

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: CS/SB 560

INTRODUCER: Regulated Industries Committee and Senator Bennett

SUBJECT: Construction Bonds

DATE: March 27, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Woodburn	Rhea	RI	FAV/CS
2.			CA	
3.			JU	
4.			TA	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill requires that a contractor who has obtained a payment bond under s. 255.05(1)(a), F.S., must record a payment bond in the public records in the county where the improvement is located. The bill requires that the local issuing authority for a building permit not inspect the improvement until the issuing authority has either a copy of the contractor's recorded payment bond on file or the contracting public entity has filed a notarized statement that the contract is exempt from the payment bond requirement.

The bill requires a contractor to provide an owner with the Statement of an Owner's Rights and Responsibilities under Florida's Construction Lien Law and copies of the following five statutory forms: (1) notice of commencement; (2) release and waiver of lien upon progress payment; (3) release and waiver of lien upon final payment; (4) request for sworn statement of account; (5) and contractor's final payment affidavit. The Statement of an Owner's Rights and Responsibilities under Florida's Construction Lien Law is included in the bill. The bill also requires a copy of the Owner's Rights and Responsibilities under Florida's Construction Lien Law be signed by the owner and filed with the building permit application at the local permitting authority or the building permit application will not be processed.

The bill deletes the requirement that the construction lien law notice be included in the construction contract between contractor and owner. The bill deletes the requirement that a construction lien law warning be included in the notice of commencement and building permit application and the bill also deletes the requirement that local permitting authority provide the homeowner with printed information about the Construction Lien Law.

The bill advances the date a Notice of Commencement, filed under the Florida Construction Lien law, expires from 1 year after the Notice of Commencement is filed to ninety days after the day of the final furnishing of all labor, services, and materials required by the direct contract. The bill also amends the statutory Notice of Commencement form to reflect the change of expiration date.

The bill creates a new section labeled s. 713.137, F.S., that creates several new prerequisites to the inspection of improvements by local issuing authorities. The bill also creates several exceptions to the requirements created in s. 713.137, F.S.

The bill defines prevailing party for the awarding of attorneys' fees in s. 713.29, F.S., in terms of which party is awarded a net judgment.

This bill amends the following sections of the Florida Statutes: 255.05, 713.015, 713.13, 713.135, 713.18, 713.22, 713.24, and 713.29. This bill creates section 713.137, Florida Statutes.

II. Present Situation:

Payment Bonds for Public Projects

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. Section 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. A payment bond is required for a state project that is more than \$100,000 unless the project is between \$100,000 and \$200,000, then a designated state agency can exempt the contractor from the bond requirement.¹

Section 255.05(1), F.S., requires a contractor constructing a public work project 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 construction lien because the project involves public property. A "payment bond" is a bond that guarantees payment of money from the contractor to persons who furnish labor, material equipment, or supplies for use in the performance of the contract. A "performance bond" is a bond that guarantees that the contractor will perform the contract in accordance with the bond's terms.

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

¹ Section 255.05(1)(a), F.S.

bond must give a contractor notice that he or she intends to make a claim against the bond for payment. Current law does not specifically provide whether the notice must be in writing.

Florida Construction Lien Law

A construction lien is an equitable device designed to protect the persons who are enhancing an owner's property that are not in direct privity with the owner,² such as subcontractors, sub-subcontractors, laborers and suppliers of material, and who remain unpaid after the owner has paid the contractor directly.³

The lien law protects subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien to ensure payment on the property receiving their services. Florida's Construction Lien Law is found in part I of ch. 713, F.S. Another purpose of construction liens is to protect owners by requiring subcontractors to provide a notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.

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

Part I of ch. 713, F.S., requires various notices, demands and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands and requests be in a statutory form. The following notices are complicated and important for the homeowner to understand during this process: Notice of Commencement; Notice to Owner; Claim of Lien; Notice of Termination; Waiver and Release of Lien, Notice of Contest of Lien, Contractor's Final Payment Affidavit, and Demands of Written Statement of Account. The procedure that a homeowner follows in paying for improvements under part I of ch. 713, F.S., determines whether a payment is proper or improper. An improper payment could result in the homeowner paying twice for the same improvement.⁶

Homeowner Education

There are several ways that the homeowner receives information about the Florida Construction Lien Law. The current statutory process requires three different notifications to the homeowner from three different parties: the county or city building officials, the lender and the contractor. The purpose of these notifications is to educate the homeowner before the lien law can take effect. The order in which the notices are required mirrors the process of building a house. Under most circumstances the contractor is the first to have contact with the homeowner, followed by the building officials or the lender.

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

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).

⁶ See Fred R. Dudley, *Florida Construction Liens: Representing the Residential Owner*, 79 Fla. Bar J. 34 (Dec. 2005).

