

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 877 Reduction of Construction Contracting Fraud
SPONSOR(S): Criminal Justice Subcommittee, Grant, M.
TIED BILLS: IDEN./SIM. **BILLS:** SB 1092

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Mawn	Hall
2) Business & Professions Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Generally, a contractor is a person who takes on a job or submits a bid to construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure for others, or for resale to others. The Construction Industry Licensing Board (Board) within the Department of Business and Professional Regulation regulates contractors and takes disciplinary action for certain prohibited behaviors. In addition to Board action, contractors face criminal penalties for offenses including:

- Construction fraud, in which the contractor receives money for contracted work and fails to perform the work for 90 days with intent to defraud the property owner; and
- Misapplication of construction funds, in which a contractor accepts payment for improvement to real property but knowingly and intentionally fails to apply the funds to pay any amount due for services and labor performed on, or materials furnished to, any improvement prior to receipt of the funds.

Construction fraud is prosecuted as theft under s. 812.014, F.S.; the offense level depends on the amount of money stolen. To commit theft under Florida law, a defendant must have the specific intent to commit the crime at the time of, or prior to, the taking. In contractual cases it is difficult to prove that criminal intent is present at the time the contract was signed or entered into. Misapplication of construction funds has specific threshold values, classifying the offense as either a first, second, or third degree felony.

Additionally, a person buying a one-family or two-family home from a building contractor or developer may place the purchase deposit into an escrow account or waive this right in writing, releasing the funds to the contractor or developer to apply toward construction costs. A building contractor or developer must notify a home buyer of his or her escrow rights and right to release the funds. A contractor who fails to comply with these requirements commits a third degree felony.

CS/HB 877 increases protections for home buyers and property owners by:

- Requiring a person buying a one-family or two-family home from a building contractor or developer to place his or her deposit into an escrow account if the deposit totals five percent or more of the purchase price;
- Deleting the intent to defraud element from the offense of construction fraud and setting specific value thresholds with corresponding offense levels;
- Requiring a person, firm, or corporation accepting more than five percent of the cost for property improvements to deposit the funds in an escrow account or provide a certified letter documenting payment made to a subcontractor out of the funds within 30 days of receipt of the funds.

The bill may impact state government but does not appear to impact local governments.

The bill provides an effective date of October 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A contractor is a person who takes on a job or submits a bid to construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure for others, or for resale to others, and who has a job scope substantially similar to one or more of those described in s. 489.105(3)(a)-(q), F.S.¹

Certification and Registration

The Construction Industry Licensing Board (Board) within the Department of Business and Professional Regulation (Department) regulates contractors.² A contractor working on a statewide basis must be certified by the Department.³ A contractor only working in a particular county or municipality must register with the Department following licensure by the county or municipality.⁴ A contractor generally must sub-contract all electrical, mechanical, plumbing, roofing, sheet metal, swimming pool, and air-conditioning work, unless the contractor holds a state certificate or registration in the respective trade category or an exception exists.⁵ A subcontractor without a state certificate or registration may perform construction work under the supervision of a certified or registered contractor, provided that the scope of work falls within the scope of the supervising contractor's license.⁶

Disciplinary Proceedings

The Board may take action⁷ against the certification or registration of any contractor found guilty of an offense including:

- Obtaining a certificate or registration by fraud or misrepresentation;⁸
- A crime relating to the practice of or the ability to practice contracting;⁹
- Performing any act which helps another to engage in uncertified or unregistered contracting if the contractor knew the person was uncertified or unregistered;¹⁰
- Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer;¹¹
- Committing fraud or deceit in the practice of contracting;¹²
- Committing negligence resulting in significant danger to life or property;¹³

¹ S. 489.105(3), F.S. These job scopes include a: general contractor; building contractor; residential contractor; sheet metal contractor; roofing contractor; class A air-conditioning contractor; class B air-conditioning contractor; class C air-conditioning contractor; mechanical contractor; commercial pool/spa contractor; residential pool/spa contractor; swimming pool/spa servicing contractor; plumbing contractor; underground utility and excavation contractor; solar contractor; pollutant storage systems contractor; and specialty contractor.

