

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.)

Prepared By: Judiciary Committee

BILL: CS/CS/SB 2590

INTRODUCER: Judiciary Committee, Regulated Industries Committee, and Senator Bennett

SUBJECT: Contracting

DATE: April 21, 2006

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|---------------|
| 1. | <u>Sumner</u> | <u>Imhof</u> | <u>RI</u> | <u>Fav/CS</u> |
| 2. | <u>Maclure</u> | <u>Maclure</u> | <u>JU</u> | <u>Fav/CS</u> |
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I. Summary:

The bill prescribes conditions under which certain business organizations will be insulated from being deemed unlicensed under the construction contracting law and the electrical/alarm system contracting law.

Specifically, the bill provides that a business organization shall not be considered unlicensed if an individual possessing a license required by the construction contracting statute, concerning the scope of the work to be performed under the contract, submitted an application for a certificate of authority designating that individual as a qualifying agent for the business organization entering into the contract, and the application was not acted upon by the department or the applicable board within the applicable time limitations imposed by the Administrative Procedure Act.

With regard to both construction contractors and electrical/alarm system contractors, the bill also provides that if no state or local license is required for the scope of work to be performed under the contract, the individual performing the work shall not be considered unlicensed.

The bill specifies that its provisions are intended to be remedial in nature and to clarify existing law. It provides that the bill shall apply retroactively to all actions, including any action on a lien or a bond claim, initiated on or after, or pending as of, July 1, 2006. If the retroactivity of any provision of the bill or its retroactive application to any person or circumstance is held invalid, the invalidity does not affect the retroactivity or retroactive application of other provisions of the bill.

The bill increases the construction ceiling from \$25,000 to \$75,000 for exemption from licensure as an electrical/alarm system contractor for persons who are owners of property and are building or improving commercial buildings on the property for the occupancy or use of the owner and not offered for sale or lease. The bill requires the property owner to satisfy any applicable local permitting agency requirements demonstrating that the owner has an understanding of the owner's responsibilities and obligations under the construction statutes. If a person violates the exemption requirements, the bill requires the local permitting agency to withhold final approval of the project, revoke the permit, or pursue any action or remedy for unlicensed activity.

The bill provides an exemption from the regulatory provisions governing electrical/alarm system contractors (part II of ch. 489, F.S.) for inspections, audits, or quality-assurance services that are performed by a nationally recognized testing laboratory recognized by the Occupational Safety and Health Administration as meeting certain federal regulatory requirements.

The bill exempts certain certified or registered electrical or alarm system contractors from any local law, ordinance, or code that requires a contractor to be listed or placarded by a nationally recognized certification organization.

Lastly, the bill prohibits conditional payment clauses in contracts for the purchase of goods or services. Specifically, the bill provides that a contract for the purchase of goods or services may not contain a clause that conditions payment on the receipt of payment from any other person. Under the bill, conditional payment clauses are void as a violation of public policy.

This bill substantially amends the following sections of the Florida Statutes: 489.128, 489.503, 489.505, 489.532, and 489.516.

II. Present Situation:

Construction Contracting

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

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 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 may not bid or offer to perform construction services without being licensed.

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.”

Section 489.128 (1)(a), F.S., provides that contracts entered into by unlicensed contractors are unenforceable in law or equity. The statute also 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.

Section 489.128(1)(b), F.S., provides that an individual or business organization shall not be considered unlicensed for failing to have an occupational license certificate issued under the authority of 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 489.128(2), F.S., provides that notwithstanding any other provision of law to the contrary, if a contract is rendered unenforceable under this section, no lien or bond claim shall exist in favor of the unlicensed contractor for any labor, services, or materials provided under the contract or any amendment thereto.

Section 489.128(3), F.S., provides that this section shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies. This section does not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor. It shall not be a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed for purposes of this section.

Electrical and Alarm System Contracting

The licensure and regulation of electrical contractors is governed by Part II of ch. 489, F.S. Section 489.503, F.S., provides certain licensure exemptions. Section 489.503(6), F.S., exempts owners of property making application for permits, supervising, and performing electrical work in connection with the construction, maintenance, repair, and alteration of and addition to a single-family or duplex residence for his or her own use and occupancy and not intended for sale, or building or improving a commercial building with aggregate construction costs of under \$25,000 on such property for the occupancy or use of such owner and not offered for sale or lease. The statute also provides that the owner may not hire unlicensed contractors to work on the project.

