



The 2005 Florida Legislature

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As we do every year, we are writing to advise you of changes to construction related statutes promulgated by the 2005 Florida Legislature. The new statutory changes are as follows:

Alarm System Contracting

House Bill 0041 amended §633.702, Fla. Stats., to provide for a criminal penalty for intentionally or willfully installing, servicing, testing, repairing, improving or inspecting a fire alarm system without being properly licensed. It is now a first degree misdemeanor to do so.

Statutory Changes Impacting Construction Contracting

House Bill 113 amended a number of construction related statutes in various ways, many of which impact construction contracting.

Section 255.05, Fla.Stats., has been amended to provide that any provision in a payment bond furnished for a public construction project restricting the class of potential claimants to something other than that provided in the Florida Construction Lien Law, or purporting to change the venue of any litigation relating to the bond, is unenforceable as a matter of law.

Section 489.129, governing license grievances against contractors, increases the maximum administrative fine that may be levied when a license grievance is filed from \$5,000.00 to \$10,000.00.

Section 713.015 was a recent statute requiring a statutory disclosure about the Florida Construction Lien Law in all contracts with property owners for the construction of single or multiple family dwellings up to and including four units. Under the 2005 revision, the language of the mandatory disclosure required in those contracts has changed. Additionally, the statute was amended to provide that the failure to include the statutory disclosure in a contract between the owner and contractor shall not adversely affect the lien and bond rights of lienors who do not have a contract with the property owner. Although the statute does not specifically say so, this new language implies that a contractor contracting with the property owner without making the required statutory disclosure may lose lien rights on that project. The statutory change further provides that the contractual disclosure is not required when the property owner is a licensed contractor or is in the business of creating and offering parcels of property for sale or lease.

Section 713.04 covers the Lien Law on subdivision improvements. Under the change to that statute, the owner of the subdivision may not make the final payment to the contractor until the contractor provides the final affidavit required on non-subdivision projects. Any final payment made without first obtaining a final affidavit shall be deemed improper and may subject the owner to paying the same amount again to any unpaid lienor.

Section 713.13 governs Notices of Commencement. Under the statutory change, it was reconfirmed that any statutory payment bond not recorded in the public records with the Notice of Commencement may nevertheless be used as a transfer bond against any subsequent liens by recording the bond and serving a Notice of Bond upon the lienor. The statutory change clarifies, however, that the notice requirements to perfect a claim against the statutory payment bond still apply, although the deadlines for serving the required notices shall begin running from the later of the time specified in the bond statute or the date on which the Notice of Bond was served on the lienor. Therefore, bond claimants must still timely serve all required notices to perfect their bond claim, but have an extension of time in which to do so where the bond was not recorded in the public records with the Notice of Commencement at the outset of construction.

Finally, §713.3471 requires lenders to give their borrowers, simultaneously with all loan disbursements, a statutory warning about the importance of obtaining releases of lien whenever a payment is made to the contractor. Under the new change in the statute, that obligation is limited to construction loans secured by residential real property and where the owner is an individual, as opposed to a corporation or other business entity. The statutory change also makes it clear that the warning the lender must give may be delivered by mail, electronic mail, facsimile, or personal delivery. Finally, the warning requirement shall not apply when the borrower is a licensed contractor or in the business of creating or offering parcels of property for sale or lease.

Construction Professionals

House Bill 213 amends the licensing laws for architects and contractors. Under the changes to Section 481.221, final plans, specifications or reports prepared or issued by a registered architect, interior

designer, or landscape architect may be transmitted, signed and sealed electronically. An architect, interior designer or landscape architect may not sign and seal by any means any final plans, specifications or reports after his or her certificate of registration has expired or is suspended or revoked. Within thirty days after the effective date of a suspension or revocation of a certificate of registration, the architect, interior designer or landscape architect must surrender the seal to the Licensing Board and confirm in writing to the executive director of the Licensing Board the cancellation of the professional's electronic signature. The professional's seal will be returned to the professional upon termination of the suspension of the license.

Section 489.105, defining different categories of contractor licenses, now includes within the scope of a class A or B air conditioning contractor license the disconnecting or reconnecting of change outs of liquified petroleum or natural gas appliances within buildings. Liquified petroleum gas lines within buildings are also now included within the scope of a mechanical contractor's license. Liquified petroleum gas and related venting are now included within the scope of a plumbing license.

