

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1563 Construction Contracting

SPONSOR(S): Judiciary Committee, 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	21 Y, 0 N, As CS	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 (FHCRF), 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 generally requires a "designated contractor or qualified business" that receives a payment of \$10,000 or more before commencement pursuant to a contract for residential real property improvements to, within 3 business days of receipt, place such payment in an escrow account with specified depository institutions, attorneys, or real estate brokers. The bill also:

- Requires the contractor to provide notice of the payment's location to the homeowner within 10 business days of a deposit, unless the contract specifies where such payment must be deposited.
- Authorizes the comingling of funds from different homeowners in one account in certain circumstances.
- Specifies the obligations of the depository institution, attorney, or broker holding the payment.
- Specifies when a designated contractor or qualified business may withdraw funds from the account.
- Allows a homeowner to waive the escrow requirement in writing, but requires the designated contractor or qualified business to obtain a performance bond for the contract's value in such circumstances.
- Authorizes a homeowner who has waived the escrow requirement to demand an accounting report and specifies the obligations of a designated contractor or qualified business upon receiving a demand.
- Provides that any specified contractor or business organization that willfully violates the escrow requirement commits a third-degree felony.
- Requires specified contractors and business organizations to obtain a performance bond equal to the value of a contract for improvements to residential real property or addenda thereto if such value exceeds \$100,000.
- Modifies disciplinary actions which the Construction Industry Licensing Board may or must take in response to specified construction fraud or escrow offenses committed by specified contractors or business organizations.
- Provides that, if a person pleads guilty or nolo contendere to, or is found guilty of, regardless of adjudication, certain construction fraud crimes, the court must impose a \$51 court cost against the offender, and that the FHCR will be funded in part through a portion of such court cost.

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. 14, 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

Moneys Received for Real Property Improvements

The bill defines “designated contractor or qualified business” as a contractor certified or registered under chapter 489, F.S. or a business organization qualified by a contractor so certified or registered who:

- Has been certified, registered, or qualified for less than five years;
- Contracts for residential real property improvements within an area for which a state of emergency has been declared under s. 252.36, F.S., for a hurricane within 18 months after the date of the declaration; or
- Has been disciplined by the CILB or the Electrical Contractor’s Licensing Board within the previous five years for failing to comply with the escrow requirements.

The bill then creates a process in s. 713.345(2)(a), F.S., generally requiring a designated contractor or qualified business that receives a payment of \$10,000 or more before commencement pursuant to a contract for residential real property improvements to, within three business days of receipt, 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.

However, under the bill, the escrow requirements do not apply to a:

- Contract for hourly labor provided by a designated contractor or qualified business.
- Designated contractor who or qualified business that owns the real property upon which the improvement or construction is to be completed.
- Cost-plus contract.

Where escrow is required, the bill gives a designated contractor or qualified business ten business days after making a deposit into an escrow account to inform the homeowner in writing of the name of the depository institution, attorney, or real estate broker with whom the funds have been deposited, and authorizes the designated contractor or qualified business to keep funds received from different homeowners in the same account if the designated contractor or qualified business has financial or accounting records that clearly show the allocation of the deposited funds to each homeowner. Under the bill, an escrow deposit generally remains the homeowner’s property, but a designated contractor or qualified business has control over the disbursement of funds in escrow upon substantial completion³⁸ of the contract, or any portion that is specifically accounted for in the contract, and may withdraw funds from the escrow account before substantial completion of the work:

- Under the terms of a payment schedule agreed to in the contract between the designated contractor or qualified business and the homeowner;
- When required to pay subcontractors or for materials related to the contracted job; or
- If the homeowner violates the contract, but only if the amount withdrawn covers reasonable costs plus liquidated damages not to exceed \$500.

However, the bill provides that a depository institution, attorney, or real estate broker who receives a payment of \$10,000 or more from a designated contractor or qualified business for residential real property improvements is not required to inquire into the nature of any deposits to or withdrawals from the escrow account or to ensure that any withdrawals are used for a specific purpose as required by a contract.

³⁷ *Id.*

³⁸ 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.

