

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Business Regulation</u>	<u>35 Y, 0 N w/CS</u>	<u>Livingston</u>	<u>Liepshutz</u>
2) <u>Judiciary</u>	<u>18 Y, 0 N w/CS</u>	<u>Billmeier</u>	<u>Havlicak</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The regulation of construction contracting is governed by part I of chapter 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 chapter 489, F.S., and is administered by the Electrical Contractors' Licensing Board within the DBPR.

The bill specifies that contracts entered into on or after October 1, 1990 by an unlicensed construction or electrical contractor are unenforceable under law or equity. The bill provides that an individual is unlicensed if the individual does not have a license for the scope of work to be performed under the contract. It provides that a business organization is unlicensed if it fails to have a primary or secondary qualifying agent.

The bill specifies that failure to have a local occupational license or a certificate of authority does not cause an individual or a business organization to be considered unlicensed. It further specifies that a contractor is considered unlicensed if on the date of the original contract, the contractor was unlicensed.

The bill provides that a townhouse is considered a single family residence for purposes of performing specialty contracting services without obtaining a local professional license if the person is supervised by a contractor. The bill specifies that authorized supervision does not require a direct contract between the contractor and the person performing the specialty contracting services.

The bill provides that a business organization proposing to engage in contracting is not required to apply for a certificate of authority through a qualifying agent if the business employs a contractor who is responsible for supervising the work under contract; the business organization can only engage in contracting activities on property owned and operated by the business organization; and a minimum net worth of \$20 million dollars is maintained.

The bill clarifies that a general contractor may perform, on public or private property any of the services for which a license as an underground utility and excavation contractor is required.

The bill provides for the retroactive application of specific sections of the bill and further provides that if the retroactive application of any section is held invalid, the invalidity shall not affect the retroactive application of the other sections. The bill provides for severability.

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1277c.ju.doc
DATE: April 14, 2003

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 chapter 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 chapter 489, F.S., and is administered by the Electrical Contractors’ Licensing Board within the DBPR.

Both parts I and II of chapter 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 a contractor who fails to obtain or maintain a license as required by part I of chapter 489, F.S., shall be unenforceable in law or in equity. Section 489.532, F.S., sets forth a similar provision pertaining to electrical contractors. However, s. 489.128, F.S., contained a “forgiveness” provision, until July, 2000, which permitted a construction contractor to cure the enforceability of the contract by becoming properly licensed. The “forgiveness” provision was deleted in 2000.¹

¹ See Ch. 2000-372, s. 35, L.O.F. (deleting “However, in the event the contractor obtains or reinstates his or her license, the provisions of this section shall no longer apply.” from s. 489.128, F.S.).

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. In The Palms v. Magil Construction, Inc.,² the Third District Court of Appeal held that the amendments to s. 489.128, F.S., which removed the "forgiveness" policy, which made contracts enforceable if a contractor obtained or reinstated its license, were not retroactive.

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

Effect of Proposed Changes

Section 489.128 of part I of chapter 489, F.S., construction contracting.

The bill amends s. 489.128, of part I of chapter 489, F.S., relating to construction contracting, to specify that contracts entered into on or after October 1, 1990 by an unlicensed construction contractor are unenforceable under law or equity. The bill provides that an individual is unlicensed if the individual does not have a license required under part I of chapter 489, F.S., for the scope of work to be performed under the construction contract. It provides that a business organization is unlicensed if it fails to have a primary or secondary qualifying agent in accordance with part I of chapter 489, F.S.

The bill specifies that failure to have a local occupational license or a certificate of authority under part I of chapter 489, F.S., does not cause an individual or a business organization to be considered unlicensed. It further specifies that a contractor is considered unlicensed if on the date of the original contract the contractor was unlicensed. If the contract does not establish the original contract date, the contractor is considered unlicensed if the contractor was unlicensed on the first date the contractor provided labor, services, or materials.

If a contract is rendered unenforceable, the bill provides that a claim against a lien or bond would not exist for the unlicensed contractor for any labor, services, or materials that may have been provided under the contract. It provides that this section only affects the rights of the unlicensed contractor and not the obligations of a surety or the rights of parties other than the unlicensed contractor to enforce the contract, lien, or bond remedies. The bill states that if the principal or indemnitor is unlicensed, it may not be used as a defense to a claim on a bond or indemnity agreement.

Section 489.532 of part II of chapter, F.S., electrical contracting.

The bill amends s. 489.532, of part II of chapter 489, F.S., relating to electrical contracting, to specify that contracts entered into on or after October 1, 1990 by an unlicensed electrical contractor are unenforceable under law or equity. The bill provides that an individual is unlicensed if the individual does not have a license required under part II of chapter 489, F.S., for the scope of work to be performed under the contract. It provides that a business organization is unlicensed if it fails to have a primary or secondary qualifying agent in accordance with part II of chapter 489, F.S.

The bill specifies that failure to have a local occupational license does not cause an individual or a business organization to be considered unlicensed. It further specifies that a contractor is considered unlicensed if on the date of the original contract the contractor was unlicensed. If the contract does not establish the original contract date, the contractor is considered unlicensed if on the first date the contractor provided labor, services, or materials under the contract the contractor was unlicensed.

² 785 So. 2d 597 (Fla. 3rd DCA 2001).