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.¹

In addition, when a certificate holder want to engage in contracting in any area of the state, he or she must exhibit evidence of holding a current certificate and pay the fees for local occupational licenses and building or electrical permits.²

Section 489.532, F.S., also address unlicensed activity. It provides, in part, that a contract may be rendered unenforceable for work performed by an unlicensed person. 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.

Conditional Payment Clauses

The last twenty-five years have seen a tremendous increase in the use of conditional payment clauses in construction contracts. These highly controversial clauses can take several forms, but they most commonly are referred to as “pay-if-paid” or “pay-when-paid” provisions. These provisions are used in contracts between a general contractor and a subcontractor, and typically state that payment to the subcontractor will not be made until the general contractor is paid by the owner. The obvious risk in these clauses is that if the owner and the general contractor get into a payment dispute, or if the owner petitions in bankruptcy, the subcontractor may not be paid for its work.³

According to the American Subcontractors Association, Inc., high courts in California and New York have held that “pay-if-paid” clauses cannot be enforced, on the rationale that such clauses would frustrate enforcement of mechanics’ liens under the two states’

¹ Section 489.516(1) and (2), F.S.

² Section 489.516(3), F.S.

³ Margie Alsbrook, *Contracting Away an Honest Day’s Pay: An Examination of Conditional Payment Clauses in Construction Contracts*, 58 Ark. L. Rev. 353, 353 (2005).

mechanics' lien laws.⁴ The association further reports that some states have provided that such liens can be enforced notwithstanding the contract clauses, while some states have abolished contingent payment clauses in construction contracts.⁵

III. Effect of Proposed Changes:

Determination as Unlicensed

The bill prescribes conditions under which certain business organizations will not be deemed to be unlicensed under the construction contracting law and the electrical/alarm system contracting law.

Construction Contracting

Under existing statutory provisions, s. 489.128(1), F.S., as a matter of public policy, contracts entered into on or after October 1, 1990, by unlicensed construction contractors shall be unenforceable in law or in equity by the unlicensed contractor. An individual is unlicensed if he or she does not have a license required concerning the scope of work to be performed. A business is unlicensed if it does not have a primary or secondary qualifying agent concerning the scope of work to be performed under the contract.

The bill amends this statute to provide that if no state or local license is required for the scope of work to be performed under the contract, the individual performing the work shall not be considered unlicensed.

The bill further amends s. 489.128(1)(b), F.S., to provide that for purposes of this section, a business organization entering into a contract may not be considered unlicensed if, before the date established by paragraph (c), an individual possessing a license required by the construction contracting statute (part I of ch. 489, F.S.), concerning the scope of the work to be performed under the contract, had submitted an application for a certificate of authority designating that individual as a qualifying agent for the business organization entering into the contract, and the application was not acted upon by the Department of Business and Professional Regulation or the applicable board within the time limitations imposed by s. 120.60, F.S., of the Administrative Procedure Act.

Electrical/Alarm System Contracting

With regard to electrical and alarm system contractors, the bill similarly provides that if no state or local license is required for the scope of work to be performed under the contract, the individual performing the work shall not be considered unlicensed.

⁴ "Enforceability of Pay-If-Paid Clauses," information sheet from the American Subcontractors Association, Inc. (undated).

⁵ *Id.*

Retroactive Application

The bill specifies that the provisions of the bill are intended to be remedial in nature and to clarify existing law. It provides that the provisions shall apply retroactively to all actions, including any action on a lien or a bond claim, initiated on or after, or pending as of, July 1, 2006. If the retroactivity of any provision of the bill or its retroactive application to any person or circumstance is held invalid, the invalidity does not affect the retroactivity or retroactive application of other provisions of the bill.

Electrical/Alarm System Contractor Exemptions

The bill amends s. 489.503(6), F.S., to increase the \$25,000 limit for electrical work performed on commercial buildings to \$75,000. The bill also provides that if any person violates the provisions of the exemption, local permitting agency shall have the authority to withhold final approval, revoke the permit, or pursue any action or remedy for unlicensed activity against the owner and any person performing work that requires licensure under the permit.

