

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1563 Construction Contracting

SPONSOR(S): Grant

TIED BILLS: IDEN./SIM. BILLS: SB 1778

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform & Economic Development Subcommittee	15 Y, 0 N	Wright	Anstead
2) Judiciary Committee		Mawn	Kramer
3) Commerce Committee			

SUMMARY ANALYSIS

Construction contractors are certified or registered by the Construction Industry Licensing Board housed within the Department of Business and Professional Regulation (DBPR). The Florida Homeowners' Construction Recovery Fund, under DBPR, is used to compensate homeowners who have suffered a covered financial loss at the hands of state-licensed contractors, and is funded through a building permit surcharge.

Certain crimes related to construction fraud exist; however, currently, there is no requirement for construction funds to be placed in an escrow account.

The bill creates a process to require contractors to keep certain contract funds in an escrow account, under certain circumstances, with criminal penalties.

Specifically, the bill requires a contractor or qualified company that receives \$10,000 or more for improvements to residential real property to, before the substantial completion of work under the contract, place such payment in an escrow account with:

- A savings and loan association, bank, or trust company located in the state;
- An attorney who is a member in good standing with The Florida Bar; or
- A real estate broker licensed in the state.

The bill also:

- Allows such escrow requirements to be waived in writing by the homeowner. However, if the value of the improvement or construction is more than \$100,000, such contractor or qualified company must obtain a performance bond for the value of the contract.
- Allows a contractor or qualified company to withdraw funds from the escrow account before the substantial completion of work, in certain circumstances.
- Provides that a contractor or qualified company that willfully violates the escrow requirements commits a felony of the third degree.
- Provides that, if a person pleads guilty or nolo contendere to, or is found guilty of, regardless of adjudication, a construction fraud crime, the court must impose a cost of \$51 against the offender in addition to any other cost or penalty required by law, and that the Florida Homeowners' Construction Recovery Fund will be funded through such allotted fees, in addition to DBPR permit surcharges.

The bill will have an indeterminate fiscal impact on state and local governments.

The bill provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Department of Business and Professional Regulation

The Florida Department of Business and Professional Regulation (DBPR), through 11 divisions, regulates and licenses businesses and professionals in Florida. The divisions established under DBPR include:

- The Division of Administration;
- The Division of Alcoholic Beverages and Tobacco;
- The Division of Certified Public Accounting;
- The Division of Drugs, Devices, and Cosmetics;
- The Division of Florida Condominiums, Timeshares, and Mobile Homes;
- The Division of Hotels and Restaurants;
- The Division of Professions;
- The Division of Real Estate;
- The Division of Regulation;
- The Division of Technology; and
- The Division of Service Operations.¹

Construction Contractors

Chapter 489, F.S., relates to “contracting,” with part I of that chapter addressing the licensure and regulation of construction contracting, and part II of that chapter addressing the licensure and regulation of electrical and alarm system contracting.

Construction contractors are certified or registered by the Construction Industry Licensing Board (CILB) housed within DBPR. The CILB consists of 18 members who are appointed by the Governor and confirmed by the Senate. The CILB meets to approve or deny applications for licensure, review disciplinary cases, and conduct informal hearings relating to discipline.²

“Certified contractors” are individuals who pass the state competency examination and obtain a certificate of competency issued by DBPR. Certified contractors are able to obtain a certificate of competency for a specific license category and are permitted to practice in that category in any jurisdiction in the state.³

“Certified specialty contractors” are contractors whose scope of work is limited to a particular phase of construction, such as drywall or demolition. Certified specialty contractor licenses are created by the CILB through rulemaking. Certified specialty contractors are permitted to practice in any jurisdiction in the state.

“Registered contractors” are individuals that have taken and passed a local competency examination and can practice the specific category of contracting for which he or she is approved, but only in the local jurisdiction for which the license is issued.⁴

¹ s. 20.165, F.S.

² S. 489.107, F.S.

³ S. 489.105, F.S.

⁴ S. 489.103, F.S.

