

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: Regulated Industries Committee

BILL: CS/SB 2590

INTRODUCER: Regulated Industries Committee and Senator Bennett

SUBJECT: Contracting/License

DATE: March 31, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sumner</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute provides that a business organization shall not be considered unlicensed if an individual possessing a license required by this part 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 applicable board within the applicable time limitations imposed by s.120.60, F.S.

The committee substitute provides that the provisions of the bill is 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.

This bill substantially amends section 489.128 of the Florida Statutes.

II. Present Situation:

The Construction Industry Licensing Board (CILB) is responsible for licensing and regulation of state construction contractors, as governed by ch. 489, F.S. 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.

Licensure and regulation of construction contractors is governed by Part I of ch. 489, F.S. 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. 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.

III. Effect of Proposed Changes:

The committee substitute amends s. 489.128(1)(b), F.S., to provide that for purposes of this section, a business organization entering into the contract may not be considered unlicensed if, before the date established by paragraph (c), an individual possessing a license required by this part 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 or applicable board within the applicable time limitations imposed by s.120.60, F.S.

The committee substitute provides that the provisions of the bill is 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.

It provides that the act will take effect 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:

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 (2d DCA 2004)

Section 10, Art. I, Fla. Const., provides in relevant part, “No... 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 “No 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:

- i. Whether the law was enacted to deal with a broad, generalized economic or social problem;
- ii. Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- iii. Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive.¹

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.”² The severity of the impairment increases the level of scrutiny.

¹ *Pompano*, 378 So. 2d at 779.

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

- 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.³
- If the state regulation constitutes a substantial impairment, the state needs a significant and legitimate public purpose behind the regulation.⁴
- 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.⁵

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

C. Government Sector Impact:

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.

³ *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).

⁴ *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)).

⁵ *Id.*

VIII. Summary of Amendments:

None.

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