

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1277 Construction Contracts
SPONSOR(S): Kottkamp
TIED BILLS: **IDEN./SIM. BILLS:** SB 1382

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Business Regulation</u>	_____	<u>Livingston</u>	<u>Liepshutz</u>
2) <u>Judiciary</u>	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The regulation of construction contracting is governed by part I of ch. 489, F.S., and is administered by the Construction Industry Licensing Board within the Department of Business and Professional Regulation (DBPR). The regulation of electrical contracting is governed by part II of ch. 489, F.S., and is administered by the Electrical Contractors' Licensing Board within the DBPR.

This bill provides that construction and electrical contracts entered into on or after October 1, 1990, and performed by an individual contractor who fails to obtain licensure under ch. 489, F.S., or by a business organization contractor that fails to obtain or maintain a registered or certified qualifying agent as provided in ch. 489, F.S., are unenforceable. It clarifies that unlicensed contractors do not include business organizations that have obtained or maintain the services of a primary or secondary qualifying agent. The bill provides that any business organization contractor that fails to obtain a qualifying business license or certificate of authority is not an unlicensed contractor for purposes of ss. 489.128, F.S., and 489.532, F.S. The bill provides that unlicensed contracts are only unenforceable on the part of the unlicensed contractor. The bill also amends ss. 489.128, F.S., and 489.532, F.S., to provide that that these sections do not apply to any licensing requirements beyond those set forth in ch. 489, F.S.

The bill also provides that an occupational license issued under ch. 205, F.S., is not a license for purposes of ss. 489.128, F.S., 489.532, F.S., or 255.05, F.S., relating to bonds of contractors constructing public buildings. The bill provides that it does not affect the rights of any party other than the unlicensed contractor to enforce contract, lien, or bond remedies. The bill does not affect the obligations of a surety who has provided a bond on behalf of an unlicensed contractor. The bill also provides that it is not a defense to a claim on a bond or indemnity agreement that the principle on the bond or its indemnitor is an unlicensed contractor.

The bill amends s. 713.02(7), F.S., to clarify that lien rights exist in favor of any lienor whose primary or secondary qualifier is licensed under ch. 489, F.S., and makes conforming changes.

The bill is not anticipated to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Present Situation

The regulation of construction contracting is governed by part I of ch. 489, F.S., and is administered by the Construction Industry Licensing Board within the DBPR. Contractors are divided into Division I and II categories. Division I contractors include general, building, and residential contractors. Division II contractors are those contractors typically referred to as "subcontractors" that include professions such as roofing, plumbing, air-conditioning, and pool contracting. The regulation of electrical contracting is governed by part II of ch. 489, F.S., and is administered by the Electrical Contractors' Licensing Board within the DBPR.

Both parts I and II of ch. 489, F.S., require the registration or certification of contractors. Certified contractors are authorized to engage in contracting on a statewide basis, whereas registered contractors are limited to contracting within those counties in which they meet local, building department competency requirements. Section 489.119, F.S., provides that when an individual engages in contracting in the individual's own name or a fictitious name where the individual is doing business as a sole proprietorship, registration or certification may be issued only to that individual. However, if the applicant proposes to engage in contracting in any other type of business organization, such as a corporation or partnership, the business organization must apply for a certificate of authority through a licensed contractor acting as the organization's qualifying agent. The DBPR issues qualified business (QB) licenses in lieu of certificates of authority.

Section 489.521, F.S., provides for licensure of electrical contractors in either an individual or qualifying capacity. However, when qualifying a business organization, licensure is issued in the name of the qualifying agent, with the name of the organization noted on the license. The business organization is not required to have a certificate of authority.

Section 489.128, F.S., provides that contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain a license as required by part I of ch. 489, F.S., shall be unenforceable in law or in equity. Section 489.532, F.S., sets forth an identical provision pertaining to electrical contractors. However, s. 489.128, F.S., contained a forgiveness provision until July of 2000, which permitted a construction contractor to cure the enforceability of the contract by becoming properly licensed.