Florida Homeowners' Construction Recovery Fund

The Florida Homeowners' Construction Recovery Fund is used to compensate homeowners who have suffered a covered financial loss at the hands of state-licensed contractors. Claims are filed with the DBPR and reviewed for completeness and statutory eligibility. The DBPR then presents the claim to the Construction Industry Licensing Board for review.⁵

Current law requires all local governments to assess and collect a 1% surcharge on any building permit issued by their respective enforcement agencies for the purpose of enforcing the Building Code. The local jurisdictions collect the assessment and remit the surcharge fees to DBPR to fund the activities of the Commission, DBPR's Building Code Compliance and Mitigation Program, and the Florida Fire Prevention Code informal interpretations.⁶

Current law also requires all local governments to assess and collect a separate 1.5% surcharge on any building permit issued by their respective enforcement agencies for the purpose of enforcing the Building Code. The local governments collect the assessment and remit the surcharge fees to DBPR, where it is divided equally to fund the activities of the Building Code Administrators and Inspectors Board (BCAIB) and the Florida Homeowners' Construction Recovery Fund.⁷

Local government are permitted to retain 10% of the amount of the surcharges they collect to fund participation by their agencies in the national and state building code adoption processes and to provide education related to enforcement of the Building Code.⁸

Construction Liens (Ch. 713, F.S.)

Florida law seeks to ensure that people working on construction projects are paid for their work. Any person who provides services, labor, or materials for improving, repairing, or maintaining real property (except public property) may place a construction lien⁹ on the property, provided the person complies with statutory procedures.¹⁰ These procedures require the filing or serving of various documents, including a:

- Notice of Commencement;¹¹
- Notice to Owner;¹²
- Claim of Lien;¹³
- Notice of Termination;¹⁴
- Waiver or Release of Lien;¹⁵
- Notice of Contest of Lien;¹⁶
- Contractor's Final Payment Affidavit;¹⁷ and

⁵ S. 489.1401(2), F.S.

⁶ S. 553.721, F.S.

⁷ S. 468.631, F.S.

⁸ Ss. 468.631, and 553.721, F.S.

⁹ A lien is a claim against property that evidences a debt, obligation, or duty. Fla. Jur. 2d Liens s. 37:1.

¹⁰ Ch. 713, F.S.

¹¹ S. 713.13, F.S.

¹² To secure construction lien rights, a person working on a construction project who is not in direct contract ("privity") with the owner must serve a notice to owner in the statutory form provided; laborers are exempt from this requirement. The notice informs the owner that someone with whom he or she is not in privity is providing services or materials on the property and that such person expects the owner to ensure he or she is paid. The notice must be served no later than 45 days after the person begins furnishing services or materials and before the date the owner disburses the final payment after the contractor has furnished his or her final payment affidavit. After receiving a notice to owner, the owner must obtain a waiver or release of lien from the notice's sender before paying the contractor, unless a payment bond applies, or risk payments to the contractor constituting improper payments that leave the owner liable to the notice sender if the contractor does not pay such person. *Stocking Bldg. Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So. 3d 313 (Fla 3d DCA 2011); s. 713.06, F.S.

¹³ S. 713.08, F.S.

¹⁴ S. 713.132, F.S.

¹⁵ S. 713.20, F.S.

¹⁶ S. 713.22(2), F.S.

¹⁷ S. 713.06(3), F.S.

- Demands of Written Statement of Account.¹⁸

Construction Fraud Crimes (Sections 489.126 and 489.127, F.S.)

Moneys Received by Contractors – Commencing Work

A contractor who receives, as initial payment, money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property must:

- Apply for permits necessary to do work within 30 days after the date payment is made, except where the work does not require a permit under the applicable codes and ordinances, and
- Start the work within 90 days after the date all necessary permits for work, if any, are issued, unless:
 - The person who made the payment agreed, in writing, to a longer period to apply for the necessary permits or start the work or to longer periods for both; or
 - The contractor is permitted to show “just cause” as to why they have failed to apply for the necessary permits, starting the work, or refunding the payment.¹⁹

If a contractor fails to comply with these requirements, the contractee, who is normally the homeowner, must make written demand to the contractor that includes a demand to:²⁰

- Apply for the necessary permits,
- Start the work, or
- Refund the payment.