Further, the bill authorizes a homeowner to waive the escrow requirement in writing and, in the event of such a waiver, to demand an accounting report of the funds paid to the designated contractor or qualified business by delivering such demand by certified mail, return receipt requested, to:

- The address of the designated contractor or qualified business listed in the contract; or
- If such address is not provided in the contract, or a written contract or agreement does not exist, to the address listed for the designated contractor or qualified business in DBPR's licensing records.

Under the bill, the designated contractor or qualified business that receives such demand must, within 60 days of receipt, provide the owner with an accounting report indicating all payments made to and from the designated contractor or qualified business by certified mail, return receipt requested. Where a designated contractor or qualified business fails to respond to such a demand, the bill creates a rebuttable presumption that the failure was willful.

Finally, the bill:

- Requires a designated contractor or qualified business to obtain a performance bond equal to the value of the contract and provide proof thereof to the homeowner before commencing or continuing the project:
 - If a homeowner waives the escrow requirement; or
 - If the value of the contract for residential real property improvements or addenda thereto exceeds \$100,000.
- Provides that a designated contractor or qualified business that willfully fails to place funds in an escrow account as required by the bill commits a third-degree felony.
- Provide that, if a designated contractor or qualified business pleads guilty or no contest to, or is found guilty of, regardless of adjudication, the willful failure to place funds in an escrow account, the licensee is subject to discipline under s. 489.129(1)(s), F.S.

Disciplinary Proceedings

The bill amends s. 489.129(1), F.S., to authorize the CILB to take disciplinary action as authorized in that subsection against a contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, or a secondary qualifying agent responsible under s. 489.1195, F.S., found guilty of committing a violation of s. 713.345(2), F.S., relating to the escrow requirements created by the bill. The bill also directs the CILB and the Electrical Contractor's Licensing Board to suspend all licenses issued to a contractor or qualified business under chapter 489, F.S., for at least one year from the date of conviction if the contractor or qualified business pleads guilty or nolo contendere to, or is found guilty of, regardless of adjudication, an offense in violation of:

- S. 489.126(5)(b), (c), or (d), F.S., relating to failure to start work or apply for permits in specified circumstances after receiving, as an initial payment, money totaling more than 10 percent of the contract price for residential real property improvement;
- S. 489.126(6)(b), (c), or (d), F.S., relating to failing or refusing to perform work in specified circumstances after receiving money for residential real property improvement in excess of the value of work performed; or
- S. 713.345(2)(g), F.S., relating to failure to place funds in an escrow account.

However, under the bill, the suspension required is not exclusive, and the CILB may impose any additional penalties set forth in s. 489.129(1), F.S.

Florida Homeowners' Construction Recovery Fund

The bill creates s. 938.14, F.S., to provide that, if a person pleads guilty or nolo contendere to, or is found guilty of, regardless of adjudication, an offense in violation of ss. 489.126, 489.127, or 713.345, F.S., a court must impose a \$51 court cost against the offender in addition to any other cost or penalty required by law. Under the bill, payment of such court cost is a condition of probation, community control, or any other court-ordered supervision, the clerk of the court must transfer \$50 of each such court cost to the FHCRF monthly, and the FCHR will be funded by such court costs in addition to those

funding sources already authorized in law. However, the bill authorizes the clerk to retain \$1 of each such court cost collected as a service charge.

Effective Date

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

B. SECTION DIRECTORY:

- Section 1: Amends s. 489.129, F.S., relating to disciplinary proceedings.
- 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.

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, but may impose additional costs on a contractor related to the escrow and payment bond requirements and related criminal and disciplinary penalties created by the bill.

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 as to whether the escrow account requirements apply only to single, lump sum payments of \$10,000 or more, or if such requirements apply to payments totaling \$10,000 in the aggregate.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 14, 2024, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Modified and created new disciplinary provisions relating to certain financial crimes committed by contractors or qualified businesses.
- Limited the escrow requirement's applicability.
- Clarified when a contractor may exercise control over or remove funds from the escrow account.
- Modified the criminal penalty relating to the escrow requirements created by the bill.
- Modified when a contractor or qualified business must obtain a payment bond.

This analysis is drafted to the Committee Substitute as passed by the Judiciary Committee.