

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Mawn	Hall
2) Commerce Committee	20 Y, 0 N, As CS	Brackett	Hamon
3) Judiciary Committee			

SUMMARY ANALYSIS

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

- Theft, if the contractor receives money totaling more than 10 percent of the contract price, with the intent to deprive the owner, and fails to apply for permits within 30 days, or fails to begin work within 90 days after permits are issued; and
- Construction fraud, in which the contractor receives money for contracted work, with the intent to defraud the owner, and fails to perform the work for 90 days.

Construction theft and fraud are prosecuted as theft under s. 812.014, F.S.; the offense level depends on the amount of money stolen. To commit theft under Florida law, a defendant must have the intent to commit the crime at the time of, or prior to, the taking. In contractual cases, it is difficult to prove that criminal intent is present at the time the contract was signed or entered into.

The bill:

- Deletes the intent element from the offense of construction theft and fraud;
- Provides a just cause defense against the offense of construction theft and fraud;
- Provides a rebuttable presumption that a contractor does not have a just cause defense; and
- Sets specific value thresholds with corresponding offense levels for construction theft and construction fraud.

The fiscal impact on state and local government is indeterminate.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

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

Certification and Registration

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

Disciplinary Proceedings

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

- Obtaining a certificate or registration by fraud or misrepresentation;⁸
- A crime relating to the practice of or the ability to practice contracting;⁹
- Performing any act which helps another to engage in uncertified or unregistered contracting if the contractor knew the person was uncertified or unregistered;¹⁰
- Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer;¹¹
- Failing in any material respect to comply with the provisions of ch. 489, part I, F.S., the Construction Contractor Practice Act;¹²

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

² S. 489.107(1), F.S.

³ S. 489.113(1), F.S.

⁴ S. 489.117(1)(b), F.S.

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

⁶ S. 489.113(2), F.S.

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

⁸ S. 489.129(1)(a), F.S.

⁹ S. 489.129(1)(b), F.S.

¹⁰ S. 489.129(1)(d), F.S.

¹¹ S. 489.129(1)(g), F.S.

¹² S. 489.129(1)(i), F.S.

- Abandoning a construction project. There is a presumption a contractor abandoned a project after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, or the contractor fails to perform work without just cause for 90 consecutive days;¹³
- Committing fraud or deceit in the practice of contracting;¹⁴
- Committing negligence resulting in significant danger to life or property;¹⁵
- Committing incompetency or misconduct in the practice of contracting;¹⁶ or
- Proceeding on a job without obtaining applicable local building department permits and inspections.¹⁷

Criminal Offenses

In addition to Board action, Florida law imposes criminal penalties for prohibited behavior in the contracting industry. A person commits a first degree misdemeanor¹⁸ if he or she:¹⁹

- Falsely holds himself or herself out as a licensee, certificate holder, or registrant;²⁰
- Falsely impersonates a certificate holder or registrant;²¹
- Presents the certificate or registration of another as his or her own;²²
- Knowingly gives false or forged evidence to the Board or a Board member;²³
- Uses or attempts to use a suspended or revoked certificate or registration;²⁴
- Acts or advertises as a contractor without being duly registered or certified;²⁵
- Operates a contracting business 60 days after termination of its only qualifying agent without designating another primary qualifying agent;²⁶
- Commences or performs work for which a building permit is required without such permit;²⁷ or
- Willfully or deliberately disregards any municipal or county ordinance relating to uncertified or unregistered contractors.²⁸

A person commits a third degree felony²⁹ if he or she commits a second or subsequent offense or commits such an offense during a state of emergency declared by the Governor.³⁰

Construction Theft

A contractor commits theft under s. 812.014, F.S., if the contractor receives money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property, with the intent to deprive the owner of such money, and fails to:

- Apply for any necessary permits within 30 days after the payment is made; or
- Start the work within 90 days after the date all necessary permits are issued.

¹³ S. 489.129(1)(j), F.S.

¹⁴ S. 489.129(1)(l), F.S.

¹⁵ S. 489.129(1)(n), F.S.

¹⁶ S. 489.129(1)(m), F.S.

¹⁷ S. 489.129(1)(o), F.S.

¹⁸ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

¹⁹ S. 489.127(2)(a), F.S.

²⁰ S. 489.127(1)(a), F.S.

²¹ S. 489.127(1)(b), F.S.

²² S. 489.127(1)(c), F.S.

²³ S. 489.127(1)(d), F.S.

²⁴ S. 489.127(1)(e), F.S.

²⁵ S. 489.127(1)(f), F.S.

²⁶ S. 489.127(1)(g), F.S.

²⁷ S. 489.127(1)(h), F.S.

²⁸ S. 489.127(1)(i), F.S.

²⁹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

³⁰ Ss. 489.127(2)(b) and (c), F.S.