² S. 489.107(1), F.S.

³ S. 489.113(1), F.S.

⁴ S. 489.117(1)(b), F.S.

⁵ S. 489.113(3), F.S. Exceptions include swimming pool work by a general contractor and the installation or repair by a general, building, or residential contractor of wood shingles, wood shakes, or asphalt or fiberglass shingle roofing materials on a new building of the contractor's own construction.

⁶ S. 489.113(2), F.S.

⁷ The Board may place a contractor on probation, reprimand him or her, revoke or suspend the contractor's certificate or registration, or deny the issuance of a renewal certificate or registration. The Board may also require financial restitution to a consumer for financial harm directly related to a violation, require continuing education, or assess costs associated with investigation and prosecution. S. 489.129(1), F.S.

⁸ S. 489.129(1)(a), F.S.

⁹ S. 489.129(1)(b), F.S.

¹⁰ S. 489.129(1)(d), F.S.

¹¹ S. 489.129(1)(g), F.S.

¹² S. 489.129(1)(l), F.S.

¹³ S. 489.129(1)(n), F.S.

- Committing incompetency or misconduct in the practice of contracting;¹⁴ or
- Proceeding on a job without obtaining applicable local building department permits and inspections.¹⁵

Criminal Offenses

In addition to Board action, Florida law imposes criminal penalties for prohibited behavior in the contracting industry. A person commits a first degree misdemeanor¹⁶ if he or she:¹⁷

- Falsely holds himself or herself out as a licensee, certificate holder, or registrant;¹⁸
- Falsely impersonates a certificate holder or registrant;¹⁹
- Presents the certificate or registration of another as his or her own;²⁰
- Knowingly gives false or forged evidence to the Board or a Board member;²¹
- Uses or attempts to use a suspended or revoked certificate or registration;²²
- Acts or advertises as a contractor without being duly registered or certified;²³
- Operates a contracting business 60 days after termination of its only qualifying agent without designating another primary qualifying agent;²⁴
- Commences or performs work for which a building permit is required without such permit;²⁵ or
- Willfully or deliberately disregards any municipal or county ordinance relating to uncertified or unregistered contractors.²⁶

A person commits a third degree felony²⁷ if he or she commits a second or subsequent offense or commits such an offense during a state of emergency declared by the Governor.²⁸

Deposits for Home Purchase

A person buying a one-family or two-family home from a building contractor²⁹ or developer³⁰ must make a purchase deposit.³¹ There is no statutory limit on the amount a building contractor or developer may require for an initial deposit.³² However, a prospective buyer may choose to deposit up to 10 percent of the purchase price into an escrow account³³ or waive this right in writing and release the funds to the builder or developer for application towards construction costs.³⁴ A building contractor or developer must notify the buyer of his or her escrow rights and the option to waive these rights.³⁵ Such notice

¹⁴ S. 489.129(1)(m), F.S.

¹⁵ S. 489.129(1)(o), F.S.

¹⁶ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

¹⁷ S. 489.127(2)(a), F.S.

¹⁸ S. 489.127(1)(a), F.S.

¹⁹ S. 489.127(1)(b), F.S.

²⁰ S. 489.127(1)(c), F.S.

²¹ S. 489.127(1)(d), F.S.

²² S. 489.127(1)(e), F.S.

²³ S. 489.127(1)(f), F.S.

²⁴ S. 489.127(1)(g), F.S.

²⁵ S. 489.127(1)(h), F.S.

²⁶ S. 489.127(1)(i), F.S.

²⁷ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

²⁸ Ss. 489.127(2)(b) and (c), F.S.

²⁹ "Building contractor" means any person who, for compensation, constructs and sells 10 or more one-family or two-family residential dwelling units in a year. S. 501.1375(1)(a), F.S.

