

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Regulated Industries Committee

BILL: CS/SB 2768

INTRODUCER: Regulated Industries Committee and Senator Aronberg

SUBJECT: Construction Liens

DATE: April 16, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Imhof	RI	Fav/CS
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

This bill makes a number of changes to the Construction Lien Law. Significant changes include:

- Defines the phrase "final furnishing" to mean the last date that the lienor furnishes labor, services, or materials;
- Requiring written notices in all direct contracts between an owner and contractor on residential projects even if the direct contract is unwritten;
- Providing that a recorded notice of commencement can be amended to extend the effective period, to change erroneous information in the original notice, or to add information that was omitted from the original notice; and
- Providing conformity with previous changes made in the law.

This bill substantially amends the following sections of the Florida Statutes: 255.05, 713.01, 713.015, 713.02, 713.07, 713.08, 713.13, 713.135, 713.16, 713.18, 713.22, 713.31 and 713.36. The bill creates section 713.02, Florida Statutes.

II. Present Situation:

A construction lien is an equitable device, designed to protect those enhancing an owner's property who are not in direct privity with the owner,¹ such as laborers and suppliers of material, who remain unpaid while the owner pays the contractor directly.² Another purpose of construction liens is to protect owners by requiring subcontractors to provide notice of possible

¹ *Hiers v. Thomas*, 458 So.2d 322 (Fla. 2nd DCA 1984)

² *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995)

liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.³

Construction lien statutes set forth a right of action that did not exist at common law,⁴ and thus construction liens are purely statutory.⁵ Florida's Construction Lien Law is found in ch.713, F.S.

Under current law, contractors cannot place a lien on public or state owned lands or buildings to secure payments for construction performed on the public buildings or public lands. However, s. 255.05, F.S., provides for payment or performance bonds as an alternative to filing a lien to secure payment for work done by contractors on publicly owned land.

Payment and Performance Bonds

Section 255.05(1), F.S., requires a contractor constructing a public work for state or local government valued in excess of \$200,000 to post a payment and performance bond. Payment and performance bonds protect state and local governments from default by a contractor, and they protect subcontractors who cannot file a mechanic's lien because the project involves public property. "Payment bond" is a bond that guarantees payment of money from the contractor to persons who furnish labor, material equipment and/or supplies for use in the performance of the contract. "Performance bond" is a bond that guarantees that the contractor will perform the contract in accordance with its terms.

It is a common occurrence that a private entity may own a public building or public work in Florida. However, s. 255.05, F.S., does not include construction contracts with private entities in the bonding requirements provided in this section.

Section 255.05(2), F.S., provides procedures for subcontractors and suppliers to make claims against a payment bond. Section 255.05(2)(a)(2), F.S., provides that a claimant on a payment bond must give a contractor notice that they intend to make a claim against the bond for payment. Current law does not specifically provide whether the notice must be in writing.

Definition of "Final Furnishing"

Section 713.08(5) provides, in part, that the claim of lien may be recorded at any time during the progress of the work, or thereafter, but not later than 90 days after the final furnishing of the labor or services or materials by the lienor. However, the phrase "final furnishing" is not defined in ch. 713, F.S., and this has led to some confusion in the implementation of this particular construction lien law.

Written Notices, Demands, or Requests in Construction Lien Law

Chapter 713, F.S., allows and sometimes requires various notices, demands and requests to be provided. Chapter 713, F.S., often requires certain notices, demands and requests to be in a

³ *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995)

⁴ *Fleitas v. Julson, Inc.*, 580 So. 2d 636 (Fla. 3rd DCA 1991)

⁵ *Home Elec. of Dade County, Inc. v. Gonas*, 547 So. 2d 109 (Fla. 1989)

statutory form. However, other times the statute is silent as to whether other notices are required to be in writing. This has led to confusion in many cases as to whether a particular notice, demand, or request has to be in writing.

Lien Exemptions

Section 713.02(6), F.S., provides that an owner can require that a contractor furnish a payment bond so that the owner is exempt from the construction lien law.

Priority of Liens

Section 713.07, F.S., provides a mechanism for an owner to terminate a notice of commencement when construction ceases and to record a notice of recommencement if the owner desires to recommence construction. Although it is implied in the statute that construction ceases when the direct contract is terminated, it is not so stated.

Direct Contracts Between an Owner and a Contractor

A "direct contract" is defined in the Construction Lien Law as a contract between the owner and any other person.⁶ Section 713.015, F.S., provides that a contractor who has a direct contract with the owner of the real property must include a notice to the owner regarding the potential effects of the construction lien law. This section does not specify whether a contract related to this section is required to be in writing, which causes confusion in the implementation of this section when there is an oral or implied contract between an owner and any other person.

Claim of Lien

Section 713.08(2), F.S., provides that the claim of lien must be signed and verified by the lienor or his or her agent acquainted with the facts. The requirement of taking an "oath or affirmation" is the standard in other legal proceedings and the filing of affidavits. A claim of lien is similar to an affidavit, but has these different legal standards.

Section 713.08(5), F.S., provides the time periods for which a claim of lien can and cannot be recorded with the clerk of court.

Notice of Commencement

Section 713.13, F.S., provides that the recording of a notice of commencement gives constructive notice that claims of lien may be recorded and may take priority. It does not constitute a lien, cloud, or encumbrance on real property.

A notice of commencement must be recorded in the clerk's office before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. Currently, s. 713.13(1)(a), F.S., provides that the notice of commencement should include the legal description of the property and also the street address.

⁶ Section 713.01(9), F.S.

The statutory notice of commencement form contained at 713.13(1)(d), however, also contains a blank for the tax folio number. This number is not mentioned in the statute text.

There is a reference in s. 713.13(5), F.S., regarding the ability of an owner to amend a notice of commencement. However, there is no specific statutory authority allowing an owner to amend a notice of commencement, or specifically how amendments are to be made. The practice in the industry is that owners will record an amended notice of commencement. If an owner were not permitted to amend a notice of commencement, it would be forced to cease construction and record a new notice of recommencement. According to industry representatives, this can be costly and time consuming.

Demand for Copy of Contract and Statement of Account

Section 713.16(5), F.S., permits a lienor to request from the owner a sworn statement as to the amounts of all direct contracts, presumably even direct contracts that the lienor is not performing work under. The apparent intent of s. 713.16(5), F.S., is for a lienor to have information relevant to the direct contract under which it is performing work or supplying materials.

Manner of Serving Process and Other Instruments

Section 713.18, F.S., provides procedural requirements for service of notices, claims of lien, affidavits, assignments, and other instruments permitted or required in the Construction Lien Law. Since the enactment of ch. 713, F.S., the limited liability type of business entity has become more widely used. However, the Construction Lien Law does not specifically address how one could obtain service of the statutorily permitted or required notices on this relatively new form of business entity.

Section 713.18, F.S., also provides that if an instrument that is served as provided in this section is returned as being "refused", "moved, not forwardable", or "unclaimed", or is otherwise undeliverable through no fault of the person serving the item, then service is effective on the date the notice was sent.

Duration of Lien

Section 713.22, F.S., provides that a construction lien cannot continue for a longer than one year after the claim of lien has been recorded.

Remedies for Fraud

Section 713.31(2)(c), F.S., provides that an owner has a right of action against a lienor for a fraudulent lien. This right of action can be in the form of:

- An independent action;
- In connection with a summons to show cause under s. 713.21, F.S.; or
- A counterclaim or cross-claim to any action to enforce or to determine the validity of the lien.

Unlike section 713.29, F.S., which provides that the prevailing party is entitled to attorney's fees, s. 713.31(2)(c), F.S., provides that the owner is entitled to attorney's fees if it is successful in demonstrating that the lien was fraudulent.

III. Effect of Proposed Changes:

The bill amends s. 255.05(1), F.S., to provide that the performance and payment bond requirements in this section will also apply in situations where a person enters into a construction contract with a private entity for the completion of repairs or other construction on a public building or public works.

It amends s. 255.05(2)(a)2., F.S., to add "services" and delete "supplies" to the list of items that a subcontractor or supplier must give the contractor to make a claim against a payment bond. It specifies that the notice must be a written notice.

It amends s. 713.01, F.S., to add the definition of "final furnishing" in the construction lien law. "Final furnishing" is defined to mean:

The last date that the lienor furnishes labor, services, or materials. Such date may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of final completion, and does not include correction of deficiencies in the lienor's previously performed work or materials supplied. With respect to rental equipment, the term means the date that the rental equipment was last on the job site and available for use.

It amends the definition of "furnish materials" to clarify that the delivery of rental equipment to the improvement site is prima facie evidence of the period of actual use of the equipment through the time the equipment is last available for use at the site, or two business days after a written notice is received by the lessor of the equipment from either the owner or the rental equipment lessee to pick up the equipment, whichever occurs first.

It creates s. 713.012, F.S., to provide that notices, demands, or requests that are allowed or required under the Construction Lien Law, except any notice required by s. 713.14, F.S.⁷ must be in writing.

It amends s. 713.015, F.S., to provide mandatory provisions for direct contracts greater than \$2500. It changes the face type of the contract from 14 point to 12-point. It makes clarifying changes that the lien law also applies to persons who provides services on an owners property. It clarifies that a claim against an owners property is known as a construction lien.

It provides that the claim of lien notice must be in the contract document; and if the contract is oral or implied, then the notice must be provided in a document referencing the contract. The bill also provides that failure to provide the written notice does not bar the enforcement of a lien against a person who has not been adversely affected.

⁷ Section 713.04, F.S., provides authority for filing a lien against any real property for any money owned to a person who performs under a contract for making real property suitable as the site of a subdivision improvement. Section 713.04, F.S., also provides that a lienor is not required to give notice to an owner for any liens filed under this section.

It amends s. 713.02(6), F.S., to provide that the owner and contractor may agree for the contractor to furnish a payment bond for the purpose of exempting the owner from the construction lien law. This bill changes current law by removing a property owner's ability to force a contractor to provide a payment bond. Under this bill, the contractor and the property owner have to agree to the payment bond provision.

It amends s. 713.07, F.S., to provide that the termination of the direct contract before completion of construction can be a basis to initiate the recommencement process.

It amends s. 713.08(2), F.S., to provide that the claim of lien may be prepared by the lienor or by the lienor's employee or attorney. According to representatives of The Florida Bar, this will codify an existing Florida Bar opinion. It replaces the term "verified" with "sworn to or affirmed" to create uniformity with other areas of the law.

It amends s. 713.08(5), F.S., to conform this section to changes made in other sections of the bill. Specifically, the definition of "final furnishing" makes the rental equipment provisions in this section unnecessary, and therefore, this bill amends s. 713.08(5), F.S., to conform.

It amends s. 713.13(1)(a), F.S., to specifically provide that the property owner should include property's tax folio number in the description of the property for the notice of commencement.

It makes changes to the notice of commencement form in s. 713.13(1)(d) to update the notary provision that is consistent with the requirements in ch. 117, F.S.

It amends s. 713.13(5)(a), F.S., to specifically provide a means for amending a notice of commencement to extend the effective period, change erroneous information in the original notice, or add information that was omitted from the original notice.

It requires the amended notice must identify the official record of the original notice and that a copy must be served by the owner on the contractor each lienor who has filed notice within 30 days of the filing of the notice.

It amends s. 713.135, F.S., to changes the type face in the "warning to owner" provisions on building permits from 18 point to 14-point type. It requires that the "warning to owner" statement must also induce a provision that states that a notice of commencement must be recorded and posted on the job site before the first inspection.

It also requires clarifying language in the "Warning to owner" provision that notifies that the owner that if they intend to obtain financing, consult with the lender or an attorney before commencing work.

The bill amends s 713.16(2), F.S., to clarify that when an owner serves a written demand on a lienor for an accounting the lienor's statement must be under oath.

This bill amends s. 713.16(5), F.S., to provide that that the lienor who has recorded a lien is only entitled to information regarding direct contracts under which it is providing labor, materials or

services. It deletes the provision in s. 713.16(6), F.S., which provides that a failure to furnish the statement of information to an owner by a lienor under oath does not constitute an omission of information that deprives the lienor of his or her lien.

It amends s. 713.18(1)(a), F.S., to provide for serving process through actual delivery to a limited liability company member or manager. The bill also provides that if it cannot be served through actual delivery then it may be served by posting on the premises.

It amends s. 713.18, F.S., to provide that if an instrument that is served as provided in this section is returned as being "refused", "moved, not forward able", or "unclaimed", or is otherwise undeliverable through no fault of the person serving the item, then service is effective on the date the instrument was sent.

It amends s. 713.22, F.S., to provide that an amended lien cannot continue for more than one year after the claim of lien has been recorded, or one year after the recording of an amended claim of lien which shows a later date of final furnishing of labor, services, or materials.

It amends s. 713.31(2)(c), F.S., to incorporate the prevailing party standard in the fraudulent lien context.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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