If a contract is rendered unenforceable, the bill provides that a claim against a lien or bond would not exist for the unlicensed contractor for any labor, services, or materials that may have been provided under the contract. It provides that this section only affects the rights of the unlicensed contractor and not the obligations of a surety or the rights of parties other than the unlicensed contractor to enforce the contract, lien, or bond remedies. The bill states that if the principal or indemnitor is unlicensed it may not be used as a defense to a claim on a bond or indemnity agreement.

Chapter 713, F.S., relating to liens, generally.

The bill amends s. 713.02, F.S., to specify that a lien shall not exist against a contractor, subcontractor, or sub-subcontractor who is unlicensed pursuant to the provisions of s. 489.128, F.S.

The bill amends s. 713.06, F.S., to eliminate the lien rights relating to labor, services, or materials furnished in accordance with the direct contract.

Section 489.113, F.S., relating to work performed by general contractors.

The bill provides that a general contractor may provide any of the services, on public or private property, for which a license as an underground utility and excavation contractor is required

Section 489.117, F.S., relating to registration; specialty contractors.

Current law does not reference a town house, as defined under the Florida Building Code, as a single-family residence.

The bill amends s. 489.117, F.S., to provide that a person may perform specialty contracting services on a townhouse as defined in the Florida Building Code without obtaining a local professional license if the person is supervised by a certified or registered general building, or residential contractor. The bill specifies that authorized supervision does not require a direct contract between the contractor and the person performing the specialty contracting services.

Section 489.119 of part I and section 489.521 of part II of chapter 489, F.S.

The bill amends these two sections 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:

- (1) 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;
- (2) 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;
- (3) The business entity, or its parent entity, if it is a wholly owned subsidiary, must maintain a minimum net worth of \$20 million dollars.

The bill specifies that a business organization or a contractor employed by a business organization to supervise activities is not required to post a bond. The bill provides that a business organization engaging in contracting without a certificate of authority is required to report to the appropriate construction or electrical board, the name and license number of each registered or certified contractor employed by the business organization to supervise activities that are under contract.

Retroactive Application and Severability

The bill provides for the retroactive application of sections 1, 2, 3, and 4, and further provides that if the retroactive application of any section is held invalid, the invalidity shall not affect the retroactive application of the other sections. Making the provisions retroactive would have the effect of overruling the Third District's decision in The Palms.

The bill provides that if any provision of this act is held invalid, the invalidity shall not affect the application of any other provision in the act.

C. SECTION DIRECTORY:

Section 1. Amends s. 489.128, F.S., to clarify that certain construction contracts are unenforceable

Section 2. Amends s. 489.532, F.S., to clarify that certain electrical contracts are unenforceable.

Section 3. Amends s. 713.02, F.S., to clarify certain lien rights.

Section 4. Amends s. 713.06, F.S., to eliminate certain lien rights under a direct contract.

Section 5. Amends s. 489.113, F.S., relating to work which may be performed by general contractors.

Section 6. Amends s. 489.117, F.S., to address specialty contractor supervision.

Section 7. Amends s. 489.119, F.S., relating to business organizations for part I contractors.

Section 8. Amends s. 489.521, F.S., relating to business organizations for electrical contractors.

Section 9. States that sections 1, 2, 3, and 4 of the bill are remedial in nature and intended to clarify existing law and apply to all actions.

Section 10. Provides for severability.

Section 11. 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:

The bill provides for retroactive effect of the provisions relating to the unenforceability of contracts entered into by unlicensed contractors. In The Palms v. Magil Construction, Inc. and Michnal v. Palm Coast Development, Inc.³, courts held that the 2000 amendments to s. 489.128, F.S., were not retroactive.

In Metropolitan Dade County v. Chase Federal Housing Corp.⁴, the Florida Supreme Court discussed the tests applicable to retroactive statutes:

Two interrelated inquiries arise when determining whether statutes should be retroactively applied. The first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retrospectively. If the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.

This bill makes clear that the legislature intends for these provisions to have retroactive effect. In Department of Transportation v. Knowles,⁵ the court discussed some of the issues raised by retroactive application of statutes:

Despite formulations hinging on categories such as "vested rights" or "remedies," it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.

The Florida Supreme Court has not applied this provision of Knowles recently.⁶ In Metropolitan Dade County, the court noted that retroactive statutes are not invalid unless they adversely affect or destroy vested rights or when they create an additional obligation or duty.⁷ It is unclear how the court would apply these cases when considering the retroactive effects of this bill.

B. RULE-MAKING AUTHORITY:

NA

C. DRAFTING ISSUES OR OTHER COMMENTS:

³ 2003 WL 1035713 (Fla. 4th DCA March 12, 2003).

⁴ 737 So. 2d 494, 499 (Fla. 1999)(citations omitted).

⁵ 402 So. 2d 1155, 1158 (Fla. 1981)(citations and footnotes omitted).

⁶ See Metropolitan Dade County, 737 So. 2d at 500 n. 9.

⁷ See Metropolitan Dade County, 737 So. 2d at 503.

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 chapter 489, F.S., does not provide for qualifying business licenses or certificates of authority.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Committee on Judiciary considered the bill on April 9, 2003. The Committee adopted an amendment to clarify that a general contractor may perform work on main sanitary sewer collection systems, storm collection systems, and water distribution systems on public property. The bill, as amended, was reported favorably with a committee substitute.