Condominium Construction

House Bill 291 amended Florida Statute Section 718.301 involving the transfer of control to a condominium association. Under the new statute, before the developer relinquishes control of the association, actions taken by members of the board of administration of the association designated by the developer will be deemed actions taken by the developer, thereby subjecting the developer to liability for same. Additionally, as a condition precedent to any claim by an association against the developer for defective design, structural elements, construction, mechanical, electrical, fire protection, plumbing or other elements requiring licensed design professionals,

the defect must first be examined and certified by an appropriately licensed Florida engineer, design professional, contractor or other licensed individual or entity. This statutory change applies to claims against developers and does not seem to apply to claims brought by a condominium association against contractors, subcontractors, or design professionals. It is also not yet clear whether this statutory change is limited to claims brought immediately after turnover or whether it applies to claims brought against the developer at any time. This change is good and bad to developers. It is good because the requirement of certification by a licenseholder before litigation should weed out frivolous lawsuits, but it can also result in the licenseholder identifying other defects and problems that otherwise may have been omitted from a claim.

Building Safety And Building Code Issues

Senate Bill 442 amends a number of statutes impacting building safety and Building Code issues. Sections 468.621, 471.033 and 481.225, covering disciplinary proceedings against building code administrators and inspectors, engineers, and architects and interior designers, respectively, were amended to make it unlawful for any of those licensees to perform building code inspections or plan reviews without satisfying the statutory insurance requirements (to be discussed below).

Section 553.73, authorizing the Statewide Florida Building Code, now provides that future updates to the Code shall take effect no sooner than six months after publication of the changes.

Section 553.775 now provides that local enforcement agencies, building officials, state agencies, and the Florida Building Code Commission may interpret provisions of the Building Code in a manner consistent with declaratory statements and interpretations entered by the Building Code

Commission. The new statute establishes a number of procedures regarding the manner in which the Florida Building Code may be interpreted and appeals taken from adverse interpretations by local building officials.

Section 553.79 was amended to provide that truss placement plans need not be signed and sealed by an engineer or architect unless prepared by an engineer or architect or specifically required by the Florida Building Code.

Section 553.791 is a relatively recent statute providing for privatized plan review and inspection. Under the statutory change, found in Senate Bill 442 and House Bill 567, the owner of a building, or the owner's contractor upon written authorization from the owner, may use a private provider for building code inspections and plan review. If so, the owner or the contractor shall post at the project site, before commencing construction and updated within one business day after any change, on a form provided by the Building Code Commission, information related to each private provider engaged in building code inspections, the type of service performed, and similar information. Notwithstanding a private inspector, the local building official still has the authority to issue stop work orders if a condition on the site constitutes an immediate threat to public safety and welfare.

Private providers of inspection and/or plan review services must maintain insurance with minimum policy limits of \$1 million per occurrence and \$2 million in the aggregate for any project with a construction cost of \$5 million or less and \$2 million per occurrence and \$4 million in the aggregate for any project with a construction cost exceeding \$5 million. The project owner may require additional insurance or higher policy limits. The required insurance must be written by an insurer authorized to do business in the State of Florida with a minimum A.M. Best's rating

of A. Before providing inspection services, the private provider must provide to the local building official a certificate of insurance evidencing compliance with these requirements.

Section 553.841 creates the Building Code Education and Outreach Council, charged with coordinating, developing and maintaining education and outreach to ensure proper administration and enforcement of the Building Code. As part of their mission, the Council will review all advanced continuing education building code courses and recommend related subjects to be approved for future courses.

The procedures for local product approval established by Section 553.842 have been modified to provide a greater amount of detail than exists in the current statute. The general concept of the statute remains essentially unchanged.

Senate Bill 442 requires the local product approval process to include a demonstration of compliance with structural wind load requirements of the Building Code through one of six specifically defined methods. It also requires back flow prevention assemblies to be inspected once every three years.

Section 633.026 authorizes the Division of State Fire Marshall to establish a uniform process of rendering non-binding interpretations of the Florida Fire Prevention Code.

Section 633.082 was amended to expand the inspection procedures of fire control systems to include fire protection systems.

Section 633.521 was amended to provide that any individual employed by a licensed contractor who will be inspecting water based fire protection systems must be issued a specific permit by the State Fire Marshall. The permittee must have a valid permit

upon his or her person at all times while engaging in inspections of fire protection systems. The water based fire protection inspector holding a valid permit will be allowed to inspect water sprinkler systems, water spray systems, foam-water sprinkler systems, foam-water spray systems, standpipes, combination standpipes and sprinkler systems, all piping integral to the system beginning at the point where the piping is used exclusively for fire protection, sprinkler tank heaters, airlines, and thermal systems used in connection with sprinklers, tanks and pumps connected thereto, excluding pre-engineered systems. Effective July 1, 2008, the State Fire Marshall shall require a certain level of training and education as proof that these permit holders are knowledgeable about nationally accepted standards for inspecting fire protection systems.

The Florida Building Commission has been directed to address the issues of water intrusion and roof covering attachment weaknesses experienced in the recent hurricanes. Therefore, you can expect more modifications to the Building Code. The Building Commission must recommend to the Legislature changes to the Building Code, specifically as it applies to the region from the eastern border of Franklin County to the Florida/Alabama line. The Commission's report summarizing its findings and recommendations are due before the 2006 legislative session.

Prompt Payment For Construction Services

House Bill 509 amends a number of the prompt payment statutes governing construction projects. Section 218.735, Fla. Stats., was amended to provide that every construction contract between a local governmental entity and a contractor must require the development of a punchlist at the conclusion of the project. Upon completion of all punchlist items, the contractor may submit a payment requisition for the remaining retainage withheld by the local governmental entity. The failure to include any

corrective work item on a punchlist does not alter the contractor's responsibility to complete all work under its contract. If a good faith dispute exists as to whether any punchlist items have been completed when the payment request for retainage is submitted, the local governmental entity is authorized to withhold an amount up to 150% of the total cost to complete the disputed items. Warranty items are not considered in determining when final payment of retainage is due. Retainage may not be held by a local governmental entity, or a contractor from its subcontractors as security for payment of insurance premiums under a consolidated insurance program or series of insurance policies. If the local governmental entity fails to provide the required punchlist, then the contractor may submit a payment request for the remaining retainage withheld by the local governmental entity. The entity need not pay or process any payment request for retainage if the contractor has failed to cooperate with the governmental entity in developing the punchlist.

On all construction contracts, a local governmental entity may now withhold from each progress payment to a contractor retainage in an amount not exceeding 10% of the payment until 50% completion of construction work has been achieved. After 50% completion of construction, the local governmental entity must reduce the retainage on each subsequent progress payment to 5%. The exception to this rule is a municipality having a population of 25,000 or fewer people or a county having a population of 100,000 or fewer, both of which may hold retainage up to 10% of each progress payment until final completion and acceptance of the project.

After 50% completion of construction, even if the contractor's retainage must be reduced to 5% or less, the contractor may still withhold retainage from its subcontractors at a rate exceeding 5%. In that event, the contractor shall notify the subcontractor in

writing of its determination to withhold more than 5% of the progress payment and the reason for doing so. In that instance, the contractor may not request the release of retained funds as to that subcontractor from the governmental owner. If the governmental owner pays retainage to the contractor attributable to the work of any subcontractor or supplier, then the contractor must timely remit the corresponding payment of retainage to those subcontractors and suppliers.

A local governmental entity is not prohibited by law from withholding retainage less than 10% of each progress payment, incrementally reducing the retainage rate pursuant to a contractual schedule, or releasing at any time all or a portion of any retainage attributable to the work of the contractor or any subcontractors or suppliers. Nothing in this statute requires the local governmental entity to pay any amounts that are the subject of a good faith dispute. The statutory provisions regarding release of retainage do not apply to construction jobs funded in whole or part with federal money or any project where the total cost of construction is \$200,000 or less.

These statutory changes are, for the most part, applicable to construction jobs for state agencies and school boards in accordance with amendments to Sections 255.077 and 255.078 of the Florida Statutes.

The new Section 255.073 addresses timely payment for construction on public projects. Under this statute, if a public entity disputes a portion of a payment request, then the undisputed portion must be timely paid (presumably in accordance with the parties' contract). When a contractor receives payment from a public entity for work attributable to subcontractors or suppliers, the contractor shall pay those subcontractors and suppliers within 10 days after receipt of payment from the owner. Subcontractors must pay the corresponding sums attributable to

subsubcontractors and suppliers within seven days after the subcontractors' receipt of payment from the contractor. However, the contractor or subcontractor are free to dispute, pursuant to the terms of their contracts, any payment alleged to be due to another party if they notify the party whose payment is disputed in writing of the amount in dispute and the actions required to cure the dispute. However, all undisputed amounts must be paid within the time limits imposed by this statute. Beginning January 1, 2007, all payments due from any public entity shall bear interest at the rate of 1% per month.

The new Section 255.074 requires a public entity to submit a contractor's payment request to the chief financial officer for payment no more than twenty days after receipt of the request from the contractor.

Pursuant to the new Section 255.075, a contract between a public entity and a contractor may not prohibit the collection of late payment interest charges.

The new statute Section 255.076 provides a mandatory award of prevailing party attorney's fees in any lawsuit to recover unpaid payments from a public owner provided the court finds the non-prevailing party withheld any portion of the payment without any reasonable basis.

Section 255.05, governing payment and performance bonds on public jobs, was amended to provide that any Notice of Non-Payment served by a potential bond claimant not in privity with the contractor must specifically identify the portion of its unpaid amount constituting retainage. A recent change in the statute provided that a bond claimant must sue to recover against the bond within one year from its last day of work on the project, except for a lawsuit exclusively to recover retainage, in which case the lawsuit must be filed within ninety days after the contractor's receipt of final payment or a final

reconciliation of quantities if no further payment is due from the owner. This was a confusing statute to apply, so the 2005 Legislature modified its provisions to provide more detail. Under the new changes, an action solely for recovery of retainage must be filed against the contractor or surety within one year of the claimant's last day of work on the project, provided that the lawsuit may not be filed until one of the following conditions is met:

- 1) the public owner paid the claimant's retainage to the contractor and the deadlines for payment of same to the claimant under the new prompt payment statutes have expired;
- 2) the claimant completed all work under its contract and seventy days have passed since the contractor sent its final payment request to the public entity; or
- 3) at least 160 days have passed since reaching substantial completion of the project if substantial completion is defined in the contract, and, if not, then 160 days since reaching beneficial occupancy or use of the project.

To determine when the lawsuit can be filed, the claimant must ask the contractor in writing for any of the following information and the contractor must respond to the claimant's request in writing within ten days:

- 1) whether the project has reached substantial completion, as defined in the contract, or, if not defined, if beneficial occupancy or use of the project has occurred;
- 2) whether the contractor received payment of the claimant's retainage and the date on which it was received; and
- 3) whether the contractor sent its final payment request to the public entity and, if so, the date on which it was sent.

If none of these conditions are satisfied and the one year deadline in which to sue against the bond for unpaid retainage expires, then the deadline shall be extended until 120 days after one of these conditions is satisfied.

Finally, none of the statutory changes outlined in this section dealing with prompt payment apply to any existing construction contracts, contracts pending approval by a public entity, or any project advertised for bid by the public entity on or before October 1, 2005.

Public Construction Bonds

Senate Bill 652 amended Florida Statute Section 255.05, governing payment and performance bonds on public construction projects. The form of public bonds must now specifically provide that any action instituted by a claimant for non-payment must be in accordance with the notice and time limitation provisions of Section 255.05(2), Fla. Stats. The statute now makes it clear that under no circumstances will a payment bond on a public project in accordance with the statute be deemed a common law bond. This makes it significantly more difficult, if not impossible, for a bond claimant to recover against the surety on a public project without strictly complying with the statutory notice requirements and statute of limitations.

The Senate bill also amends Section 624.155 by stating a surety issuing a payment or performance bond is not deemed an insurer for the purpose of exposing itself to civil liability for bad faith arising from the failure to settle claims. This amendment is in response to pending litigation in the Florida courts on the issue of whether a surety's liability may be increased beyond the penal sum of the bond for failure to settle claims with bond claimants in good faith.

Professions Regulated By The Department of Business and Professional Regulation

Senate Bill 1012 amends Section 455.271, involving inactive and delinquent licenses. Under the current version of the statute, a holder of a delinquent license must file a complete application to activate the license within the same licensure cycle in which the license initially became delinquent. Failure to do so under the new change in the statute will now render the license void. DBPR or the appropriate licensing board will have the discretion to reinstate a void license if they determine the license holder has made a good faith effort to comply with the timely application requirement, but failed because of illness or unusual hardship. Otherwise, the license will remain void.

Asbestos and Silica Claims

House Bill 1019 creates the new "Asbestos and Silica Compensation Fairness Act," giving priority to victims of asbestos and silica related injury with physical impairment caused by exposure to those materials. The statute preserves the rights of claimants exposed to those materials to pursue compensation if they become impaired in the future as a result of the exposure, enhances the ability of the judicial system to supervise and control asbestos and silica litigation, and allows compensation to cancer victims and others physically impaired by exposure to those materials. The bill is not yet assigned a statute number, but we can provide you with a copy of the text of the house bill if you are interested in more details.

Statute Relating Only to the City Of Jacksonville

Under House Bill 1167, the City of Jacksonville is authorized to waive payment and performance bonds on public construction projects costing \$500,000 or less, provided the contract is awarded pursuant to a race- and gender-neutral economic development

program to encourage local small business activity. On any job on which a payment or performance bond has been waived, the City of Jacksonville must pay all lienors in the same way a bond surety would have been obligated to pay. The city is required to record notice of this obligation in the same manner and location that surety bonds are recorded under the Florida Statutes.

Broker Liens on Commercial Real Estate

House Bill 1459 creates the “Commercial Real Estate Sales Commission Lien Act,” providing real estate brokers with liens upon net proceeds from sales

of commercial real estate to cover their commissions under a brokerage agreement and providing liens on commercial real estate for commissions earned with respect to leases of commercial property. These broker liens may in some situations challenge the priority of construction liens should foreclosure be necessary. This controversial new statute will be found in Chapter 475 of the Florida Statutes.

The text of all these bills can be obtained online at www.flsenate.gov and we are available to assist should you have any questions regarding how the statutes may be applied or interpreted. ■