³⁰ "Developer" means either a building contractor who offers new residential dwelling units for sale or any person who offers 10 or more new one-family or two-family residential dwelling units for sale in a year. S. 501.1375(1)(b), F.S.

³¹ The Florida Bar, *Consumer Pamphlet: Building a Home*, <https://www.floridabar.org/public/consumer/pamphlet005/> (last visited Mar. 26, 2019).

³² *Id.*

³³ An escrow account is a bank account generally held in the name of the depositor and an escrow agent, the contents of which are returned to the depositor or paid to a third person when certain conditions are met. Black's Law Dictionary 378 (6th ed., 1995).

³⁴ S. 501.1375(2), F.S.

³⁵ *Id.*

must be in all offers to purchase, sales agreements, and written contracts between a building contractor or developer and the buyer.³⁶

If a buyer elects to deposit funds into an escrow account, the records of the account holder³⁷ must clearly identify the account as an escrow account.³⁸ Funds in an escrow account for a home purchase from a building contractor or developer may only be released if:

- The contractor or developer:
 - Obtains a surety bond, payable to the buyer in the amount of the deposit, to secure the release of the funds from the escrow account for application towards construction costs;³⁹ or
 - Borrows money equal to the amount of the deposit to apply towards construction costs if no surety bond is available;⁴⁰
- The buyer defaults in the performance of his or her contract obligations;⁴¹ or
- The transaction closes.⁴²

A developer who willfully fails to comply with requirements for establishing, depositing funds into, or withdrawing funds from an escrow account commits a third degree felony.⁴³ The failure of the developer to place a required deposit into an escrow account within 10 days after receiving the funds, is prima facie evidence⁴⁴ of a violation.⁴⁵

Construction Fraud

A contractor who receives money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property must, unless the buyer or homeowner agreed in writing otherwise:

- Apply for any necessary permits within 30 days after the payment is made,⁴⁶ and
- Start the work within 90 days after the date all necessary permits are issued.⁴⁷

A contractor commits construction fraud, punishable as theft under s. 812.014, F.S., if he or she receives money for repair, restoration, addition, improvement, or construction of residential real property exceeding the value of work already performed and, with intent to defraud the owner,⁴⁸ fails or refuses to perform any work for a 90-day period.⁴⁹ A court may infer intent to commit construction fraud when a contractor:

- Received money in excess of the value of the work already performed;
- Failed to perform work during any 60-day period, and the failure was not due to the owner terminating or materially breaching the contract; and

³⁶ *Id.*

³⁷ The account holder may be a savings and loan association, bank, or trust company; an attorney who is a Florida Bar member; a licensed Florida real estate broker; or a title insurance company authorized to insure title to real property in this state. S. 501.375(2) F.S.

³⁸ S. 501.1375(3), F.S.

³⁹ S. 501.1375(4), F.S.

⁴⁰ *Id.*

⁴¹ S. 501.1375(7)(d), F.S.

⁴² S. 501.1375(7)(e), F.S.

⁴³ S. 501.1375(9), F.S.

⁴⁴ "Prima facie evidence" is evidence that is sufficient to establish a given fact. Black's Law Dictionary 825 (6th ed. 1995).

⁴⁵ *Id.*

⁴⁶ S. 489.126(2)(a), F.S.

⁴⁷ S. 489.126(2)(b), F.S.

⁴⁸ Florida recognizes two basic types of intent crimes: specific intent crimes and general intent crimes. A specific intent crime requires the offender to intend to accomplish a precise, prohibited act. A general intent crime requires the offender to intend to do something unlawful, but the offender does not need to intend the precise harm or result that occurs. See Black's Law Dictionary 47, 559, and 560 (6th ed. 1995). Unless an offender confesses his or her intent, intent must be inferred. See generally, David Crump, *What Does Intent Mean*, 38 Hofstra L. R. 1059, https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v38n04_cc1_crump_final.pdf (last visited Mar. 26, 2019).

