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LEGAL INFORMATION FOR THE CONSTRUCTION INDUSTRY

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2009 Florida Legislative Update

Regular Session

Public Construction Projects: CS/CS/HB 611 changes some of the requirements of Chapter 255, F.S., relating to local government bidding and contracting for public construction projects to increase the requirements imposed where such work is not publicly procured.

Changes include:

- increasing thresholds for competitive procurement from \$200,000 to \$300,000 (\$50,000 to \$75,000 for electrical contracting);
- adding definitions of "repair" and "maintenance" in an effort to exclude new construction or substantial additional extensions or upgrades exceeding the threshold amounts and 20 percent of the estimated total costs;
- requiring public availability of estimated costs and allowing qualified contractors to present evidence at a public hearing regarding the estimated project costs;
- exempting airport and port facilities, as well as public and mass transit systems, where repairs and maintenance are to be performed by local government employees;
- disqualifying for five years contractors found guilty of certain federal labor or employment tax laws; and
- indexing threshold amounts to the January 2009 Engineer News-Record's Building Costs Index (in lieu of the January 1994 Consumer Price Index).



Effective Date: October 1, 2009

Public Procurement of Services: CS/SB 2666 creates a new statutory section regarding state construction management contracting, and amends existing Section 255.103, F.S., relating to local government (re-defined to now include school districts, in addition to counties, cities and special districts) construction management programs, as well as the requirements for the acquisition of certain professional services (architects, engineers, landscape architects, and surveyors and mappers) and commodities, and the contracting and construction techniques for educational facilities.

The new Section 255.32, F.S. directs and authorizes the Department of Management Services (DMS) to:

- select and contract with general and building contractors, on a competitive basis under current law; and
- coordinate and supervise a grouping of minor or substantially similar fixed capital outlay state construction projects from conceptual development

through final completion, including scheduling, selection, contracting and directing specialty trade contractors and through value engineering.

This new statutory authority includes the state (or local governments) entering into a "continuing" contract for construction projects in which the estimated cost of each individual project does not exceed \$2 million. For state projects, this section also allows the use of guaranteed maximum pricing and completion dates, if the management entity secures a surety bond. DMS is also given rulemaking authority for the use of such construction services by other state agencies.

For professional service continuing contracts, the current statutory thresholds for estimated total construction cost of each individual project is increased from \$1 million to \$2 million and from \$50,000 to \$200,000 for professional services study activity.

Advertising is removed from the exemption from competitive bidding for artistic services.

Finally, in addition to the current law governing the construction of new educational facilities by competitive bids, design-build or construction management, these techniques will now also be available for remodeling, renovations, maintenance and repairs to existing educational facilities.

Effective Date: 07/01/2009

Construction Defects: CS/SB 2064 amends portions of Chapter 558, F.S., which requires that a pre-suit notice of a construction defect and an opportunity to cure any such defect be given to a contractor.

The legislation does the following:

- adds a definition of "completion" to mean the issuance of a certificate of occupancy (or its equivalent);
- adds a definition of "service" (in lieu of "receipt") to include hand delivery, or use of postal or courier services with written evidence of delivery or attempted delivery;
- adds a statement that the pre-suit notice requirements are not intended to interfere with the property owner's ability to complete construction that has not been substantially complete (and is not required for a project that has not reached the stage of completion);

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- adds a requirement for restoration when destructive testing has been agreed to, but denying any lien rights for repairs unless agreed to by the property owner;
- adds a requirement that an owner who refuses to allow destructive testing loses any claim for damages that could have been avoided or mitigated if the owner "thereafter permits" destructive testing;
- adds a provision that a contractor's service of the owner's notice on a subcontractor, supplier or design professional does not constitute an admission of any liability by the contractor (overriding a court decision to the contrary);
- requires any requested exchange of documents be made within 30 days; and
- applies the notice requirement to all contracts for improvements entered into after October 1, 2009, unless the parties have agreed in writing to opt out of these statutory provisions.

Effective Date: 10/01/2009

Lis Pendens: CS/CS/SB 1552 amends Section 48.23, F.S., regarding the effect of a Notice of Lis Pendens recorded in connection with litigation involving real estate in an effort to improve the enforceability of certain liens, such as construction liens.

The legislation does the following:

- eliminates the adverse effect of a notice on junior liens after the notice has expired or been withdrawn or discharged;
- extends the time for the holder of an unrecorded lien to intervene from 20 to 30 days; and
- requires the court to discharge the notice when the action no longer affects the real estate (such as a transfer of security from the property to a surety bond).

Effective Date: 07/01/2009

Department of Business & Professional Regulation: CS/CS/CS/CS/HB 425 makes numerous changes to the laws relating to the Department of Business and Professional Regulation (DBPR). This bill amends Chapter 455, F.S., including but not limited to: adding grounds for disciplinary actions against licensees who fail to report criminal convictions or no-contest pleas within 30 days or who fail to comply or complete or terminate from a drug or alcohol treatment program; and authorizes agency representatives to appear in criminal proceedings against licensees. This bill also affects the following:

- Building Code Administrators and Inspectors (Chapter 468, Part XII)

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- Professional Engineers (Chapter 471)
- Realtors (Chapter 475)
- Architects and Interior Designers (Chapter 481)
- Construction Industry Licensing Board (Chapter 489, Part I)
- Electrical Contracting Licensing Board (Chapter 489, Part II)

Other major features of the legislation relating to the construction industry include:

- adding a Division of Services Operations to DBPR, to repealing the need for construction-related licensees to have completed a "core code curriculum" regarding the statewide building code;
- extending statutory notice requirements to owner-builders;
- changing requirements for licensing "specialty" contractors;
- deleting unenforceability of construction contracts for locally unlicensed contractors (including electrical); and
- deleting statutory references to "certificate of authority" for contractors.

If approved by the Governor, the effective date of this bill is October 1, 2009.

Bills That Did Not Pass:

Building Code Changes: No building code bills passed this year, although CS/CS/SB 2100 cleared the Senate Regulated Industries Committee. This is the first year since 2000 that legislation to change Florida's Building Code has not passed. Therefore, look for this issue to be addressed next session.

Construction Lien Law: There were a handful of bills (SB 466, SB 696, SB 560) filed this session to change Florida's construction lien law (Chapter 713). None of these bills passed this session, even though the Senate Regulated Industries Committee had issued an Interim Study Report prior to the session suggesting needed reforms to the law.

Construction Industry Licensing Board: Additional DBPR, including the Construction Industry Licensing Board, licensure changes regarding determination of financial responsibility, delivery of continuing education courses and application review procedures (the latter of which have been successfully challenged in court) were filed this session but did not pass. (SB 2598, CS/HB 1413)

Crane Regulation: The regulation of tower cranes (SB 1654, HB 923), to preempt local government regulations (such as those in Miami-Dade County that were partially struck down by court order shortly before this year's session began), will be back. There is now a new coalition that has banded together on this issue.

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