Such demand must be sent via certified mail, return receipt requested, to the address listed in the contracting agreement. If there is no address for the contractor listed in the contracting agreement, or no written agreement exists, it must be sent to the address listed for licensing purposes with DBPR or the local licensing board.²¹

A contractor will not be permitted to show “just cause” for failing to apply for the necessary permits, starting the work, or refunding the payment if the contractor fails to apply for the necessary permits, start the work, or refund payments within 30 days of receiving written demand to apply for the necessary permits, start the work, or refund the payment from the person who made the payment.²²

A contractor or qualified company who violates these requirements commits:²³

- A misdemeanor of the first degree, if the total money received is less than \$1,000.
- A felony of the third degree, if the total money received is \$1,000 or more, but less than \$20,000.
- A felony of the second degree, if the total money received is \$20,000 or more, but less than \$200,000.
- A felony of the first degree, if the total money received is \$200,000 or more

Moneys Received by Contractors – Termination

A contractor who receives money for repair, restoration, addition, improvement, or construction of residential real property in excess of the value of the work performed may not fail or refuse to perform any work for any 90-day period or for any period that is mutually agreed upon and specified in the contract.²⁴

¹⁸ S. 713.16, F.S.

¹⁹ S. 489.126(2), F.S.

²⁰ S. 489.126(2)(b)1., F.S.

²¹ *Id.*

²² S. 489.126(2)(b)2., F.S.

²³ S. 489.126(5), F.S.

²⁴ S. 489.126(3)(a), F.S.

It is prima facie evidence that a contractor received money for the repair, restoration, addition, improvement, or construction of residential real property and that the amount received exceeds the value of the work performed by the contractor when:²⁵

- The contractor failed to perform any of the contracted work during any 90-day period or any period that is mutually agreed upon and specified in the contract;
- The failure to perform any such work during the 90-day period or such period that is mutually agreed upon and specified in the contract was not related to the owner's termination of the contract or a material breach of the contract by the owner; and
- The contractor failed to perform for the 90-day period or such period that is mutually agreed upon and specified in the contract without "just cause," or terminated the contract without proper notification to the owner.

Proper notification of termination must be made by the contractor in the form of a letter that includes the reason for termination of the contract or the reason for failure to perform sent via certified mail, return receipt requested, mailed to the address of the owner listed in the contracting agreement. If no written agreement exists, the letter must be mailed to the address where the work was to be performed or the address listed on the permit, if applicable.²⁶

If a contractor fails to properly submit a notice of termination, written demand must be made to the contractor to:²⁷

- Perform work, or
- Refund the money received in excess of the value of the work performed.

Such demand must be sent via certified mail, return receipt requested, mailed to the address listed in the contracting agreement. If there is no address for the contractor listed in the contracting agreement, or no agreement exists, the letter must be mailed to the address listed with the department for licensing purposes or the local construction industry licensing board, if applicable.²⁸

A contractor will not be permitted to show "just cause" to terminate the contract if the contractor fails to perform work, or refund the money received in excess of the value of the work performed, within 30 days after receiving a written demand to perform the work, or refund the money received in excess of the value of the work performed, from the person who made the payment.²⁹

A contractor or qualified company who violates these requirements commits:³⁰

- A misdemeanor of the first degree, if the total money received exceeding the value of the work performed is less than \$1,000.
- A felony of the third degree, if the total money received exceeding the value of the work performed is \$1,000 or more, but less than \$20,000.
- A felony of the second degree, if the total money received exceeding the value of the work performed is \$20,000 or more, but less than \$200,000.
- A felony of the first degree, if the total money received exceeding the value of the work performed is \$200,000 or more.

²⁵ S. 489.126(3), F.S.

²⁶ S. 489.126(3)(b)3.a., F.S.

²⁷ S. 489.126(3)(b)3.b., F.S.

²⁸ *Id.*

²⁹ S. 489.126(3)(b)3.c., F.S.

³⁰ S. 489.126(6), F.S.

