

**THERE IS NO AUTHORITY FOR ISSUING CONDITIONAL PROBATIONARY CONTRACTOR LICENSES IN
FLORIDA**

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Construction contractors engaged in contracting in the state of Florida require a professional license from the state Department of Business and Professional Regulation (DBPR). Chapter 489, Florida Statutes, Part I, contains the state's legislation governing general, building and residential contractors and most subcontractors.ⁱ Within Chapter 489, the legislature creates the Construction Industry Licensing Board of the Department of Business and Professional Regulation. The Board regulates licensees and considers applicants for licensure. The purpose of this article is to examine the Board's common practice of issuing contractors' licenses that are suspended, with the suspension stayed pending completion of probation before the Board.

As a creature of the Florida Statutes, the Board is delegated legislative authority to promulgate rules setting forth technical and financial requirements for trade licensure, which rules are memorialized in the Florida Administrative Code. The Board's rulemaking authority extends to establishing guidelines for the imposition of discipline on licensed contractors.

Section 489.111, Florida Statutes, sets forth prerequisites to obtaining a contractor's license. The Board has adopted rules at Chapter 61G4 of the Florida Administrative Code, which refine, and are subject to the limitations of, the statute. In recent years, the CILB has engaged in a pervasive practice in considering applicants for licensure as a state certified contractor; it is not embodied in a promulgated rule nor authorized by the Florida legislature. When the Board has an issue or concern –general or specific, about an applicant that otherwise meets the criteria for licensure, it approves the issuance of a license (or a change in status to an existing license) conditioned upon the licensee's successful completion of probation.ⁱⁱ The Board's oft-stated purpose in not simply denying the application is its members' desire to permit the applicant to work in his or her trade while protecting the public by requiring regular appearances before the Board's probation committee. During probation appearances that are generally required on a biannual basis over a period of years, the licensee's contracts, permits and bank statements for the prior six-month period are subject to inspection and he or she must respond to unrestricted inquiries by its members. Because the license is actually issued in suspended status with the suspension stayed pending successful completion of probation, the Board's orders reserve to itself the unrestricted authority to lift the stay at any time. The lifting of the stay automatically places the licensee in suspended status, unable to engage in contracting, including in regard to ongoing work.

Review of publicly available information evidences the Board's imposition of probation on licensees applying to change the status of a license (e.g., from qualifying one business entity to another, from individual to qualifying a business) and initial applicants. At the Board's November 2010, monthly meeting, for example 17 of 24 probationers were subject to disciplinary action "as a condition of licensure."

Because there is no statutory authority for the Board's actions, there is also no rule establishing any limitations on or guidelines for probationary licenses. Analysis of public records reveals the Board has routinely approved applications on condition of probation on a variety of grounds, for example:

- License issued conditioned upon completing 6-years of probation because the Board "had issues with the applicant's moral character";ⁱⁱⁱ
- License issued conditioned upon probation until applicant completes his criminal probation;
- License issued conditioned upon probation based on concern over applicant's financial responsibility;^{iv}
- License issued on indefinite term of probation, pending submission of a credit score of 660;
- Probationary status (2-years) due to nonspecific concerns about applicant experience; or,
- License issued with probation for nonspecific period until proof of satisfaction of outstanding judgment(s).^v

The procedure followed by the Board, i.e., the execution of a "Notice of Intent to Approve with Conditions" is itself unsuitable.^{vi} On the merits, there are multiple problems emanating from the Board's good intentions.

First, individuals have a right to the fair administration of rules regulating the granting of professional licenses.^{vii} Established guidelines ensure that the grant or denial of an application is not at the whim of the decision makers.

As a second, associated issue, applicants and potential applicants should be able to know and understand the prerequisites for obtaining a contractor's license.

Thirdly, an applicant's license should be denied if the applicant lacks requisite experience, financial stability or other condition of licensure. The issuance of a Notice of Intent to Deny permits the applicant to exercise his or her right to administrative review. An unsuccessful applicant can always reapply when he or she has obtained additional experience or can present the necessary credit history. The practice of issuing the license subject to probation puts a license in the hands of a candidate the Board has found is not entitled to fully exercise the privileges that come with it. The Board is not doing anyone any favors by placing licensing an unqualified contractor –the procedure is unfair to the new licensee who was not ready to successfully perform the duties of a licensed contractor, candidates that have invested time and effort to present sufficient credentials, existing licensees in the competitive construction market, and the consuming public. A licensee that does not comport with the prerequisites to obtaining the license in the first instance is free to engage in contracting unrestricted for six-months before coming before the Board for review. See note vi.

Finally, and perhaps most importantly, licensees have a right to due process that is of constitutional proportions. This includes the right to reasonable notice of charges and the opportunity to prepare and present his or her case in response. In a disciplinary case, the Board must have clear and convincing evidence to discipline a licensee, at which time it has the authority to impose a suspension and to stay the suspension pending probation or restitution.^{viii} However, in considering an application for licensure –where it is at all times the applicant’s burden to prove he or she is entitled to the license, there is no basis for the Board to approve an application subject to punishment.

Florida Statutes and rules in the Florida Administrative Code are designed to protect a professional licensee’s rights to rudimentary due process. The statutory scheme is short-circuited by the Board’s imposition of discipline as a condition of licensure or application for change of status by an existing licensee.^{ix}

When the board, or the department when there is no board, ***finds any person guilty*** of the grounds set forth in subsection (1) (acts that are grounds for which disciplinary actions may be taken) or of any grounds set forth in [Chapter 489, Florida Statutes], including conduct ...which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:

* * *

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

§ 455.227(2), Fla. Stat. (2011). The Board’s rule is consistent with the statutory mandate and includes the probationer’s responsibilities, as follows:

In cases where the Board imposes probation ***for violation of Chapter 455 or Part I of Chapter 489, F.S., or of the rules promulgated thereunder***, the following conditions shall apply:

The licensee shall be required to appear before the Probation Committee of the Board at such times as directed by the Executive Director or as specified in the Final Order. In connection with each probation appearance, the licensee shall answer questions under oath and shall provide copies of all construction related monthly bank statements, financial statements reflecting a minimum net worth requirement..., permit applications, contracts and operations questionnaires since the entry of the final order if it is the first probation appearance or since the last probation appearance if it is other than the first probation appearance. In addition, the licensee shall provide such other

information or documentation as is requested by either the Department, the Board or the Probation Committee. The licensee shall forward said documentation to the Board in advance of the probation appearance.

(b) The burden shall be solely upon the licensee to remember the requirement for said appearance and to take the necessary steps in advance of said appearance to contact the Board office and ascertain the specific time, date and place of said appearance. The licensee shall not rely on getting notice of said appearance from the Board or the Department.

(c) Should the licensee violate any condition of the probation, it shall be considered a violation of Section 489.129(1)(j), F.S., and **shall result in further disciplinary action** by the Board.

(d) Should the licensee fail to make a satisfactory appearance as determined by the Board, the term of the probationary period shall automatically be extended by six months. If there occurs a second such failure, then the term of the probationary period will be extended an additional year. Should the Board determine a third failure of the licensee to make a satisfactory appearance, then the stay of suspension of the licensee's licensure to practice contracting shall be lifted and the license shall remain in suspended status unless and until a further stay is granted by the Board.

(e) Should the licensee's licensure to practice contracting be suspended or otherwise placed on inactive status, the probation period shall be tolled and shall resume running at the time the licensee reactivates the license or returns to the active practice of contracting and the licensee shall then serve the time remaining in the term of probation.

(f) The licensee's licensure to practice contracting shall be suspended for the period of probation, with the suspension stayed for the period of probation. The time of the suspension and the stay shall run concurrently with the period of probation, except as provided otherwise in the Final Order. If the licensee successfully completes probation, the suspension shall terminate. If the licensee fails to comply with the requirements set forth in this rule or in the Final Order imposed in this case or fails to make satisfactory appearances as determined by the Board, the stay shall be lifted. Once the stay is lifted, the license shall remain in suspended status unless and until a further stay is granted by the Board.

61 FL ADC 61G4-12.008

Notwithstanding the law that the Board must rely upon to give it authority to act, the foregoing disciplinary strictures are regularly imposed on applicants for licensure or existing licensees applying to change the status of a license. As stated in a recent case before the Division of Administrative Hearings,

[the Board] has attempted to approve the application while imposing disciplinary penalties on the [Contractor's] existing license. The [Board] lacks statutory authority to take such action in this case. Section 455.225 establishes the procedure through which the Respondent may commence a disciplinary proceeding against a licensee. *The process requires an investigation, a determination of probable cause, a formal filing of charges against a licensee, and an administrative hearing at which the charging agency must establish the truthfulness of the allegations by clear and convincing evidence, if the licensee disputes the allegations. None of that has occurred here.*^x

All concerned would be best served if the Board simply complied with the law.

ⁱ Part II of Chapter 489, Florida Statutes, creates the Electrical Contractors' Licensing Board, which does not issue probationary licenses and is not included in the scope of this article.

ⁱⁱ There is no statutory grant of authority for the Construction Industry Licensing Board's actions. For example, following disciplinary proceedings, the Board of Nursing was found to have specific statutory authority to suspend the license holder and stay the suspension provided the nurse successfully completed a two-year probationary period. Ospina v. Agency for Health Care Admin., 654 So. 2d 1010, 1011 (Fla. 3d DCA 1995).

ⁱⁱⁱ See Robert Petito v. Constr. Ind. Lic. Bd., 2011 WL 2662927, 5 (Div. Admin. Hearings July 1, 2011).

^{iv} But see 61G4-15.006, Financial Responsibility and Financial Stability, Grounds for Denial.

^v http://www.myfloridalicense.com/dbpr/pro/cilb/documents/cilb_faqs.pdf

^{vi} A "Notice of Intent to Approve" is used when a third party may "challenge an agency's issuance of a license, permit, or conceptual approval." § 120.569, Fla. Stat. (2011).

^{vii} Verleni v. Dept. of Health, Bd. of Podiatric Med., 853 So. 2d 481, 484 (Fla. 1st DCA 2003).

^{viii} Raimi v. Dept of Bus. & Prof. Reg., 798 So. 2d 913, 914 (Fla. 1st DCA 2001).

^{ix} The CILB FAQ's (http://www.myfloridalicense.com/dbpr/pro/cilb/documents/cilb_faqs.pdf), describes probation as follows:

57. What is probation?

Applicants for initial licensure may be placed on a probationary status if the board has concerns about the applicant's criminal history, good moral character, financial stability, or for any other reason deemed appropriate by the board. Additionally, licensees may be placed on probation status due to a disciplinary case.

Probationary licensees are required to appear before the board at least twice annually until the expiration of the probationary status. In connection with each probation appearance, the licensee shall answer questions under oath and shall provide copies of all construction related monthly bank statements, permit applications, contracts, and operations questionnaires.

58. Does a probationary status limit the work that the contractor can perform?

No. As long as the licensee is complying with the conditions of probation, there are no restrictions placed on the probationary license.

^x Petito, 2011 WL 2662927, 5.