Contractor

Under s. 713.015, F.S., the contractor is required to include in the contract with the homeowner this 12-point boldface typed warning regarding the lien law:

According to Florida's Construction Lien Law (sections 713.001-713.37, Florida Statutes), those who work on your property or provide materials and services and are not paid in full have a right to enforce their claim for payment against your property. This claim is known as a construction lien. If your contractor or a subcontractor fails to pay subcontractors, sub-subcontractors, or material suppliers, those people who are owed money may look to your property for payment, even if you have already paid your contractor in full. If you fail to pay your contractor, your contractor may also have a lien on your property. This means if a lien is filed your property could be sold against your will to pay for labor, materials, or other services your contractor or subcontractor may have failed to pay. To protect yourself, you should stipulate in this contract that before any payment is made, your contractor is required to provide you with a written release of lien from any person or company that has provided you a "Notice to Owner." Florida's Construction Lien Law is complex and it is recommended that you consult an attorney.

The owner must sign and date the section of the contract that includes this notice. The delivery and initial explanation of this information is dependent on the contractor, and this is normally when the homeowner would have first contact with any information regarding the lien law.

Building Officials

Under s. 713.135, F.S., when a person applies for a building permit, the county or city that issues the building permit ("building officials") must furnish the homeowner with an explanation of the lien law that is provided by the Department of Business and Professional Regulation (DBPR).⁷ The most common method of delivering this information is by mail, but the building officials have the option of electronic mail, facsimile, or personal delivery.⁸

The rationale behind having the building officials distribute the lien law information is that they serve as a central nexus among all the parties in the home building process (homeowner, contractor, lender, sub-contractor, etc).

Lenders

The third party that is required to give a notice of the construction lien law is the lender. Section 713.3471(1), F.S., requires the lender, prior to making a loan disbursement on a residential construction loan directly to the owner, to send the owner a notice. The notice warns the owner that the disbursement is directly to him or her and that, to protect themselves, they

⁷ See http://www.myflorida.com/dbpr/pro/cilb/documents/florida_lien_law.pdf for a copy of the DBPR explanation of the Florida Construction Lien Law (Last visited 03/10/09).

⁸ Section 713.135(1)(b), F.S.

need to require the contractor to give them lien releases from each lienor who has sent the homeowner a Notice to Owner each time they make a payment to the contractor.

The notice from the lender also warns the homeowner about the possibility of having to pay twice if they do not follow the statute.

Notice of Commencement

Section 713.13, F.S., provides that the recording of a Notice of Commencement (NOC) gives constructive notice that claims of lien may be recorded and will have priority over any conveyance, encumbrance, or demand not recorded against the real property prior to the time the notice is recorded. However, any conveyance, encumbrance, or demand recorded prior to the time the notice is recorded and any proceeds thereof regardless of when disbursed, shall have priority over liens.

The NOC must be recorded with the clerk of the court where the property is located by the owner or the owner's agent before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. A certified copy of the recorded notice or a notarized statement of filing and a copy must be posted at the jobsite. The NOC must include the legal description of the property, the street address and the tax folio number, if available. It must also include a general description of the improvement, the name and address of the owner, the name and address of the contractor, the name and address of any person designated to receive notices, and the anticipated expiration date if different from one year. The form for the NOC is provided in s. 713.13(1)(d), F.S.

For contracts greater than \$2,500, the applicant for the building permit must file a certified copy of the recorded notice or a notarized statement of filing and a copy with the building permit authority. The notice must be filed before the first inspection or the property will not be inspected.⁹

A NOC is specifically not required prior to issuing a building permit.¹⁰ The building permit must include a 12-point capitalized notice regarding the filing of a NOC.¹¹ All liens from persons who do work to improve a property relate back to the filing of the NOC.¹²

The NOC is valid for 1 year, unless otherwise stated in the notice. Any payments made by the owner after the expiration of the NOC are considered to be improper payments.¹³ If the improvement described in the NOC is not commenced within 90 days of the recording of the notice, then the notice is "void and of no further effect" which results in any payments after that time also being improper.¹⁴

⁹ Section 713.135(1)(d), F.S. However, for a direct contract to repair or replace an existing heating or air conditioning system, the threshold is contracts greater than \$7,500.

¹⁰ Section 713.135(1)(d) and (e), F.S.

¹¹ Section 713.135(1)(a), F.S.

¹² Section 713.07(2), F.S.

¹³ Section 713(1)(c), F.S.

¹⁴ Section 713.13(2), F.S.

Attorney's Fees

Section 713.29, F.S., provides that in any action brought to enforce a lien or to enforce a claim against a bond under this part, the prevailing party is entitled to recover a reasonable attorney's fee for trial and appeal or for arbitration in an amount to be determined by the court. This fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions. The phrase prevailing party is not defined in the construction lien law. Courts have interpreted the prevailing party as either the party who receives a net judgment from the action or apply equitable principles to determine the prevailing party. The Florida Supreme Court recently ruled that a court must apply equitable principles in order to determine the prevailing party.