However, a theft has not occurred if the person who made the payment agrees, in writing, to have a longer period apply for the necessary permits, to start the work, or agrees to longer periods for both.³¹

Construction Fraud

A contractor commits construction fraud, punishable as theft under s. 812.014, F.S., if he or she receives money for repair, restoration, addition, improvement, or construction of residential real property exceeding the value of work already performed, with intent to defraud the owner,³² and fails or refuses to perform any work for a 90-day period.³³ A court may infer intent to commit construction fraud when a contractor:

- Received money in excess of the value of the work already performed;
- Failed to perform work during any 60-day period, and the failure was not due to the owner terminating or materially breaching the contract; and
- The contractor failed to perform work for which he or she contracted for an additional 30-day period after the owner mailed a notice of failure to perform to the contractor.³⁴

Theft

Section 812.014, F.S., provides that a person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

- Deprive the other person of a right to the property or a benefit from the property; or
- Appropriately the property to his or her own use or to the use of any person not entitled to the use of the property.

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

	Property Value	Offense Level
Grand Theft	≥ \$100,000	First Degree Felony ³⁵
	≥ \$20,000, but < \$100,000	Second Degree Felony ³⁶
	≥ \$10,000, but < \$20,000	Third Degree Felony
	≥ \$5,000, but < \$10,000	Third Degree Felony
	≥ \$300, but < \$5,000	Third Degree Felony
	≥ \$100, but < \$300 if taken from a dwelling or unenclosed curtilage ³⁷ of a dwelling	Third Degree Felony
Petit Theft	≥ \$100, but < \$300	First Degree Misdemeanor
	< \$100	Second Degree Misdemeanor ³⁸

³¹ S. 489.126(2)(b), F.S.

³² Florida recognizes two basic types of intent crimes: specific intent crimes and general intent crimes. A specific intent crime requires the offender to intend to accomplish a precise, prohibited act. A general intent crime requires the offender to intend to do something unlawful, but the offender does not need to intend the precise harm or result that occurs. See Black's Law Dictionary 47, 559, and 560 (6th ed. 1995). Unless an offender confesses his or her intent, intent must be inferred. See generally, David Crump, *What Does Intent Mean*, 38 Hofstra L. R. 1059, https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v38n04_cc1_crump_final.pdf (last visited Mar. 26, 2019).

³³ S. 489.126(3)(a), F.S.

³⁴ S. 489.126(3)(b), F.S.

³⁵ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

³⁶ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

³⁷ "Unenclosed curtilage of a dwelling" means the unenclosed land or grounds, or any outbuildings, directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling. S. 810.09(1)(b), F.S.

³⁸ A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Ss. 775.082 and 775.083, F.S.

To commit theft under Florida law a defendant must have the intent to commit the crime at the time of, or prior to, the taking.³⁹ However, in contractual cases it is difficult to prove that criminal intent is present at the inception of an agreement.⁴⁰ Further, courts have found that partial performance of a contract negates criminal intent.⁴¹ It may be difficult to prove a contractor charged with construction fraud had the necessary criminal intent at the time he or she entered into the contract, making successful prosecution of construction fraud cases difficult.⁴² This recently became an issue in Charlotte County, Florida, when a contractor accepted money from dozens of consumers to construct new homes.⁴³ These consumers lost their payments when the contractor abruptly closed, leaving many homes unfinished.⁴⁴ However, because the contractor claimed to have merely ran out of money due to the rising cost of supplies after Hurricane Irma in September 2017, proving the requisite intent to defraud at the time of taking was challenging.⁴⁵

Moneys Received for Real Property Improvements

A person, firm, or corporation commits misapplication of construction funds if he, she, or it receives payment for improving real property and knowingly and intentionally fails to apply such payment to any amount owed for services and labor performed, or materials used.⁴⁶ This offense is often charged when a contractor fails to pay sub-contractors for performing work despite receiving funds for these payments. Misapplication of construction funds is punishable as follows:

Aggregate Value of Misapplied Payments	Offense Level
≥ \$100,000	First Degree Felony ⁴⁷
≥ \$1,000 but < \$100,000	Second Degree Felony ⁴⁸
< \$1,000	Third Degree Felony ⁴⁹

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

- A valid lien was recorded against the property for labor, services, or materials;
- The person who ordered the labor, services, or materials received sufficient funds to pay for such labor, services, or materials; and
- The person failed, for at least 45 days from receiving the funds, to pay for such labor, services, or materials.⁵⁰

A person who withholds payment according to the terms of a contract for services, labor, or materials, or pursuant to a bona fide dispute about the amount due does not commit misapplication of construction funds.⁵¹

³⁹ See *Stramaglia v. State*, 603 So. 2d 536, 537-38 (Fla. 4th DCA 1992).

⁴⁰ See *Adams v. State*, 443 So. 2d 1003 (Fla. 2d DCA 1983).

⁴¹ See *Yerrick v. State*, 970. So. 2d 1288 (Fla. 4th DCA 2008).

⁴² The Office of the State Attorney, 20th Judicial Circuit, *Proposal* (2019).

⁴³ Elaine Allen-Emrich, *Rep. Grant, Sen. Albritton Fighting Contractor Fraud*, https://www.yoursun.com/englewood/rep-grant-sen-albritton-fighting-contractor-fraud/article_b47d6dbc-36f0-11e9-b582-df69d65d0465.html (last visited Mar. 26, 2019).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ S. 713.345(1)(a), F.S.