Following the repeal of the forgiveness policy, court cases have arisen wherein parties have successfully defeated lien and/or contractual rights to payment. In some cases the consumer challenged the payment rights of contractors who did not obtain a QB license. In other cases, payment challenges were made to subcontractors and suppliers who provided services and materials to

contractors who did not have a QB license. Furthermore, challenges were made to the prime contractors' rights to payment where subcontractors did not obtain QB licenses.

Unlicensed contracting is prohibited by s. 489.127, F.S. and s. 455.228, F.S.

Effect of Proposed Changes

The bill amends ss. 489.128 and 489.532, F.S., to provide that contracts entered into on or after October 1, 1990, and performed by an individual contractor who fails to obtain licensure under ch. 489, F.S., or by a business organization contractor that fails to obtain or maintain a registered or certified qualifying agent as provided in ch. 489, F.S., are unenforceable. Unlicensed contractors do not include business organizations that have obtained or maintain the services of a primary or secondary qualifying agent. The bill provides that any business organization contractor that fails to obtain a qualifying business license or certificate of authority is not an unlicensed contractor for purposes of ss. 489.128 and 489.532, F.S. The bill provides that said unlicensed contracts are only unenforceable on the part of the unlicensed contractor. The bill also amends ss. 489.128 and 489.532, F.S., to provide that those sections do not apply to any licensing requirements beyond those set forth in ch. 489, F.S.

The bill also provides that an occupational license issued under ch. 205, F.S., is not a license for purposes of ss. 489.128 and 489.532, F.S. The bill provides that it does not affect the rights of any party other than the unlicensed contractor to enforce contract, lien, or bond remedies. The bill does not affect the obligations of a surety who has provided a bond on behalf of an unlicensed contractor. The bill also provides that it is not a defense to any claim on a bond or indemnity agreement that the principle on the bond or its indemnitor is an unlicensed contractor.

The bill creates subparagraph 3 of s. 255.05(2)(a), F.S., to provide that bond claims do not exist in favor of unlicensed contractors, subcontractors, and sub-subcontractors. The bill does not affect the contract or bond claim rights of any party other than the unlicensed contractor, nor does it affect the obligations of a surety who has provided a bond on behalf of an unlicensed contractor. The bill amends s. 255.05(2)(a), F.S., to provide that an occupational license is not a license for purposes of subparagraph 3.

The bill amends s. 713.02(7), F.S., to clarify that lien rights exist in favor of any lienor whose primary or secondary qualifier is licensed under ch. 489, F.S., and makes conforming changes.

The bill clarifies that it is remedial in nature, is meant to clarify existing law, and applies retroactively.

Finally, the bill provides that if any part is held invalid, it does not affect the validity of any other part.

C. SECTION DIRECTORY:

Section 1. Amends s. 255.05, F.S., to address bond claims.

Section 2. Amends s. 489.128, F.S., to clarify that certain construction contracts are unenforceable

Section 3. Amends s. 489.531, F.S., to clarify that certain electrical contracts are unenforceable.

Section 4. Amends 713.02, F.S., to clarify certain lien rights.

Section 5. States that sections 2, 3, and 4 of the bill are remedial in nature and intended to clarify existing law. Section 2 and section 3 apply retroactively to all contracts entered into on or after October 1, 1990. Section 4 applies retroactively to all actions initiated on or after, and to all actions pending as of the effective date of the act.

Section 6. Provides for severability.

Section 7. Effective date - Upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

NA

2. Expenditures:

NA

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

NA

2. Expenditures:

NA

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Unknown. The bill is designed to be clarifying.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None noted.

B. RULE-MAKING AUTHORITY:

NA

C. DRAFTING ISSUES OR OTHER COMMENTS:

The DBPR points out that section 3 of the bill provides, in part, that business organizations that do not obtain qualifying business licenses or certificates of authority shall not be considered unlicensed. However, part II of ch. 489, F.S., does not provide for qualifying business licenses or certificates of authority.

The bill provides for retroactive application that could result in an increase in litigation.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES