

SUMMARY OF CHANGES IN CHAPTER 120
1987 LEGISLATIVE SESSION

Seven laws were enacted during the 1987 Legislative Session making changes to Chapter 120, Florida Statutes: Chapters 87-54, 87-100, 87-101, 87-198, 87-224 (Reviser's), 87-322 and 87-385, Laws of Florida.

The following summaries of changes were prepared by the Senate Governmental Operations Committee, the House Transportation Committee and the House Bill Drafting Service.

I. Chapter 87-54, Laws of Florida*

This chapter reenacts and amends Chapter 86-108, Laws of Florida, to clarify legislative intent and to restore provisions of Section 120.57, F.S., omitted during enactment of that chapter. [In 1986, during the process of amending the bill which ultimately became Chapter 86-108, Laws of Florida, Subparagraphs 5 through 13 of Paragraph 120.57(1)(b), F.S., were omitted inadvertently. The provisions of those subparagraphs arguably were repealed by omission.]

In reenacting Chapter 86-108, Laws of Florida, the act provides that all pleadings, motions, or other papers filed in an administrative proceeding under Subsection 120.57(1), F.S., must be signed by the party, his attorney, or his qualified representative. The signature certifies that the signatory has read the document, and that to the best of his knowledge, the document is not interposed for any improper purpose, such as a frivolous purpose, or to harass, unnecessarily delay, or needlessly increase litigation costs. The act also authorizes a hearing officer to impose reasonable expenses, including a reasonable attorney fee, if the document is signed in violation of the provisions of the act.

Provisions reenacting Chapter 86-108, Laws of Florida, also create a new Subsection 120.57(6), F.S., which provides for an expedited review of petitions challenging the issuance of a construction or operating permit implementing a conceptual review permit issued by a water management district.

In amending Chapter 86-108, Laws of Florida, the act reenacts and renumbers as Subparagraphs 6. through 14., omitted Subparagraphs 5. through 13. of Paragraph 120.57(1)(b), F.S., which assure due process for parties in formal administrative

hearings, and provide procedures for formal administrative hearings, hearings on applications for licensing and merger of financial institutions, and consumptive use permit hearings.

By express provision, the act operates retroactively to the effective date of Chapter 86-108, Laws of Florida, which was July 1, 1986.

II. Chapter 87-100, Laws of Florida**

This chapter provides for tighter controls on the Department of Transportation construction contracts and bid protest procedures.

The legislation allows only contractors who are certified by the Department to bid on a project to protest the contract award of that project. Upon filing a formal written protest the bidding process or award of a contract is stopped. The bill requires the protesting contractor to post a bond equal to 1 percent of the lowest bid or \$5,000, whichever is less. The return of the bond is conditional upon the contractor paying all court costs adjudicated against him in a hearing. In addition to the reasons in Paragraph 120.53(5)(c), F.S., the Department will be able to award a contract that is under protest in order to avoid a substantial loss of funding to the state. The Department of Administration's hearing officers are required to render their recommended order within 30 days after the hearing or within 30 days after the officer's receipt of the hearing transcript, whichever is later.

The act also amends Section 337.14, F.S., to increase the construction contract amount to \$250,000 for which bidding contractors must first be certified by the Department. It also requires applicants for certification to document equipment, past record, experience, financial resources and organizational personnel necessary to perform the specific classes of work for which the applicant is seeking qualification. The Department is also authorized to limit both the dollar amount of any contract on which the person is qualified to bid or the total dollar volume of contracts that a person may have under contract at any one time.

The law also amends Section 337.14, F.S., authorizing the Department to waive the requirements for all or a portion of the bond for contracts of \$150,000 or less.

Subsection 337.11(7), F.S., is amended to require a prime contractor, prior to receiving any progress payments under a contract with the Department, to certify that the prime contractor has disbursed to all subcontractors their pro rata shares of previous progress payments received by the prime contractor, except when "good cause" can be demonstrated.

The act also requires a prime contractor to disburse to subcontractors their pro rata shares of the final progress payment within 30 days of receipt, except when "good cause" can be demonstrated. It requires the Department to establish a clearinghouse to document and monitor nonpayment claims.

Section 337.175, F.S., is created, requiring the Department to provide for retainage in construction contracts. It also allows only contractors who have not been declared delinquent for 3 consecutive years to substitute securities for retainage amounts.

The law also amends Section 337.18, F.S., increasing the liquidated damages amount to a level more in line with the actual contract administration cost incurred by the Department. The act also imposes a monetary penalty upon contractors failing to complete a project within the allowable time. The penalty amount is equal to daily liquidated damages charge. The law also authorizes the Department to recover from delinquent contractors losses suffered by a third party.

Section 337.185, F.S., is amended to provide in lieu of the "Arbitration Board" that at the request of either party the claim would be submitted to binding private arbitration.

Section 337.18, F.S., is amended to free the Department from liability for anticipated profits for any unfinished work when a contractor is declared to be in default.