Unlicensed Activity

No person shall:³¹

- Falsely hold himself or herself or a business organization out as a licensee, certificateholder, or registrant;
- Falsely impersonate a contractor certificateholder or registrant;
- Present as his or her own the contractor certificate or registration of another;
- Knowingly give false or forged evidence to the CILB or a member thereof;
- Use or attempt to use a contractor certificate or registration that has been suspended or revoked;
- Engage in the business or act in the capacity of a contractor or advertise himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor without being duly registered or certified;
- Operate a business organization engaged in contracting after 60 days following the termination of its only qualifying agent without designating another primary qualifying agent, with certain exceptions;
- Commence or perform work for which a building permit is required without such building permit being in effect; or
- Willfully or deliberately disregard or violate any municipal or county ordinance relating to uncertified or unregistered contractors.

For purposes of these prohibitions, a person or business organization operating on an inactive or suspended certificate or registration is not duly certified or registered and is considered unlicensed.³²

Any unlicensed person who commits a violation of these prohibitions:³³

- Commits a misdemeanor of the first degree.
- After having been previously found guilty of such violation, commits a felony of the third degree.
- During the existence of a state of emergency declared by executive order of the Governor, commits a felony of the third degree.
- If such person operates as a pollutant storage systems contractor, precision tank tester, or internal pollutant storage tank lining applicator, commits a felony of the third degree.

Relatedly, a certified or registered contractor may not:³⁴

- Enter into an agreement to allow his or her certification number or registration to be used by a person or company who is unlicensed.
- Knowingly allow his or her certification number or registration to be used by a person or company who is unlicensed.
- Apply for or obtain a building permit for a person or company that is unlicensed.³⁵

A person who violates these prohibitions:

- Commits a misdemeanor of the first degree.
- After having been previously found guilty of such violation, commits a felony of the third degree.

Escrow Accounts

Escrow is a legal concept describing a financial agreement where an asset or money is held by a third party on behalf of two other parties that are in the process of completing a transaction.³⁶

³¹ S. 489.127(1), F.S.

³² *Id.*

³³ S. 489.127(2), F.S.

³⁴ S. 489.126(4), F.S.

³⁵ This does not prohibit a contractor from applying for or obtaining a building permit to allow the contractor to perform work for another person without compensation or to perform work on property that is owned by the contractor. *Id.*

³⁶ Caroline Banton, *How Escrow Protects Parties in Financial Transactions*, Investopedia, Aug. 23, 2023,

<https://www.investopedia.com/terms/e/escrow.asp> (last visited Feb. 13, 2024).

Escrow accounts are managed by the escrow agent. The agent releases the assets or funds upon the fulfillment of predetermined contractual obligations, or upon receiving appropriate instructions. Money, securities, funds, and other assets may be held in escrow.³⁷

Effect of the Bill

Construction Fraud Crimes

The bill creates a process in s. 713.345(2)(a), F.S., to require contractors to keep certain contract funds in an escrow account, under certain circumstances, with criminal penalties.

The bill defines "substantial completion" as performance that is nearly equivalent to that which was contracted for and when only minor, corrective, or warranty work remains.

The bill requires a contractor or qualified company that receives \$10,000 or more for improvements to residential real property to, before the substantial completion of work under the contract, place such payment in an escrow account with:

- A savings and loan association, bank, or trust company located in the state;
- An attorney who is a member in good standing with The Florida Bar; or
- A real estate broker licensed in the state.

The escrow requirements do not apply to the following:

- A contract for hourly labor provided by the contractor or qualified company, but only to the extent payments are made to subcontractors and for materials before substantial completion of the contract.
- A contractor who owns the real property upon which the improvement or construction is to be completed.
- A cost-plus contract.
- A situation in which the escrow requirements are waived in writing by the owner of the residential real property. However, if such escrow requirement is waived, and the value of the improvement or construction is more than \$100,000, the contractor or qualified company must record a copy of a payment by the owner of the residential real property and a performance bond equal to the value of the contract with an insurer authorized to do business in Florida as surety.

The bill requires the contractor or qualified company, within 10 business days after a deposit has been made, to inform the owner of the residential real property in writing of the name of the depository institution, attorney, or real estate broker with whom the funds have been deposited, unless the contract specifies where such payment must be deposited.