⁴⁷ S. 713.345(1)(b)1., F.S.

⁴⁸ S. 713.345(1)(b)2., F.S.

⁴⁹ S. 713.345(1)(b)3., F.S.

⁵⁰ S. 713.345(1)(c)1., F.S.

⁵¹ S. 713.345(1)(a), F.S.

Effect of the Proposed Changes

Construction Theft and Construction Fraud

The bill modifies the offenses of construction theft and construction fraud so that they are no longer prosecuted or punished in accordance with s. 812.014. Thus, removing the intent requirement. As such, the state no longer needs to prove a person charged with construction theft or fraud acted with the intent to defraud or the intent to temporarily or permanently deprive the owner of such property.

Instead, in order to prove that construction theft has occurred, regardless of the intent of the contractor, the state must prove that:

- The contractor received money totaling more than 10 percent of the contract price for repair, restoration, improvement, or construction to residential real property and failed to:
 - Apply for any necessary permits within 30 days after the payment is made, or
 - Start the work within 90 days after the date all necessary permits are issued; and
- The person who made the payment did not agree, in writing, to a longer period of time to apply for the necessary permits, to start the work, or to longer periods for both.

The bill provides that if a contractor has just cause for failing to apply for the necessary permits or start the work the contractor has a complete defense against the charge that the contractor committed construction theft. There is a rebuttable presumption that a contractor does not have just cause if:⁵²

- The owner sent a certified letter to the contractor demanding that the contractor apply for permits, start work, or refund the money; and
- The contractor failed to apply for the permits, start the work, or refund the payment within 30 days of receiving letter.

The bill provides that the burden is on the contractor to prove just cause or rebut the presumption that the contractor does not have just cause.

For construction fraud, it is prima facie evidence that a contractor committed construction fraud, without consideration of the intent of the contractor, if the state shows that:

- The contractor failed to perform any work for 90 days;
- The failure to perform the work was not related to the owner terminating or materially breaching the contract; or
- The contractor failed to perform work without just cause or terminated the contract without proper notice to the owner.
 - There is a rebuttable presumption that a contractor does not have just cause if the owner sent a certified letter to the contractor demanding that the contractor perform work or refund the money in excess of the value of the work performed, and the contractor does not refund the money or perform work within 30 days of receiving the letter.⁵³

The bill provides that the burden is on the contractor prove just cause or rebut the presumption that the contractor does not have just cause.

⁵² The just cause defense and the rebuttable presumption would also apply to any disciplinary action that is brought by the Board against the contractor for failing to comply with s. 489.126(2), F.S.

⁵³ The just cause and the termination of the contract defense along with the rebuttable presumption would apply to any disciplinary action that is brought by the Board against the contractor for failing to comply with s. 489.126(3), F.S.

The bill modifies the penalties for construction theft and construction fraud by establishing value thresholds and assigning offense levels as follows:

<u>Current Law</u> ⁵⁴	Offense Level	<u>The Bill</u>
Total Money Received		Total Money Received
≥ \$100,000	First Degree Felony	≥ \$50,000
\$20,000, but < \$100,000	Second Degree Felony	≥ \$20,000 but < \$50,000
≥ \$300, but < \$5,000	Third Degree Felony	≥ \$1,000 but < \$20,000
≥ \$100, but < \$300	First Degree Misdemeanor	< \$1,000

Notice Requirements

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

- The address where work was to be performed; or
- The address listed on the permit.

The bill removes the requirement for a property owner to send a failure to perform notice to the contractor.

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

B. SECTION DIRECTORY:

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

Section 2: Providing an effective date of October 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

⁵⁴ S. 812.014, F.S.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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

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

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

On April 4, 2019, the Commerce Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all:

- Clarified that a contractor who is charged with a crime for receiving 10% of the contract price for a project and failing to apply for permits or start work within 90 days after the date the permits are issued:
 - May be charged with a misdemeanor or a felony, depending on the amount of money received from the owner;
 - Has a complete defense against the criminal charge if the contractor has just cause for failing to apply for the permits, starting the work, or refunding the payment;

- Is presumed not to have just cause if the owner sent a certified letter to the contractor and the contractor failed to apply for the permits, start the work or refund the payments within 30 days of receipt of the letter; and
- Has the burden to prove just cause and rebut the presumption that the contractor does not have just cause.
- Clarified that a contractor who is charged with a crime for receiving money for repairs in excess of the value of the work performed and fails to perform work for 90 days:
 - May be charged with a misdemeanor or a felony, depending on the amount of money received in excess of the value of the work performed;
 - Has a complete defense against the criminal charge if the contractor has just cause for failing to perform or if the contract was terminated with proper notification to the owner;
 - Is presumed not to have just cause if the owner sent a certified letter to the contractor and the contractor failed to perform the work or refund the payments within 30 days of receipt of the letter; and
 - Has the burden to prove just cause and rebut the presumption.
- Removed provisions of the bill related to escrow accounts.

This analysis is drafted to the committee substitute to the committee substitute as adopted by the Commerce Committee.