⁴⁹ S. 489.126(3)(a), F.S.

- The contractor failed to perform work for which he or she contracted for an additional 30-day period after the owner mailed a notice of failure to perform to the contractor.⁵⁰

The offense levels for theft crimes depend upon the value of the property taken and are classified as follows:

	Property Value	Offense Level
Grand Theft	≥ \$100,000	First Degree Felony ⁵¹
	≥ \$20,000, but < \$100,000	Second Degree Felony ⁵²
	≥ \$10,000, but < \$20,000	Third Degree Felony
	≥ \$5,000, but < \$10,000	Third Degree Felony
	≥ \$300, but < \$5,000	Third Degree Felony
	≥ \$100, but < \$300 if taken from a dwelling or unenclosed curtilage ⁵³ of a dwelling	Third Degree Felony
Petit Theft	≥ \$100, but < \$300	First Degree Misdemeanor
	< \$100	Second Degree Misdemeanor ⁵⁴

To commit theft under Florida law a defendant must have the specific intent to commit the crime at the time of, or prior to, the taking.⁵⁵ However, in contractual cases it is difficult to prove that criminal intent is present at the inception of an agreement.⁵⁶ Further, courts have found that partial performance of a contract negates criminal intent.⁵⁷ It may be difficult to prove a contractor charged with construction fraud had the necessary criminal intent at the time he or she entered into the contract, making successful prosecution of construction fraud cases difficult.⁵⁸ This recently became an issue in Charlotte County, Florida, when a contractor accepted money from dozens of consumers to construct new homes.⁵⁹ These consumers lost their payments when the contractor abruptly closed its doors, leaving many homes unfinished.⁶⁰ However, because the contractor claims it merely ran out of money due to the rising cost of supplies after Hurricane Irma in September 2017, proving the requisite intent to defraud at the time of taking is challenging.⁶¹

Moneys Received for Real Property Improvements

A person, firm, or corporation commits misapplication of construction funds if he, she, or it receives payment for improving real property and knowingly and intentionally fails to apply such payment to any amount owed for services and labor performed, or materials used.⁶² This offense is often charged when a contractor fails to pay sub-contractors for performing work despite receiving funds for these payments. Misapplication of construction funds is punishable as follows:

⁵⁰ S. 489.126(3)(b), F.S.

⁵¹ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

⁵² A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

⁵³ "Unenclosed curtilage of a dwelling" means the unenclosed land or grounds, or any outbuildings, directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling. S. 810.09(1)(b), F.S.

⁵⁴ A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Ss. 775.082 and 775.083, F.S.

⁵⁵ See *Stramaglia v. State*, 603 So. 2d 536, 537-38 (Fla. 4th DCA 1992).

⁵⁶ See *Adams v. State*, 443 So. 2d 1003 (Fla. 2d DCA 1983).

⁵⁷ See *Yerrick v. State*, 970. So. 2d 1288 (Fla. 4th DCA 2008).

⁵⁸ The Office of the State Attorney, 20th Judicial Circuit, *Proposal* (2019).

⁵⁹ Elaine Allen-Emrich, *Rep. Grant, Sen. Albritton Fighting Contractor Fraud*, https://www.yoursun.com/englewood/rep-grant-sen-albritton-fighting-contractor-fraud/article_b47d6dbc-36f0-11e9-b582-df69d65d0465.html (last visited Mar. 26, 2019).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² S. 713.345(1)(a), F.S.

Aggregate Value of Misapplied Payments	Offense Level
≥ \$100,000	First Degree Felony ⁶³
≥ \$1,000 but < \$100,000	Second Degree Felony ⁶⁴
< \$1,000	Third Degree Felony ⁶⁵

A court may infer that a person knowingly and intentionally misapplied construction funds when:

- A valid lien was recorded against the property for labor, services, or materials;
- The person who ordered the labor, services, or materials received sufficient funds to pay for such labor, services, or materials; and
- The person failed, for at least 45 days from receiving the funds, to pay for such labor, services, or materials.⁶⁶

A person who withholds payment according to the terms of a contract for services, labor, or materials, or pursuant to a bona fide dispute about the amount due does not commit misapplication of construction funds.⁶⁷

Effect of the Proposed Changes

Deposits for Home Purchase

CS/HB 877 requires a person buying a home from a building contractor or developer to place any deposit totaling five percent or more of the purchase price into an escrow account, removing a home buyer's option to waive his or her escrow rights and release the deposit to the building contractor or developer. The bill also lowers the threshold that triggers escrow requirements from 10 percent of the purchase price to five percent of the purchase price. This prevents a developer from obtaining deposits over a certain amount without some financial protection for the buyer in the event the developer decides to steal or misappropriate the funds. A violation of the escrow requirements of s. 501.1375, F.S., remains a third degree felony.

Construction Fraud

The bill modifies the offense of construction fraud from a specific intent crime to a general intent crime. As such, the state no longer needs to prove a person charged with construction fraud acted with a specific intent to defraud at the time of the taking. Instead, the state must prove the:

- Contractor failed to perform any work for 90 days;
- Failure to perform the work was not related to the owner terminating or materially breaching the contract; or
- The contractor failed to perform work without just cause or terminated the contract without proper notice to the owner.

The bill requires the contractor to notify the property owner of the contract termination or explain the contractor's failure to perform. The contractor must send the notification by certified mail to the last address provided in the written contracting agreement, or if none is listed or no written agreement exists, the notification must be:

- Sent to the address of the payment received; or
- Filed with the building department with jurisdiction over the improvement.

⁶³ S. 713.345(1)(b)1., F.S.

⁶⁴ S. 713.345(1)(b)2., F.S.

⁶⁵ S. 713.345(1)(b)3., F.S.

⁶⁶ S. 713.345(1)(c)1., F.S.

⁶⁷ S. 713.345(1)(a), F.S.

The bill removes the requirement for a property owner to send a failure to perform notice to the contractor. The bill also modifies the penalties for construction fraud by establishing value thresholds and assigning offense levels as follows:

Total Money Received for Permits	Offense Level
≥ \$50,000	First Degree Felony
≥ \$20,000 but < \$50,000	Second Degree Felony
< \$20,000	Third Degree Felony

Thus, the state would no longer prosecute construction fraud as general theft under s. 812.014, F.S.

Moneys Received for Real Property Improvements

The bill requires any person, firm, or corporation who receives more than five percent of any payment for improving real property to:

- Deposit the payment into an escrow account with a savings and loan association, bank, or trust company, an attorney licensed by the Florida Bar, or a licensed Florida real estate broker; or
- Provide a certified letter to the property owner detailing the amount and date of any payment made to a subcontractor out of the funds within 30 days after their receipt.

The bill provides that a person failing to comply with the escrow or notice requirements commits a third degree felony. However, the bill does not modify the offense of misapplication of construction funds.

The bill provides an effective date of October 1, 2019.

B. SECTION DIRECTORY:

Section 1: Amending s. 489.126, F.S., relating to moneys received by contractors.

Section 2: Amending s. 501.1375, F.S., relating to deposits received for purchase of residential dwelling units; placement in escrow; waiver; exceptions.

Section 3: Amending s. 713.345, F.S., relating to moneys received for real property improvements; penalty for misapplication.

Section 4: Providing an effective date of October 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on state government by removing the specific intent element from construction fraud, which may increase the need for prison beds if the number of successful prosecutions increases.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may prevent or reduce construction fraud and the misapplication of construction funds, ensuring more Florida consumers receive the improvements or homes they contract and pay for.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 26, 2019, the Criminal Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Clarified that a contractor's failure to perform work for 90 days without just cause is an element of the offense of construction fraud;
- Clarified that the certified letter a contractor may send in lieu of placing certain payments for improvements to real property in an escrow account must be sent to the property owner; and
- Changed the effective date to October 1, 2019.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.