The bill also provides that the owner must satisfy any local permitting agency requirements proving that the owner has a complete understanding of the owner's obligations under law. The bill also provides that if any person violates the provisions of the exemption, the local permitting agency shall have the authority to withhold final approval, revoke the permit, or pursue any action or remedy for unlicensed activity against the owner and any person performing work that requires licensure under the permit.

The bill provides an exemption from the regulatory requirements governing electrical and alarm system contractors under part II of ch. 498, F.S., for certain services provided by a qualifying nationally recognized testing laboratory. To be qualified for the exemption, the testing laboratory must be recognized by the Occupational Safety and Health Administration as meeting the requirements of federal regulation 29 C.F.S. s. 1910.7. In addition, the exemption applies for inspections, audits, or quality-assurance services performed by this testing laboratory.

The bill also exempts certain certified or registered contractors from any local law, ordinance, or code that requires a contractor to be listed or placarded by a nationally recognized certification organization. The exemption applies to:

- A certified electrical contractor;
- A certified alarm system contractor I;
- A certified alarm system contractor II;
- A registered alarm system contractor I; or
- A registered alarm system contractor II.

However, a person performing work within the scope of work of these contractors must be certified or registered under part II of ch. 489, F.S.

Conditional Payment Clauses/Contracts for Goods or Services

The bill prohibits conditional payment clauses in contracts for the purchase of goods or services. Specifically, the bill provides that a contract for the purchase of goods or services may not contain a clause that conditions payment on the receipt of payment from any other person. Under the bill, conditional payment clauses are void as a violation of public policy.

This bill does not assign a statutory number to the prohibition on conditional payment clauses. It is not immediately clear if the provision is designed to apply to construction contracts, solely, and thereby might be envisioned for codification in ch. 489, F.S.

Effective Date

The bill provides an effective date of July 1, 2006.

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:

Retroactive Application

This bill has retroactive application to all actions, including any action on a lien or bond claim, initiated on or after, or pending as of, July 1, 2006.

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.⁶

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 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.⁷

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.”⁸ 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

⁶ *R.A.M. of South Florida, Inc., v. WCI Communities, Inc.*, 869 So. 2d 1210, 1220 (Fla. 2d DCA 2004).

⁷ *Pompano*, 378 So. 2d at 779.

⁸ *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spanners*, 438 U.S. 234, 244 (1978)).

contract was entered, then it is understood that it would be subject to further legislation upon the same topic.⁹

- If the state regulation constitutes a substantial impairment, the state needs a significant and legitimate public purpose behind the regulation.¹⁰
- 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.¹¹

Single Subject Requirement

Article III, s. 6 of the State Constitution requires that a bill must pertain to a single subject that is briefly stated in the bill's title. Courts have interpreted this to mean that all provisions of a bill must be "properly connected" to the subject of the bill in a "natural or logical" way.¹²

The bill contains a section that specifies that a contract for the purchase of goods or services may not contain a clause that conditions payment for the goods or services on the receipt of payment from any other person. The bill further specifies that such a conditional payment clause is void as a violation of public policy. The bill, however, does not assign a statutory section number to this provision, and it is not immediately clear if the bill envisions that this provision will be codified in ch. 489, F.S., codified elsewhere in the Florida Statutes, or codified at all.

Although the bill is titled an act relating to "contracting," the other provisions in the bill relate to contracting as specifically governed by ch. 489, F.S., which applies to regulation of construction contracting, electrical and alarm system contracting, and septic tank contracting. The provision governing conditional payment clauses arguably appears to apply more broadly to any contract governing the purchases of goods or services. This bill may raise single-subject questions to the extent that a provision governing contracts for goods or services is deemed to apply beyond the context of construction or similar contracts related to ch. 489, F.S.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

⁹ *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).

¹⁰ *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)).

¹¹ *Id.*

¹² *See, e.g., Franklin v. State*, 887 So. 2d 1063, 1078-79 (Fla. 2004); *Env'tl. Confed. of Sw. Fla. v. State*, 886 So. 2d 1013, 1018-19 (Fla. 1st DCA 2004).

B. Private Sector Impact:

The provisions of the bill appear to insulate certain business organizations from being deemed unlicensed. The bill also attempts to apply retroactively to pending legal actions on certain lien or bond claims, and thus may affect the financial interests of parties to such legal actions.

The bill makes void a provision within a contract for goods or services which conditions payment for the goods or services on receipt of payment from any other person.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

VIII. Summary of Amendments:

None.

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