STORAGE NAME: s0220s1z.brc ****AS PASSED BY THE LEGISLATURE****
DATE: July 1, 2000 **CHAPTER** #: 00-372, Laws of Florida

HOUSE OF REPRESENTATIVES
COMMITTEE ON
BUSINESS REGULATION & CONSUMER AFFAIRS
FINAL ANALYSIS

BILL #: CS/SB 220

RELATING TO: Regulation of Nonmedical Professions

SPONSOR(S): Senate Regulated Industries

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) REGULATED INDUSTRIES YEAS 7 NAYS 0
(2)
(3)

I. SUMMARY:

CS/SB 220 combines a number of bills, or portions of bills, related to nonmedical professions of which most deal with construction, electrical or alarm system contracting. The act:

1) Reenacts and saves from automatic repeal the Florida Engineers Management Corporation (FEMC). (HB 2115)

2) Establishes special procedures for discipline of building code enforcement officials (Building Code Enforcement Official's Bill of Rights), when investigated by the Department of Business and Professional Regulation (DBPR). It increases the licensure validity period for provisional licensees; and allows counties with a population of 75,000 or less greater leeway regarding licensure qualification requirements. (HB 2239 and HB 1109))

3) Requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to study the various aspects of local governments' temporarily holding a percentage of money from their progress payments to various contractors, subcontractors, and material suppliers (retainage). (HB 715)

4) Clarifies the roles and responsibilities of professional engineers and fire protection contractors in the design and installation of fire sprinkler systems. It also requires that the final bid documents the engineer provides to the owner must be sealed, making the engineer accountable for them. (CS/HB 993)

5) Clarifies that locally licensed, registered electrical contractors that qualify to be grandfathered into state certification must receive an unlimited electrical certification certificate, and makes the grandfathering available through November 1, 2004. The act clarifies that a contract with an unlicensed contractor is unenforceable. It provides that the Electrical Contractors Licensing Board may not adopt a rule over the proposed objections of the Joint Administrative Procedures Committee, unless the DBPR approves the proposed rule. The act provides that an authorized representative of a company that makes personal emergency response systems can provide these modular systems to clients without having to be a licensed alarm contractor. (HB 2239)

The act has no significant fiscal effect upon state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes [x]	No []	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

See section-by-section portion of this analysis.

C. EFFECT OF PROPOSED CHANGES:

See section-by-section portion of this analysis.

D. SECTION-BY-SECTION ANALYSIS:

The Florida Engineers Management Corporation (HB 2115)

Section 1. Reenacts, modifies, and saves from automatic repeal the Florida Engineers Management Corporation (FEMC).

Section 2. Repeals the section of the FEMC enacting legislation (section 5 of ch. 97-312, L.O.F.) which had set FEMC for automatic repeal on October 1, 2000.

Section 3. Amends s. 471.005, F.S., making technical changes and adding a definition for “board of directors,” management corporation,” and “Secretary.”

Sections 4-10. Amend ss. 471.0035, 471.011, 471.015, 471.017, 471.021, 471.023, 471.033, F.S., making technical changes.

Present Situation

The Florida Engineers Management Corporation (FEMC) is a private corporation statutorily established to provide administrative support to the Florida Board of Professional Engineers (BPE). Prior to the creation of FEMC in 1997, such administrative support had been provided by the Department of Business and Professional Regulation (DBPR).

FEMC serves approximately 27,000 licensed engineers with 13 full-time staff. DBPR contracts with FEMC for the regulatory services and employs a full-time contract manager to provide active supervision and to determine compliance with contract requirements.

DBPR retains responsibility for emergency orders and prosecuting unlicensed practice cases.

FEMC's by-laws provide that the its CEO shall also serve as the executive director of the BPE. These by-laws were adopted as part of the original contract executed between FEMC and the previous DBPR administration in 1998. The issue of who should control the appointment of the BPE executive director became a point of contention between FEMC and the present DBPR administration during the 2000 session, with DBPR insisting that appointment of any board's executive director should be under the control of DBPR. DBPR's contention was supported by s. 455.203(2), F.S., which provides that the DBPR shall, "appoint the executive director of each board, subject to the approval of BPE."[1]

On March 29, 2000, an agreement between BPE, FEMC, and DBPR stipulated that the DBPR contract administrator would serve as the BPE executive director. However, at this point (May 23, 2000), the CEO of FEMC remains the executive director of the BPE.

As provided in its enacting legislation, the section establishing FEMC (s. 471.038, F.S.) will automatically repeal on October 1, 2000, unless reenacted. If the section is repealed, FEMC will cease to exist and its administrative responsibilities, along with any remaining funds, will revert to DBPR.

FEMC is, to date, the only instance of a private corporation being created to provide staff support for the regulation of any profession under DBPR. However, other professions have expressed an interest in following the lead of FEMC, and additional privatization efforts are expected.

The enacting legislation for s. 471.038, F.S., stated that the Legislature had determined "that the privatization of certain functions that are performed by the department for the board will encourage greater operational and economic efficiency and, therefore, will benefit regulated persons and the public."

