the first person. The CS requires that the disclosure statement be signed and dated by the property owner.

The disclosure statement contains the same provisions as in the current disclosure statement; however, the CS adds the following provisions:

- I understand that building permits are not required to be signed by a property owner unless the owner is responsible for the construction and is not hiring a licensed contractor to assume this responsibility.

- I understand that as an owner-builder, I am the responsible party of record on the permit. I understand that I may protect myself from potential financial risk by hiring a licensed contractor and having the permit filed in his or her name instead of my own. I also understand that contractors are required by law to be licensed in Florida and to list their license numbers on permits and contracts.
- I understand that a frequent practice of unlicensed persons is to have the property owner obtain an owner-building permit that erroneously implies that the property owner is providing his or her own labor and materials. I, as an owner-builder, may be held liable and subject to serious financial risk for any injuries sustained by an unlicensed person and his or her employees while working on my property. My homeowner's insurance may not provide coverage for those injuries. I am willfully acting as an owner-builder and am aware of the limits of my insurance coverage for injuries to workers on my property.
- I understand that I may obtain more information regarding my obligations as an employer from the Internal Revenue Service, the United States Small Business Administration, the Florida Department of Financial Services, and the Florida Department of Revenue. I also understand that I may contact the Florida Construction Industry Licensing Board (CILB) at 850-487-1395 or www.myflorida.com/dbpr/pro/cilb/index.html for more information about licensed contractors.
- I am aware of and consent to an owner-builder building permit applied for in my name, and understand that I am the party legally and financially responsible for proposed construction activity at the following address: (address of location of construction activity).
- I agree to notify the issuer of this form immediately of any additions, deletions, or changes to any of the information I have provided on this form.

The CS provides that licensed contractors are regulated by laws designed to protect the public. The CS provides that if a person hires an unlicensed person, the state may not be able to assist with any financial loss sustained and that the person's only remedy may be in civil court.

Unlicensed Contractors

The CS provides that for the purposes of ss. 489.128 and 489.532, F.S., if no state license is required for the scope of work to be performed under the contract, the individual performing that work shall not be considered unlicensed. The CS removes the requirement to have a state or local license in order for the individual to enforce the contract in law or in equity.

Effective Date

The CS provides that the amendments made to ss. 489.128 and 489.532, F.S., apply retroactively to contracts entered into on or after October 1, 2000, and apply to all actions that are pending on or are filed on or after the effective date of this act.

The CS provides that this act shall 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:

This CS has retroactive application to all contracts entered into on or after October 1, 2000, and to all actions that are pending on or are filed on or after the effective date of this act.

Retroactive application of a law is constitutionally permissible if there is clear evidence that the Legislature intended to apply the statute retroactively. Retroactive application of a civil statute ordinarily transgresses constitutional limitations on legislative power if vested rights are impaired, new obligations are created, or new penalties are imposed. *R.A.M. of South Florida, Inc., v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla. 2d DCA 2004).

With regard to causes of action, the court in *R.A.M. of South Florida* stated that:

[u]nder the case law, once a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right. When a cause of action has accrued, a statute that becomes effective subsequently may not be applied to eliminate or curtail the cause of action.⁵

Section 10, Art. I, Fla. Const., provides in relevant part that “[n]o ... law impairing the obligation of contracts shall be passed.” This provision empowers the courts to strike laws that retroactively burden or alter contractual relations. Article I, s. 10 of the United States Constitution provides in relevant part that “[n]o state shall ... pass any . . . law impairing the obligation of contracts.”

In *Pompano v. Coleridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979), the court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The court set forth several factors in balancing whether the state law has in fact operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court stated that, if there is minimal alteration of contractual obligations, the inquiry can end at its first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the

⁵ *R.A.M. of South Florida, Inc., v. WCI Communities, Inc.*, 869 So. 2d 1210, 1220 (Fla. 2d DCA 2004).

state legislation. The factors to be considered are:

- Whether the law was enacted to deal with a broad, generalized economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive.⁶

The court in *United States Fidelity & Guaranty Co. v. Department of Insurance*, 453 So. 2d 1355 (Fla. 1984), also adopted the method used in *Pompano*. The court stated that the method required a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power.

Adopting the method of analysis used by the U.S. Supreme Court, the court outlined the main factors to be considered in applying this balancing test.

- The threshold inquiry is “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.”⁷ The severity of the impairment increases the level of scrutiny.
- In determining the extent of the impairment, the court considered whether the industry the complaining party entered has been regulated in the past. This is a consideration because if the party was already subject to regulation at the time the contract was entered, then it is understood that it would be subject to further legislation upon the same topic.⁸
- If the state regulation constitutes a substantial impairment, the state needs a significant and legitimate public purpose behind the regulation.⁹
- Once the legitimate public purpose is identified, the next inquiry is whether the adjustment of the rights and responsibilities of the contracting parties are appropriate to the public purpose justifying the legislation.¹⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

⁶ *Pompano*, 378 So. 2d at 779.

⁷ *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spanners*, 438 U.S. 234, 244 (1978)).

⁸ *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).

⁹ *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (citing *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)).

¹⁰ *Id.*

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on April 1, 2009:

The committee substitute (CS) differs from SB 674 and SB 1422 in the following ways:

- The CS removes the provision in SB 674 that provides that a business organization shall not be considered unlicensed for failing to have a license required by a local jurisdiction.
- The CS provides that an individual shall not be unlicensed if the scope of the work to be performed under the contract does not require a state license. This provision applies to both ss. 489.128 and 489.532, F.S.
- The CS combines the rest of the provisions from both bills into a combined CS.

B. Amendments:

None.