Changes in Section 337.105, F.S., allow the Department to suspend a consultant from the certification list for unsatisfactory performance.

There is also a provision in the law that when the Department and a utility enters into a joint agreement for utility work to be performed as part of a construction contract the Department may participate in the costs of the work that exceeds the Department's official estimate by more than 10 percent. The Department is prohibited from participating in utility costs which occur as a result of changes or additions in

the contract.

Section 337.145, F.S., is created, allowing the Department to offset settled, arbitrated or final adjudication amounts for work done on any construction contract with any party, from payment due for work done on any construction contract with the same party. The Department may not offset amounts owed subcontractors, suppliers and laborers and may only offset when payment is not made to the Department within 60 days of the Department's demand.

This legislation also creates Section 337.015, F.S., requiring the Department to (1) minimize the allowance of additional contract time, (2) minimize variances between contract lettings, (3) rigorously pursue claims, (4) stabilize the 5-year transportation plan and (5) allow flexible construction starting time when determined appropriate. The section also requires the Department to report annually how they complied with the above requirements the preceding fiscal year.

And a new section is added, requiring the Department to prepare quarterly reports on disputed contractual claims. It also authorizes the Attorney General to review the report, comment on specific claims and recommend appropriate action.

Although this chapter primarily concerns transportation construction contracts, it also amends the bid protest procedures in Subsection 120.53(5), F.S. The amendment to Paragraph 120.53(5)(c), F.S., clarifies that it is upon receipt of the formal written protest that the agency shall stop the bid solicitation process or the contract award process.

The act also amends Paragraph 120.53(5)(e), F.S., to require that, if the protest is referred to the Division of Administrative Hearings, the hearing officer shall render a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the hearing officer, whichever is later.

The act took effect July 1, 1987.

III. Chapter 87-101, Laws of Florida***

This chapter creates Section 212.0598, F.S., which provides air carriers the option of apportioning their service and property purchases on the basis of their mileage, upon written request and registration with the Department as a dealer.

The definitions applicable to Chapter 212, F.S., contained in Section 212.02, F.S., are revised, alphabetized, and expanded to include necessary references to services. Subsection (19) of said section lists the conditions under which a sale of services is considered a sale for resale, and Subsection (22) defines "services" as those activities usually provided for consideration by establishments under specifically listed Standard Industrial Classification Manual classifications.

Numerous other statutory provisions are expanded to include the tax on services. These include: Section 212.054 - discretionary sales surtaxes; Section 212.06 - exemption for qualified motion picture in-house fabrication labor, definition of "dealer," and status of imported services; Section 212.07 - collection by dealer; Section 212.08 - exemptions for sale of services by churches and services directly related to the installation of industrial machinery and equipment purchased for use in a new or expanding business. Section 212.095 - refunds: Section 212.11 - quarterly returns for certain dealers registered as service providers; Section 212.12 - dealer collection allowance and enforcement; Section 212.13 - recordkeeping, inspection and audit; Section 212.14 - enforcement and hearings; Section 212.17 - credits for returned payments; Section 212.18 - registration of dealers; and Section 212.21 - legislative intent.

Numerous administrative and transition provisions for the tax on services are also provided in Chapter 87-6, Laws of Florida as modified by Chapter 87-101, Laws of Florida. The Executive Director of the Department is authorized to adopt emergency rules, effective for 6 months. Other implementing rules are exempted from rule challenge or drawout under Section 120.54, F.S., but are subject to challenge under Section 120.56, F.S. The act mandates waiver of penalties associated with the tax on services for the first 3 months after the tax takes effect, and allows the Executive Director to waive interest on delinquent taxes on services for the first 3 months of taxes if he determines that imposition of interest will cause an undue hardship on the taxpayer. It also provides for exempting services purchased prior to April 1, 1987, and performed after July 1, 1987, and for prorating taxes on services provided before and after July 1, 1987, or continuing through that period when consideration is received after July 1, 1987. It specifies that nothing in the act shall be construed to require disclosure of information privileged under the Florida Evidence Code.

Paragraph 57.111(3)(d), F.S., is revised to expand the "Florida Equal Access to Justice Act" to provide for payment of attorney fees to a prevailing business party in a legal action to contest the legality of a tax assessment with regard to the tax on services. Subsection 120.575(1), F.S., is amended to provide for special procedures with respect to legal actions contesting the tax on services under the Administrative Procedure Act (Chapter 120, F.S.). The amendment provides for issuance of an order on the tax issue within 30 days of the hearing, and provides that the order is final agency action not subject to modification by the agency head. Paragraph 120.57(1)(b), F.S., is amended to exempt such proceedings from the general rules of procedure applicable to determination of decisions which affect substantial interests. New Subsection 120.65(5), F.S., as modified, provides for a panel of 1 to 3 hearing officers in cases involving the tax on services, depending on the revenues involved and the complexity of issues. The Department is directed to identify services that are not taxable and report to the Governor and Legislature by March 1, 1989. Also, the Department is directed to establish a sales tax hot-line. Chapter 87-101, Laws of Florida, appropriates \$364,757 to the Division of Administrative Hearings of the Department of Administration to fund administrative procedures required under the new sales tax law.

IV. Chapter 87-198, Laws of Florida**

This chapter provides for the transfer of the fuel-use tax function, Chapter 207, F.S., from the Department of Revenue to the Department of Highway Safety and Motor Vehicles effective March 1, 1988. The fuel-use tax, which is imposed on interstate motor carriers, will now be consolidated with the International Registration Plan which is a vehicle registration reciprocity agreement among various states providing for the apportionment of vehicle license taxes on the basis of miles driven in various jurisdictions. The act also revises, effective September 1, 1988, the current dual license tax structure for commercial trucks, which is based on both "empty" and "loaded" vehicle weight, to create one "loaded" weight license tax structure. Further, the law contains a provision requiring both front and rear license plate display for trucks of 26,000 pounds or more gross vehicle weight and front-end only display for truck-tractors effective September 1, 1988.

To accommodate the transfer of the fuel-use tax function, the chapter also amends Section 120.575, F.S., concerning taxpayer contest proceedings. The amendment provides that the Department of Highway Safety and Motor Vehicles shall be the designated "respondent" in actions contesting an assessment under Chapter 207.

The Chapter 120 amendment to the act also takes effect March 1, 1988.

V. Chapter 87-224, Laws of Florida

Reviser's note.--Amended to delete a provision that has served its purpose. (Subsection 120.55(1)(a)1., F.S., reference to July 1, 1981.)

VI. Chapter 87-322, Laws of Florida*

This chapter amends Paragraph 120.55(4)(a), F.S., to delete the requirement that the Department of State furnish the Florida Administrative Code, without charge and upon request to each standing House and Senate committee, each legislator, the Secretary of the Senate, the Clerk of the House, as well as multiple copies to the state's various libraries and courts. [Free distribution of the mandated copies occurred until 1981, when the publishing of the code was first contracted out to a private publishing company. Since then, none of the contracts between the Department, and the publishing company has made provision for free copies to be distributed to any state agencies, so each set of the Code is now billed by the company to the receiving agency.] The act conforms the statutes to the actual practice that has been occurring since 1981, deleting language requiring free distribution of the Code.

The Florida Administrative Weekly, published by the Bureau of Administrative Code of the Department of State, will continue to be furnished without charge to agencies as provided in Paragraph 120.55(4)(a), F.S.

VII. Chapter 87-385, Laws of Florida*

This chapter authorizes recovery of costs and a reasonable attorney fee from certain parties to formal administrative proceedings, and makes limited procedural and clarifying modifications to agency rulemaking proceedings, under Chapter 120, F.S.

In administrative proceedings under Section 120.57, F.S., the prevailing party is entitled to recover costs and a reasonable attorney fee from a nonprevailing adverse party, if the hearing officer determines that the nonprevailing adverse party participated in the proceeding for an improper purpose, defined as participation primarily for frivolous reasons, or to harass, delay, or increase the cost of licensing or approval of an activity. An improper purpose is rebuttably presumed when the nonprevailing adverse party, a party failing to substantially change the outcome of proposed or final agency action in the proceeding, is determined by the hearing officer to have been unable to establish the factual or legal merits of its position in at least two prior administrative proceedings involving the same nonagency prevailing party and the same project, if the factual or legal position of the nonprevailing adverse party was cognizable in the prior proceedings. The provisions do not apply to a party who intervened in an existing proceeding on the side of an agency. An agency that is a party is not entitled to recover its costs or attorney fees, nor is it liable for costs or attorney fees, under the act.

The definition and application of an "invalid exercise of delegated legislative authority" provided by case law, which determines whether an agency rule is valid, will be provided in statutory law. Thus, the act specifies that the Administrative Procedures Committee shall determine that a rule is an invalid exercise of delegated legislative authority when the agency has materially failed to follow applicable rulemaking authority; when its rule enlarges, modifies, or contravenes the specific provisions of the law implemented; when the rule is vague, fails to establish adequate standards, or vests unbridled discretion in the agency; or when the rule is arbitrary or capricious.

An agency is henceforth required to furnish the Administrative Procedures Committee a copy of any notice of appeal when a party seeks judicial review of final agency action in challenges to proposed or existing rules. The act eliminates duplication by deleting one of the two separate but identical statements of the impact on small business required to be prepared by an agency for each rule the agency proposes.

The time within which an agency may request the assignment of a hearing officer from the Division of Administrative Hearings to conduct formal administrative proceedings is expanded from 10 days to 15 days.

The act is effective on October 1, 1987.

*Summary of changes prepared by the Senate Governmental
Operations Committee

**Summary of changes prepared by the House Transportation
Committee

***Summary of changes prepared by the House Bill Drafting
Service