A performance review of FEMC conducted by the Office of Program Policy Analysis and Government Accountability, and issued in March of this year, concluded that performance had improved under FEMC, with FEMC handling more cases, and disposing of a higher percentage of them in a more timely fashion than had DBPR. On the other hand, the review found that the administrative costs for regulating the engineers' profession had increased 16% (or $247,467) above the regulatory costs from the previous renewal year under DBPR.

Effect of Changes

The act abrogates the scheduled repeal of FEMC, preserving the current method of providing administrative, investigative, and prosecutorial services to the Board of Professional Engineers.

The act subjects FEMC's board of directors and staff to the travel and per diem provisions of s. 112.061, F.S. It also provides that FEMC may make only prudent expenditures directly related to the responsibilities of the BPE and in accordance with the contract.

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[1] It is not clear that the department has ever actually sought explicit approval from any board for any executive director. The current administration's position is that unless a board explicitly disapproves of an executive director at the time he or she is presented to the board, the DBPR assumes the board approves the appointment.

The act establishes and phases in staggered terms of service for the FEMC's Board of Directors. All initial appointments expire on October 31, 2000, and current members may be appointed only to one additional term. Two members are to be appointed for two years, three members are to be appointed for three years, and two members are to be appointed for four years. One of the laypersons must be appointed to a 3-year term and the other layperson must be appointed to a 4-year term. Thereafter, all appointments are for 4-year terms.

The act requires FEMC to pay DBPR for specified costs associated with regulatory services DBPR provides. Specifically, FEMC must pay all cost of representation by Board counsel, all costs associated with the contract administrator, and all costs associated with the Division of Administrative Hearings.

FEMC is required to develop, in conjunction with DBPR, performance standards and measurable outcomes, which BPE must adopt by rule.

The act also provides that all meetings of FEMC's board of directors are public meetings subject to the public meetings law. Although section 471.038, F.S., expressly provides that FEMC's records are public records and are subject to the public records law, there is no such express provision presently for public board meetings. Despite this omission, FEMC's legal counsel has expressed the opinion that meetings of the board of directors are subject to public meetings law, and the current practice is to give notice of the meetings and to make them open to the public.

FEMC is made the sole repository for all records of BPE, including all historical information and records. FEMC must maintain these records in accordance with the guidelines of the Department of State.

BPE is to provide by rule the security procedures that FEMC must follow to ensure the security of licensure examinations.

The act deletes obsolete language requiring the performance audit of FEMC for the period of January 1, 1998, through January 1, 2000, by the Office of Program Policy Analysis and Governmental Accountability. The act provides for an annual audit of records by a certified public accountant, which is subject to review by the Department and the Auditor General.

No provision in the act explicitly deals with the issue of who appoints the executive director of BPE. However, during the legislative session, an agreement was reached that returned that authority to DBPR.

Retainage (HB 715, House Community Affairs Amendment)

Section 11. Requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to conduct a study on retainage.

Present Situation

The 1992 study, Alternatives to 10% Retainage, stated that the practice of retainage is unique to the construction industry. Retainage consists of the owner holding back a stipulated percentage of each progress payment, with this retainage to be paid upon completion of the contractor’s work or upon completion of the entire project. As stated in the study, this retainage (typically 10%) is considered a financial guarantee that the contractor will:

- complete the work;
- correct defects; and
- be capable of financing the project.

Contractors and subcontractors see retainage as having such disadvantages as:

- Increasing the cost of construction (the contractor often must borrow money to stay afloat, waiting for retainage payments);
- Affecting cash flows adversely;
- Increasing project duration and reducing productivity;
- Affecting workmanship and quality adversely; and
- Forcing contractors/subcontractors to front-load progress payment requests.

According to the finding of the 1992 report, owners, both public and private, tend to believe that they cannot get all the necessary work items completed without holding retainage. The report also found that it appears that subcontractors and suppliers/vendors are more adversely affected by retainage than the contractors. If the owner holds 10% retainage, the contractor typically also holds 10% retainage from each of his or her subcontractors. This means that even the first subcontractor on the project, who has completed all of his or her work to the owner and contractor's satisfaction, will wait until the project is fully complete to receive the balance of the monies owned under his or her contract. On larger projects, this time period can take several years. The average profit margin in the construction industry is currently estimated to be substantially less than 10%, often running as low as 5-6%. Therefore, unless and until retainage is released, the subcontractor has no profit in the job, and may, in fact, be financing the job until completion. In addition, contractors and subcontractors must pay in full for materials purchased.

The Florida Department of Management Services (DMS) is the state agency that has the primary responsibility for construction and maintenance of state buildings The DMS indicated that it has a policy of charging 10% retainage on the first half of the project, and 5% on the remaining portion.

The 1992 report found that most public agencies, including the federal Government Services Administration (GSA), had revised their traditional 10% retainage policy. The prior standard of 10% throughout had been reduced. Many public jobs require only 5%. The Department of Defense and GSA have adopted the policy that retainage should be withheld only for specific reasons, such as failure to maintain schedules.

The report noted that almost all <u>public</u> construction is bonded. They further noted that the <u>private</u> construction industry could also adopt some of the revisions being practiced in the public construction sector if bonding became accessible to most of the contractors or if a majority of the contractors could qualify for bonding.

<u>Effect of Changes</u>

Requires OPPAGA, in consultation with the Legislative Committee on Intergovernmental Relations, to conduct a study of local jurisdictions' construction retainage methods. The section specifies areas to be examined, requires study conclusions and recommendations, and requires a report to the Legislature and the Governor by January 1, 2001.

Building Code Administrators and Inspectors (HB 1109)

Section 12. Amends subsections (2) and (6) of s. 468.603, F.S., to replace references to "inspector" with "building code inspector" in the definitions of "building code inspector" and "categories of building inspectors." A new subsection (8) is added to define "Building Code Enforcement Official."

Section 13. Amends section 468.604, F.S., relating to responsibilities of building code administrators, plans examiners, and inspectors, to replace references to "inspector" with "building code inspector."

Section 14. Amends paragraph (c) of subsection (2) of s. 468.605, F.S., relating to membership of the Florida Building Code Administrators and Inspectors Board, to replace references to "inspector" with "building code inspector."

Section 15. Amends section 468.607, F.S., relating to certification of building code administration and inspection personnel, to replace references to "inspector" with "building code inspector."

Section 17. Section 468.617, F.S., relating to joint inspection departments, is amended to replace references to "inspector" and "inspection" with "building code inspector" or "building code inspection."

Present Situation

Part XII of chapter 468, F.S., provides for the regulation of building code administrators and inspectors by the Board of Building Code Administrators and Inspectors (Board) within the Department of Business and Professional Regulation (DBPR). The statute provides for various types and levels of mandatory certification of building code administrators and inspection personnel. The program is funded by license fees and one-half of 1% surcharge on every building permit (local governments retain up to 10% of the surcharge, then the DBPR-projected funding needs of the board are subtracted, and the remainder goes to the Construction Industries Recovery Fund, established under part I of ch. 489, F.S.).

A building code administrator supervises enforcement of building code regulation, including plans review, enforcement, and inspection. A building code inspector inspects construction that requires permits to determine compliance with building codes and state accessibility laws. A plans examiner reviews plans submitted for building permits to determine compliance with construction codes.

There are several categories of inspector and plans examiners certificates, relating to the scope of the activities the licensee may perform (e.g., building inspector, commercial or residential electrical inspector, mechanical inspector, building plans examiner, plumbing plans examiner, etc.). Part XII sets forth the requirements for licensure for the various types and categories of certificate holders, including credentials from specified private organizations or specified experience (or a combination of education and experience) and an examination.

Section 468.607, F.S., provides that no person may be employed by a state agency or local government to perform the duties of building code administrator, plans examiner, or inspector after October 1, 1993, without possessing a proper valid certificate issued in accordance with the provisions of part XII of chapter 468, F.S.

Section 468.603(2), F.S., provides a definition of “building code inspector” or “inspector.” The terms “inspector,” “building inspector,” and “building inspection” are used throughout part XII of chapter 468, F.S., as well as in other chapters of the Florida Statutes.

Effect of Changes

These provisions clarify that any person who does building code inspections is not merely a “code inspector,” but is rather a person inspecting building code construction for compliance with the building code.

Section 16. Amends section 468.609, F.S., relating to standards for certification.

Present Situation

Subsection (4) of s. 468.609, F.S., provides that no person may engage in the duties of a building code administrator, plans examiner, or inspector after October 1, 1993, unless such person possesses one of the following types of valid certificates issued by the board attesting to the person's qualifications to hold such position:

- A standard certificate;
- A limited certificate (allows an individual to continue to work only in the position held on July 1, 1993);
- A provisional certificate (allows an individual to work for 1 to 3 years pending qualification for a standard certificate).

Effect of Changes

Subsection (5) is amended to revise language providing legislative intent that examinations used for certification under this part be substantially equivalent to examinations administered by the Southern Building Code Congress International, the Building Officials Association of Florida, the South Florida Building Code, and the Council of American Building Officials. References to the Building Officials Association of Florida and the South Florida Building Code are deleted.

Subsection (7) is amended to expand the period the board may provide for the issuance of provisional certificates from a minimum of 1 year and a maximum of 3 years to a minimum of 3 years and a maximum of 5 years. Eligibility requirements for provisional certificates are added to limit provisional certificates to newly employed or promoted building code inspectors or plans examiners who meet eligibility requirements specified in subsection (2) and newly employed or promoted building code administrators who meet eligibility requirements specified in subsection (3).

Subsection (8) is deleted to remove obsolete provisions and remove language providing that any individual who holds a valid certificate issued by the Southern Building Code Congresses International, the Building Officials Association of Florida, the South Florida Building Code, or the Council of American Building Officials certification program, or who has been approved for certification under such programs not later than October 1, 1995, shall be deemed to satisfy requirements for certification. Finally, a building code administrator who holds a limited or provisional license in a county with a population of less than 75,000 people is authorized to provide supervision.

Building Code Enforcement Officials Bill of Rights (HB 1109)

Section 18. Creates section 468.619, F.S., creating the Building Code Enforcement Officials Bill of Rights.

Present Situation

Building officials have alleged that in several instances, the Department of Business and Professional Regulation (department) and the Board of Building Code Administrators and Inspectors have taken an inordinate amount of time to reach conclusions to drop cases. In at least one instance, they prevented a licensee from renewing his license, because their investigation was still ongoing. This caused him to lose his job. In general, some of the building officials are convinced that the department abuses its prosecutorial authority and that the board does not listen to reason. Therefore, they believe, additional due process protections are needed.

Currently, the department's complaint and disciplinary processes are as follows:

The department is required to investigate all legally sufficient complaints it receives, pursuant to the provisions of section 455.225, F.S. The determination of legal sufficiency is made upon initial receipt of a complaint received from the public or other source. A complaint is legally sufficient when the allegation, if true, amounts to a licensure violation.

Once the complaint is received, it must be forwarded to the proper office. Most complaints against regulated professionals are received at a central location, processed, and distributed to the appropriate board office. Legal sufficiency is determined, if possible, from the description of the alleged violation. Sometimes, additional information, such as copies of documents, may be required. In some cases this can be done quickly, but in others it can take a much longer period of time and require the cooperation of sources outside the control of the department.

If legal sufficiency is determined, the case is sent to the investigative office in the area where the alleged violation occurred. This can take several days to get the complaint to the proper office and assigned to an investigator. The investigator must rely on the cooperation of others to conduct the investigation. Sometimes subpoenas must be issued to get information. As an investigation progresses, new leads and sources of information are revealed which must be pursued. Sometimes, especially in a technical area such as building code matters, experts must be retained to perform expert analysis.

Once an investigation of a legally sufficient complaint is completed, it is forwarded to the Office of General Counsel for review and presentation to the probable cause panel of the board. The panel, which consists of at least two board members, determines whether there is probable cause to support prosecution of the matter. The complaint, the investigation, and the panel's deliberations are confidential until ten days after probable cause is found by the panel. If probable cause is not found, the case remains confidential and may be closed or sent back for further investigation.

When probable cause is found, the department files an administrative complaint and pursues prosecution of the matter. Each prosecuted case eventually ends up before the board. The board is the agency head for purposes of taking final agency action in each case.

Appeals of the board's decision may be taken to the District Courts of Appeal pursuant to section 120.68, F.S. The rights of licensees are protected during the disciplinary process by chapter 120, F.S., and the uniform rules adopted by the Administration Commission pursuant thereto, s. 455.225, F.S., and the Florida and United States Constitutions.

Effect of Changes

This section of the act establishes the building code enforcement officials' bill of rights, providing several due process protections not explicitly provided elsewhere. Most of these rights relate to assuring speedy disposition of a disciplinary investigation conducted by DBPR.

The section stipulates that local government enforcement officials (building officials, inspectors, and plans examiners) are different from other professionals licensed under the department, and that their different circumstances merit additional specific disciplinary protections. The section is modeled after provisions in the "Law Enforcement and Correctional Officers Bill of Rights," in chapter 112, F.S.

Significant provisions in this section include:

1) Requiring the DBPR to inform the licensee of any complaints, including the substance of the allegation, within 10 days;

2) Requiring the DBPR to send their case to probable cause within six months, at which time the probable cause panel may give the department up to 90 days to complete their investigation;

3) Requiring the local government to provide the legal defense for the building code enforcement official for actions he or she took within the scope of his or her employment.

4) Allowing the enforcement official to sue for abridgment of his or her civil rights arising out of the official's performance of his or her duties; and

5) Providing that if a court finds that DBPR prosecution was "without merit," or if a judgement against DBPR is awarded to the enforcement official, the DBPR shall be liable for the enforcement official's legal costs and attorney's fees.

Building Code Administrators and Inspectors (HB 1109)

The changes in sections 19 through 30 are technical changes, relating to terminology.

Section 19. Amends subsection (3) of s. 468.621, F.S., relating to disciplinary proceedings, to replace a reference to "inspector" with "building code Inspector."

Section 20. Amends subsection (2), (3), and (4) of s. 468.627, F.S., relating to application, examination, and fees, to replace references to "inspector" and "inspection" with "building code inspector" or "building code inspection" and clarify "regulation" refers to "construction regulation."

Section 21. Amends section 468.631, F.S., relating to the Building Code Administrators and Inspectors Fund, to replace references to "inspector" and "inspection" with "building code inspector" or "building code inspection."

Section 22. Amends subsection (1) of s. 468.633, F.S., relating to authority of local government, to replace a reference to building "inspector" with "building code inspector."

Section 23. Amends paragraph (a) of subsection (1) of s. 112.3145, F.S., relating to disclosure of financial interests and clients represented before agencies, to replace a reference to "building inspector" with "building code inspector."

Section 24. Amends subsection (3) of s. 125.56, F.S., relating to the adoption of amendments of building codes, to replace a reference to "building inspector" with "building code inspector."

Section 25. Amends paragraph (g) of subsection (5) of s. 212.08, F.S., relating to sales tax exemption for building materials used in an enterprise zone, to replace a reference to "building inspector" with "building code inspector."

Section 26. Amends paragraph (a) of subsection (2) of s. 252.924, F.S., relating to party state responsibilities, to replace a reference to "building inspection" with "building code inspection."

Section 27. Amends paragraph (j) of subsection (3) of s. 404.056, F.S., relating to environmental radiation standards and programs, to replace a reference to "building inspections" with "building code inspections."

Section 28. Amends section 471.045, F.S., relating to professional engineers performing building code inspector duties, to replace a reference to "building inspection" with "building code inspection."

Section 29. Amends section 481.222, F.S., relating to architects performing building code inspector duties, to replace a reference to "building inspection" with "building code inspection."

Section 30. Amends paragraph (b) of subsection (18) of s. 489.103, F.S., relating to exemptions from regulation of construction contracting, to replace a reference to "building inspections" with "building code inspections."

Construction Contract Indemnification Agreements

Section 31. Amends s. 725.06, F.S., to clarify indemnification provisions in construction contracts.

Present Situation

Currently, construction contracts may contain indemnification clauses. In an indemnification clause, one party may agree to protect a second party against loss or damage specified in the contract and may agree to cover negligence by the second party. In other words, one party may agree to pay the costs of another party's negligence. Section 725.06, F.S., limits indemnity agreements in construction contracts. Pursuant to the statute, all indemnification agreements between parties to a construction contract are void and unenforceable unless:

1) A monetary limit is placed on the extent of the indemnity and is included in the project specifications or bid document, if any; or

2) Specific consideration is included in the contract in exchange for the indemnity provision.

This provision applies to any person contracting for construction with architects, engineers, general contractors, subcontractors, sub-subcontractors, and materialmen. If the indemnity agreement meets the requirements of section 725.06, F.S., parties are free to establish mutually acceptable terms.

Effect of Changes

The section provides that a construction contract may not require a party to a contract to assume responsibility for something they did not cause through their own negligence, recklessness, or intentional wrongful misconduct.

Professional Engineers/Design Plans at a Bid Meeting (HB 993)

Section 32. Amends s.471.025, F.S., relating to engineers responsibility to seal their work product.

Present Situation

Engineers are licensed and regulated by the Board of Professional Engineers, under the Department of Business and Professional Regulation, pursuant to ch. 471, F.S. Engineers perform consultation, planning, and design of engineering systems. Chapter 471, F. S., provides for testing, licensure, and discipline of engineers.

Engineers are required to seal (physically emboss) plans that they submit "for public record." Sealing a plan makes the professional responsible for the plan in the sense that they can be disciplined if the plan is done poorly. Plans for "public record" basically refers to plans submitted to a building department for purposes of pulling permits. Such plans are kept "on file," and can be viewed/researched by the public.

However, prior to submitting plans to the building department, engineers also typically submit their plans at what is called a "bid meeting." A bid meeting is a meeting between the engineer, the owner, and the contractor who will be building the system in question. The purpose of the bid meeting is for the owner to obtain bids from the contractor regarding what he or she would charge for building the system described in the plans.

Fire protection contractors allege, and presented evidence supporting their allegation, that at many such meetings regarding the impending construction of a fire sprinkler system, they are presented with an engineer's fire protection system plans that are incompetently done. However, since these plans are not "for public record," the engineer is not required to seal these plans and, therefore, cannot be held accountable for them under the current law.

Effect of Changes

The section requires professional engineers to seal their final bid documents before providing them to an owner. The effect of this is that engineers will be responsible for the accuracy and competency of documents they present at bid meetings.

Pool/spa Contractors (HB 2239)

Section 33. Amends s. 489.105, F.S., relating to pool and spa contractors' job scope.

Present Situation

The job scope of each type of construction contractor is set forth in their respective definitions in s. 489.105, F.S. The activities listed in the definition become activities that only a person holding that license can lawfully perform. The existing job scope of a commercial pool contractor lists, among other things, uniting and fiber glassing. Interior pool finishing work that is not uniting or fiber glassing does not currently require a license. The Construction Industry Licensing Board (CILB) has recommended that a more general term, "interior finishes," replace the detailed listing, in order to capture new and evolving technologies using new materials.

Effect of Changes

The section provides a more broad and inclusive term, "interior finishes," to describe certain pool work in the commercial pool/spa job scope, to replace the more narrow and specific terms currently used. This provision would require persons doing any kind of pool finishing work, using any technology or material, to be licensed as a commercial pool/spa contractor. It also clarifies and streamlines the existing definition of the various types of pool contractors.

Grandfathering Registered Construction Contractors into State Certification (HB 2239)

Section 34 and 39. Amend s. 489.118, F.S., relating to construction contractors, and s. 489.514, F.S., relating to electrical and alarm systems contractors, to clarify and add to the grandfathering language passed in 1999.

Present Situation

Legislation adopted in 1999 provided that applying registered contractors may be granted a certification, under certain circumstances. Registered contractors are locally licensed contractors, who then must register with the state. Registered contractors may practice only in the jurisdiction(s) which issue(s) the local license. Contractors who hold a certification may practice statewide.

The process, in which a special licensure path is opened and made available for a limited time period, is know as "grandfathering." In order to be grandfathered, the applicant must: (1) Have at least five years experience as a registered contractor; (2) Have passed an acceptable examination; and (3) Have had no serious discipline imposed on him or her.

The Electrical Contractors Licensing Board (ECLB), subsequent to that 1999 legislation, attempted to create additional licensure categories in rule, and then use these categories as the categories into which the grandfathered applicants would be moved. These categories would have different names and different, more limited, job scopes than the existing categories, and is contrary to the purpose of the 1999 law.

The Joint Administrative Procedures Committee staff proposed objections to each of the versions of the ECLB's proposed rules. Eventually, the ECLB ceased its attempts to create the additional categories in rule, and declared that qualified registered applicants would be grandfathered into statutory categories (see discussion in section 38).

Effect of Changes

Section 489.118, F.S., is in part I of chapter 489, F.S., which applies to all contractors *except* electrical and alarm system contractors. Section 489.514, F.S., is in part II of chapter 489, F.S., which applies to electrical and alarm system contractors. Changes in each of these two sections designate three additional testing companies as providing exams acceptable under the grandfathering process, and provide that the board shall accept the stipulated examinations as fulfilling qualification requirements, *without spending their time investigating the format or detailed content of the examination*. The sections also provide that persons must make application by November 1, 2004, in order to avail themselves of the grandfathering opportunity.

Finally, section 39 of the act amends s. 489.514, F.S. (applying to the ECLB), to make explicit that the ECLB must grandfather approved applicants into an existing statutory category.

Contracts with Unlicensed Contractors (HB 2239)

Section 35 and 43. Amend ss. 489.128, and 489.532, F.S., relating to provisions making contracts with unlicensed contractors unenforceable.

Present Situation

Sections 489.128 (applying to construction contractors) and 489.532, F.S. (applying to electrical and alarm system contractors), provide that contracts with unlicensed contractors are unenforceable. However, each section also provides that the section does not apply if the contractor "obtains or reinstates" his or her license. The overall effect is to make the section unenforceable, since there is always the potential that some day in the future the contractor will obtain a license, or reinstate his or her license.

Effect of Changes

The section closes the perceived loophole in the two provisions that make contracts with unlicensed contractors unenforceable. No longer will the possibility that the unlicensed contractor may at some later date obtain or reinstate his or her license exist as an exception to the provision, effectively disabling it. (See section V. C., Other Comments. p. 19)

Electrical and Alarm System Contractor Licensure Exemptions (HB 2239)

Section 36. Amends s. 489.503, F.S., clarifying two exemptions from electrical or alarm system contractor licensure requirements.

Section 37. Amends s. 489.505, F.S., to clarify that a system designed to *detect* a fire or burglary, even if it is plugged in or wireless, rather than hard-wired, cannot be considered a PERS system.

Present Situation

There is presently an exemption from electrical contractor licensure requirements for any person licensed under chapter 527, F.S., which relates to liquefied petroleum gas dealers, dispensers, and installers.

Another exemption provides that an employee of a company that produces a personal emergency response system (PERS) may distribute such a system without having to be licensed as an alarm system contractor. PERS is a modular system that plugs into a phone jack and automatically dials an emergency ("panic") number when signaled by the system owner. A PERS system *signals*, rather than *detects*, and is not specifically intended for burglary or fires.

Effect of Changes

The section clarifies the licensure exemption related to the sale of liquefied petroleum gas, providing that it applies only when the person licensed under ch. 527, F.S., is performing work regulated by that license.

The section also allows persons who are authorized dealers or distributors for the producer of a personal emergency response system to be exempted from having to be an alarm contractor in order to provide these modular systems.

Joint Administrative Procedures Committee (JAPC)
Approval of Board Rules (HB 2239)

Section 38. Amends s. 489.507, F.S., limiting board authority to enact a rule over the objections of the Joint Administrative Procedures Committee.

Present Situation

JAPC reviews all rules proposed by each executive branch agency. JAPC staff determines whether, in their view, the rule lacks proper statutory authority, or is otherwise objectionable. If the staff makes such a determination, it communicates by letter with the agency proposing the rule, asking the agency to cite the proposed rule's specific statutory authority, or otherwise clear up their concerns. These communications are considered a "proposed objection" (an actual objection may only be made by a JAPC *committee* vote).

Currently, when JAPC staff proposes an objection to a board's proposed rule, the board may:

1) Ignore the proposed objection and neglect to respond (in which case the rule is automatically considered withdrawn); or

2) Modify the rule to satisfy the concerns expressed in the proposed objections; or

3) Refuse to modify the rule, and proceed to file such rule with the Department of State.

If the board refuses to modify the rule, the proposed objection goes before the JAPC committee, and the JAPC committee may then formally vote an objection. The executive director of JAPC then certifies the objection to the agency head. A note of this objection is then made in the Florida Administrative Code, attached to the rule itself. However, a JAPC objection does not impede the adoption of a rule. Once filed with the Secretary of State, the rule takes effect in 20 days.

JAPC may choose to report to the Speaker of the House and the President of the Senate the refusal to modify the rule to satisfy the objection, and a bill may be filed to repeal the

rule. However, to date, no board has refused to modify, and JAPC has never voted a formal objection.

During the last year, the Electrical Contractors Licensing Board (ECLB) has contended with the JAPC staff over a rule relating to grandfathering registered electrical contractors into state certification (see the "Present Situation" section of this analysis immediately preceding the discussion of sections 34 and 39). In April, at its regularly scheduled meeting, the ECLB apparently determined that it was going to refuse to modify its rule to satisfy the concerns expressed in the proposed objections.

Subsequent to that meeting (and in apparent reaction to an amendment filed on the floor of the House which would have repealed the existence of the ECLB if the rule had been adopted), the ECLB called an emergency meeting and reversed its course, abandoning its attempt to promulgate the rule in question.

Effect of Changes

The section provides that the ECLB may not file a rule with the Secretary of State if the board has failed to remove any proposed objections of JAPC regarding that rule, *unless the ECLB has obtained approval of the rule from the DBPR*. The section further provides that the DBPR may repeal any rule which the ECLB has previously filed with the Secretary of State without removing any JAPC proposed objections relating to that rule.

Grandfathering Registered Electrical and Alarm System Contractors into State Certification (HB 2239)

Section 39. Amends s. 489.514, F.S., to clarify provisions which require the ECLB to grandfather registered electrical and alarm system contractors into state certification. (See section 34 of this analysis for discussion)

Training of Alarm System Monitoring Personnel (HB 2239)

Section 40. Amends s. 489.5185, F.S., relating to training of alarm monitoring personnel.

Present Situation

Section 489.518, F.S., requires licensed electrical or alarm system contractors to obtain training, for persons in their employ who do installing, repairing, selling, servicing on-site, or monitoring of burglar alarm systems. These persons are termed "burglar alarm system agents." Similar provisions are in s. 489.5185, F.S., for fire alarm system agents. Each law has a number of exceptions to these requirements.

These laws were established primarily in the hope that training all alarm system agents would produce more capable work crews, and reduce the incidence of false alarms. "Monitoring" basically consists of answering a phone and forwarding the information in a responsible and competent fashion, so requiring technical training for monitoring personnel, to prevent false alarms, is not a practical solution.

Section 489.518, F.S., exempts *burglar* alarm system agents who only do monitoring from the training requirements. However, this same exemption from training requirements does not currently exist in s. 489.5185, F.S., regarding *fire* alarm system agents who only do monitoring.

Effect of Changes

The section exempts fire alarm system agents, who only do monitoring, from training requirements.

Electrical and Alarm System Contracting (HB 2239)

Section 41. Amends s. 489.522, F.S., requiring a licensee to put his or her license on inactive status within a certain time period if he or she is not designated as a qualifier for any company.

Present Situation

Every electrical construction business in Florida must designate a licensed person who is in charge of, and responsible for, that business's electrical contracting activities. The licensee who is designated is said to "qualify" that business. Presently, when a licensee ceases to be a qualifier for an electrical business in Florida, that business has 60 days to obtain another qualifier. There is, however, no time frame within which the licensee must affiliate himself or herself with another business or otherwise advise the board of his or her status.

Under the scenario discussed above, the licensee who had qualified that business still holds his or her individual license, but the regulatory board has no idea whether that licensee has ceased operating, or whether he or she is continuing to operate (either working for himself or herself, or qualifying another business).

All licensees with an active license are required to hold, or be under their company's, workers compensation insurance. That insurance does not transfer from one company to another. Therefore, when a licensee leaves a construction company he or she is required to obtain workers compensation insurance either under another company, or for himself or herself.

Effect of Changes

This section provides that if a licensee no longer qualifies a business, he or she must either report that he or she is qualifying another business within 60 days, report that he or she is working for (qualifying) himself or herself, or place his or her license in an inactive status. The purpose of this provision is to enable the Electrical Contractors Licensing Board to better track the licensee, and check whether the licensee has (re)obtained workers compensation insurance.

Section 42. Amends s. 489.531, F.S., creating criminal penalties for unlicensed electrical or alarm system contracting.

Present Situation

There are presently no criminal penalties for unlicensed electrical or alarm system contracting found in part II of chapter 489, F.S. Criminal penalties for unlicensed activity are virtually always a component of a professional licensure practice act.

Effect of Changes

This section establishes the penalty for engaging in unlicensed contracting as a first degree misdemeanor, and establishes the penalty for a subsequent violation as a third degree felony. It also provides that the following activities are a third degree felony: (a) Unlicensed contracting during a declared state of emergency; and (b) Unlicensed operation by a pollutant storage systems contractor, a precision tank tester or an internal pollutant storage tank lining applicator. It also changes several references regarding "local license" to "registration," and instances of "locally licensed" to "registered."

Section 43. Amends s. 489.532, F.S., relating to invalidating contracts with unlicensed contractors (See section 35 of this analysis).

Fire Protection Contractors (HB 993)

Section 44. Amends s. 633.021, F.S., to define "layout" (an activity understood as being within the job scope of a fire protection contractor).

Present Situation

Currently, engineers design fire sprinkler systems over a certain size (50 sprinkler heads), and fire sprinkler contractors develop installation (implementation) drawings from the engineer design direction. A dispute between the two professions exists regarding the scope of work for the engineer and the contractor, with each side arguing the other is doing work that the other should be performing.

Section 553.79(6), F.S., requires certain documents to be sealed by an engineer, in order for the construction or alteration project to receive a building permit, including:

> *(c) Fire sprinkler documents for any new building or addition which includes a fire sprinkler system which contains 50 or more sprinkler heads. A fire protection Contractor I, Contractor II, or Contractor IV, certified under s. 633.521, may design a fire sprinkler system of 49 or fewer heads and may design the alteration of an existing fire sprinkler system if the alteration consists of the relocation, addition, or deletion of not more than 49 heads, notwithstanding the size of the existing fire sprinkler system.*

This same requirement appears in s. 633.021(5), F.S. There is no definition in statute regarding what elements or level of detail need to exist in the "documents" for fire sprinkler systems. There is also no definition in statute of what elements or level of detail constitute "layouts" (which are the documents produced by fire protection contractors, according to parameters set forth in the engineer design documents).

However, the Board of Professional Engineers (BPE) has adopted a rule (Rule 61G15-32, F.A.C.) that sets forth the minimum standard of practice for engineers, with regard to design of fire protection systems. As a practical matter, this amounts to setting forth the minimum level of detail and content required in such documents.

The fire sprinkler contractors argue that the BPE rule identifies activities that are typically done by a fire protection contractor. They further assert that the actual effect of the BPE rule, coupled with the absence of defining clarity in the law, shifts certain roles and responsibilities in establishing the details of a fire protection system from the contractor to the engineer.

The Board of Professional Engineers argues that they are within their responsibility in setting forth such a definition, and that engineers are working within their responsibilities in

performing the activities set forth in the rule. They further insist that the engineer possesses the "big picture" information on fire protection factors inside and outside the building that the fire protection contractor lacks, and that choices and decisions historically made by contractors have needed (but lacked) engineer input all along.

While the engineers' rule stipulating the contents of the design document and identifying certain details in the fire protection system (details that the contractors claim should be within their purview) does not explicitly prohibit fire protection contractors from making those decisions, it does create a problem for the contractors. If the engineer delineates the system in detail in his or her design document, the contractor must then either follow those details, or be required to obtain an engineer's approval for any and every change. Such approval takes time and increases the cost of construction. Contractors argue that the nature of fire protection system design is such that a viable and effective system may take any one of several forms and costs. They assert that the contractor has knowledge of current fire protection technology options and material choices that most engineers cannot be expected to possess. Taking these facts into consideration, contractors argue that it makes no economic sense to bind them to system *detail* choices (implementation decisions) made by engineers who cannot be expected to be as knowledgeable as contractors regarding fire protection technologies and materials.

Effect of Changes

The section makes it explicit that fire protection contractors are responsible for producing a fire protection system layout, i.e., hydraulic calculations and detailed positioning of system components.

Repeal/Obsolete Language (HB 2239)

Effect of Changes

Section 45. Repeals s. 489.537(8), F.S., to delete obsolete provisions establishing a grandfathering pathway for certain varieties of alarm contractors who had, several years ago, been allowed to lawfully operate without a license.

Sections 46 & 47. Amend ss. 489.505, and 489.515, F.S., for technical purposes relating to the subsection repealed in the previous section of this act.

Effective date

Section 48. Provides that the act shall take effect July 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This act may reduce some local government expenditures required to recruit and retain necessary building code personnel. The expansion of the validity period of provisional certificates should be particularly beneficial to counties with a population of less than 75,000, several of which have experienced difficulties in recruiting and retaining certified building code staff.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

No significant impact.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This act does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This act does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

The provisions in section 38 of the act constrain the authority of the ECLB in promulgating rules. See the section-by-section portion of this analysis for a full discussion.

C. OTHER COMMENTS:

Regarding sections 35 and 43 of this act, the following intent language was read on the House Floor, as well as the Senate Floor, prior to the final vote on the bill, in each house:

> A couple of the provisions in this bill are designed to clarify the unlicensed contract invalidation provisions in sections 489.128, and 489.532, F.S. Recent court decisions appear to have misapplied those sections, and are allowing contracts with the unlicensed contractors to be enforced -- because the unlicensed contractor may obtain a license some time in the future. That was not intended. By deleting the last sentence in those sections, this bill makes clear that contracts with unlicensed contractors are unenforceable, period.

Also, one provision of note is absent from the bill. A provision moving the Construction Industry Licensing Board from Jacksonville to Leon County had been present in several versions of the House and Senate bills dealing with construction matters. However, in the waning days of session, that provision was removed from this bill (and any other bills which passed, as well).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

CS/SB 220 began as a bill to reenact and save from automatic repeal the Florida Engineers Management Corporation (FEMC). Amendments were adopted in the Senate committee and the bill was made a Committee Substitute, becoming identical to HB 2115. The bill passed the Senate, and was sent to the House. At that point the bill still only applied to FEMC. The additional sections, transforming the bill into the more broad and inclusive act described in this analysis, were amended onto the bill (per an agreement with the Senate) on the House Floor. These additional provisions were the substance of HB 2239, CS/HB 993, CS/HB 1109, and HB 715. The Senate concurred with the House amendments and passed the bill.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION & CONSUMER AFFAIRS:

Prepared by:	Staff Director:
Gip Arthur	Rebecca R. Everhart

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON BUSINESS REGULATION & CONSUMER AFFAIRS:

Prepared by:	Staff Director:
Gip Arthur	Rebecca R. Everhart