The bill allows a contractor or qualified company to keep funds received from different owners in the same account if the contractor or qualified company has financial or accounting records that clearly show how the funds deposited were allocated to each owner.

The bill provides that a depository institution, an attorney, or a real estate broker who receives such a payment in an amount of \$10,000 or more from a contractor or qualified company is not required to:

- Inquire into the validity or propriety of any deposits to or withdrawals from the escrow account; or
- Ensure that any withdrawals from such account are used for a specific purpose as required by a contract.

The bill provides that a deposit into the escrow account remains the property of the owner of the residential real property except as otherwise provided by the bill.

³⁷ *Id.*

The bill allows a contractor or qualified company to withdraw funds from the escrow account before the substantial completion of work, and therefore have control over the disbursement of funds in escrow, in the following circumstances:

- Under the terms of a payment schedule agreed to in the contract between the contractor or qualified company and the owner of the residential real property;
- When required to make payments to subcontractors or for materials related to the contracted job; or
- Upon substantial completion of the improvements to the residential real property if the owner of such property violates the contract, but only if the amount withdrawn by the contractor or qualified company covers reasonable costs plus liquidated damages not to exceed \$500.

The bill provides that if a waiver of the escrow requirement has been executed in writing, the owner of the residential real property may deliver by certified mail, return receipt requested, a written demand for an accounting report of the funds paid to the contractor or qualified company to:

- The address listed in the contract; or
- If the address is not provided in the contract, or a written contract does not exist, the address that is listed for the contractor or qualified company with DBPR for licensing purposes.

Within 60 days after receipt of such demand, the bill requires the contractor or qualified company to provide the owner with an accounting record indicating payments that were made to subcontractors and for purchased materials.

The bill provides that a contractor or qualified company that willfully violates s. 713.345(2)(a), F.S., commits a felony of the third degree.³⁸ The failure of a contractor or qualified company to respond to an owner's written demand for an accounting report creates a rebuttable presumption that a violation of s. 713.345(2)(a), F.S., was willful.

Florida Homeowners' Construction Recovery Fund

The bill provides that the Florida Homeowners' Construction Recovery Fund will be funded through allotted fees from cases related to construction fraud, in addition to DBPR permit surcharges.

The bill provides that, if a person pleads guilty or nolo contendere to, or is found guilty of, regardless of adjudication, a construction fraud crime in ss. 489.126, 489.127, or 713.345, F.S., a court must impose a cost of \$51 against the offender in addition to any other cost or penalty required by law. Payment of such court cost is a condition of probation, community control, or any other court-ordered supervision.

The bill requires the clerk of the court to transfer \$50 from the proceeds of the court cost to the Florida Homeowners' Construction Recovery Fund each month. The clerk of the court retains \$1 of each sum collected as a service charge.

Effective Date

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

- Section 1: Amends s. 713.01, F.S.; relating to definitions.
- Section 2: Amends s. 713.345, F.S.; relating to moneys received for real property improvements; penalty for misapplication.
- Section 3: Creates s. 938.14, F.S.; relating to court costs imposed in cases related to construction fraud.
- Section 4: Amends s. 489.140, F.S.; relating to Florida Homeowners' Construction Recovery Fund.
- Section 5: Provides an effective date of July 1, 2024.

³⁸ Punishable as provided in ss. 775.082, 775.083, or 775.084, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may increase funds available to be disbursed through the Florida Homeowners' Construction Recovery Fund.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may increase availability of funds from the Florida Homeowners' Construction Recovery Fund for homeowners' who have been financially harmed by a contractor.

D. FISCAL COMMENTS:

The bill may have a positive impact on jail and prison beds by creating new felony offenses relating to construction fraud, which may result in increased admissions to such facilities.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill is unclear if the escrow account requirements are applicable to contract amounts of \$10,000 or more, payments adding up to \$10,000 or more over time, or only to lump sum payments of \$10,000 or more.

The bill is unclear when a contractor may take funds from the escrow account. The bill does not state that the contractor has rights to the funds after substantial completion of the contract for improvements. The bill also lists instances when funds may be withdrawn prior to substantial completion, but then states that funds may only be withdrawn upon substantial completion if the owner of such property violates the contract.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES