

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 212

SPONSOR: Commerce and Economic Opportunities Committee and Senator Holzendorf

SUBJECT: Construction Contracts

DATE: January 24, 2002 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gillespie	MacLure	CM	Favorable/CS
2.			RI	
3.				
4.				
5.				
6.				

## I. Summary:

Committee Substitute for Senate Bill 212 requires construction contracts for one-family and two-family homes to specify the date by which a certificate of occupancy will be issued and to provide for liquidated damages for each day that occupancy is delayed by the builder after the contracted date. If a contract does not specify an amount of liquidated damages, the committee substitute establishes a default amount at \$100 for each day that occupancy is delayed. The committee substitute also allows contracts to provide actual damages in lieu of liquidated damages.

This committee substitute creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

### Construction Contractors

Under current law, construction contractors are regulated by the Construction Industry Licensing Board (part I of ch. 489, F.S.). Construction contractors encompass general, building, and residential contractors, as well as several categories of subcontractors, including plumbing, air-conditioning, mechanical, roofing, sheet metal, pool/spa, underground utility, solar, and pollutant storage system contractors. Two additional categories of subcontractors, electrical and alarm system contractors, are regulated by the Electrical Contractors' Licensing Board (part II of ch. 489, F.S.). Both licensing boards are located within the Department of Business and Professional Regulation.

Each individual who practices contracting in Florida must be certified or registered with the appropriate licensing board. The department certifies contractors who meet state experience and

examination requirements. Certified contractors may contract anywhere in the state without meeting additional local requirements. The department registers contractors who meet local licensing requirements. Registered contractors may contract only in the local jurisdiction issuing the license.

## **Construction Contracts**

A typical construction project has three principal participants: the owner, the architect or engineer, and the contractor. Generally, after an architect or engineer has prepared the plans and specifications, a contractor is selected to construct the project. Once selected, the contractor generally controls the course of the construction with limited input from the owner and the architect or engineer. Many of the rights and liabilities of the owner, including timely completion of a project, are governed by the contents of the contracts the owner has with the architect or engineer and the contractor. The Legislature has imposed few limitations on the contents of contracts between owners and contractors, and these limitations do not govern damages caused by delay in project completion.

For example, current law provides that, unless the contract specifically provides to the contrary, a dispute between an owner and a contractor does not permit the owner to withhold payment from the contractor for labor, services, or materials provided to the owner which are not subject to or affected by the dispute (s. 715.12(6)(e), F.S.). In another example, current law provides that a construction contract between an owner and a contractor in which a party promises to indemnify the other party for liability for damages arising under the contract is void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification, which must bear a reasonable commercial relationship to the contract and must be part of the applicable project specifications (s. 725.06(1), F.S.).

## **Delay Claims**

Claims for damages caused by delay arising under construction contracts have traditionally been resolved by the courts based upon judicial precedent. Under these precedents,<sup>1</sup> when a contractor agrees to complete a project within a certain time period or by a certain date, the contractor assumes the risk of many reasonably foreseeable delays. For example, some bad weather is to be expected. To avoid liability for the owner's delay damages, the contractor must show the late completion was because of a risk that was not assumed by the contract (i.e., circumstances beyond the contractor's control that caused the delay). These types of delay are known as "excusable delays," which might include acts of God, owner interference, lack of access to the construction site, inadequate plans and specifications, defective owner-supplied materials, unusually severe weather, strikes, and labor disputes. A contractor, however, would be responsible for "inexcusable delays," such as the failure of the contractor's subcontractors to perform properly and to perform timely on a project.

Because it is often difficult or impossible to predict accurately the damages an owner will suffer if a project is delayed, a liquidated damages provision is sometimes included in construction

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<sup>1</sup> See J. Avery "Skip" Kirst, Jr., *Delay Claims, Florida Construction Law and Practice*, 11-1–11-32 (Fla. Bar, 3d ed. Sept. 1999).

contracts. The term “liquidated damages” refers to an amount contractually stipulated as a reasonable estimation of the actual damages that will be suffered by one party if the other party breaches the contract.<sup>2</sup> If a contract is breached and the parties have agreed upon liquidated damages, the amount specified in the contract is the measure of the damages, whether that amount exceeds or falls short of the actual damages. Thus, a liquidated damages clause also acts as additional incentive for the contractor to complete the project on time. The amount of liquidated damages must bear some relationship to the actual damages suffered, and the owner cannot enforce a liquidated damages provision when the owner is the principal cause of delay.

### **III. Effect of Proposed Changes:**

The committee substitute requires each contract for construction of a one-family or two-family home to contain a clause specifying the date by which a certificate of occupancy will be issued. The committee substitute also requires each contract to contain an explicit penalty clause providing liquidated damages for delay caused by the builder. The penalty clause must also specify the amount of liquidated damages for each day that occupancy is delayed after the contracted date.

In lieu of liquidated damages, the committee substitute allows a construction contract to provide actual damages, but a provision for actual damages must be explicitly stipulated in the contract.

If a contract does not have a penalty clause, or if a contract’s penalty clause does not specify the amount of liquidated damages or provide for actual damages in lieu of liquidated damages, the committee substitute establishes a default amount of liquidated damages at \$100 for each day that occupancy is delayed after the contracted date. The committee substitute does not, however, provide a clear remedy in circumstances in which a builder fails to specify in the construction contract the date by which a certificate of occupancy will be issued.

The committee substitute provides an effective date of January 1, 2003, and applies prospectively to contracts that are entered into on or after that date. Renewals of contracts entered into before the effective date are not affected by the committee substitute.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

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<sup>2</sup> *Black's Law Dictionary* 395 (7th ed. 1999).

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

If a builder inadvertently fails to include a penalty clause providing for actual damages or specifying an amount of liquidated damages in a construction contract for a one-family or two-family home, the committee substitute would require the builder to pay \$100 in liquidated damages for each day that construction is delayed by the builder after the contracted date. To avoid the risk of paying damages, some builders would likely stipulate extended construction completion dates.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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