The Florida Supreme Court, in *Trytek v. Gale Industries, Inc.*,¹⁵ held "that trial courts are required to apply the 'significant issues test' of *Prosperi*¹⁶ to evaluate entitlement to prevailing party attorneys' fees under s. 713.29, F.S., even when the lienor obtains judgment on the lien."¹⁷

In *Trytek*, the insulation contractor brought action against the homeowner to foreclose on a construction lien.¹⁸ The homeowner counterclaimed for the cost to repair electrical work that the insulation contractor had damaged.¹⁹ The amount of the construction lien was \$12,725 and the amount of the repair work for the electrical system was \$11,770. The homeowner delivered a check for the difference (\$736), but the insulation contractor refused to accept the check and proceeded with the foreclosure action on the construction lien. The trial court entered a judgment of \$1,525 in favor of the lienor. The trial court used the 'significant issues' test to determine that the prevailing party for awarding of attorneys' fees,²⁰ under s. 713.29, F.S., was the homeowner.

Under the significant issues test, the fact that the foreclosure claimant recovers a net judgment is significant but it does not necessarily determine which party is the prevailing party.

III. Effect of Proposed Changes:

Payment Bonds for Public Projects

This bill amends s. 218.72(7), F.S., to redefine the term "construction services" to include architectural and engineering services. The substantive effect of this provision is to include architectural and engineering services within the timely payment by local governments for the construction services requirement in ss. 218.73 and 218.735, F.S.

¹⁵ *Trytek v. Gale Industries, Inc.*, 2009 WL 465808 (Fla.).

¹⁶ *Prosperi v. Code, Inc.*, 626 So.2d 1360 (Fla. 1993) (Court ruled that the trial court should look to which party prevailed on the significant issues in determining who the prevailing party is for determining attorneys' fees, rather than just who received a net judgment).

¹⁷ *Trytek v. Gale Industries, Inc.*, 2009 WL 465808, 3 (Fla.).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The attorneys' fees for the plaintiff were \$55,982.00.

This bill amends s. 218.735(6), F.S., to require the contractor and the subcontractor to verify that all undisputed payments were made within the applicable time limits.

This bill amends s. 255.05(1), F.S., to require that the surety that supplies the payment bond for the contracting public entity record the payment bond in the public records of the county in which the improvement is located. The bill deletes the requirement that the person entering into the formal contract with the public entity record the payment and performance bond in the public records of the county where the improvement is located. The bill requires that the bond must state on its front page the bond number assigned by the surety. The bill also prohibits the local issuing authority from inspecting the improvement until the issuing authority has a recorded payment bond on file or the contracting public entity has filed a notarized statement stating that the contract is exempt from the requirement for a payment bond. The bill exempts installation of temporary electrical service or other temporary utility service, land clearing, or other preliminary site work from this requirement.

Florida Construction Lien Law

The bill substantially amends the way in which an owner receives information regarding the mechanics and effects of the construction lien law. The bill creates a new form called Owner's Rights and Responsibilities under Florida's Construction Lien Law. The form gives step by step instructions regarding the construction lien law.

The Owner's Rights and Responsibilities under Florida's Construction Lien Law provides information on the construction lien law and elaborates a four step process to help the owner:

- Step 1: Information about the Notice of Commencement
- Step 2: Information about monitoring important notices that the home owner receives
- Step 3: Information about obtaining waivers each time the homeowner pays the contractor
- Step 4: Information about obtaining a contractor's final payment affidavit

The statement also gives additional information about the hiring of a contractor and the legal steps in building a house. The statement also includes copies of a Notice of Commencement, a Waiver and Release of Lien upon Progress Payment, a Waiver and Release of Lien upon Final Payment, a Request for Sworn Statement of Account, and a Contractor's Final Payment Affidavit.

The bill provides that a contractor must provide the Owner's Rights and Responsibilities under Florida's Construction Lien Law form to the owner at the signing of the construction contract. The owner must sign this form and the form must be turned in with the building permit application to the local permitting authority.

The bill deletes the requirement in s. 713.015(1), F.S. that a contractor include a statutory warning in every direct contract between the contractor and home owner. This warning has been replaced by the requirement that the contractor deliver the General Statement of an Owner's Rights and Responsibilities under Florida's Construction Lien Law.

The bill deletes the warning to owner in the notice of commencement.²¹ The bill deletes the requirement that the local permitting authority provide the applicant with a printed statement warning the owner of the effects of the construction lien law.²² The bill also deletes the warning to the owner about the effects of failure to record a notice of commencement in the building permit.²³

The effect of this bill would be to have the majority of the information regarding the construction lien law given to the owner at the beginning of the construction process. The current statutes have the owner receiving information at various points in the construction process. The owner would receive the Owner's Rights and Responsibilities under Florida's Construction Lien Law with the construction contract and would have to sign the form and turn it in with the building permit application.

The bill amends s. 713.13(1)(c), F.S. to advance the expiration of the Notice of Commencement from 1 year, or the amount of time specified by the homeowner, to 90 days after the day of final furnishing of all labor, services, and materials required by the direct contract, including any change orders or on the effective date of the Notice of Termination. This change would eliminate the need to enter any period of time greater than 1 year on the Notice of Commencement or to file an amended Notice of Commencement if the construction takes longer than 1 year or more than the specified amount of time on the original Notice of Commencement. This change could help the homeowner avoid making improper payments because he or she did not amend the Notice of Commencement when the specified time expired. The Notice of Commencement would still expire if construction did not begin within 90 days.

The bill also amends the warning regarding the expiration of the Notice of Commencement in the statutory Notice of Commencement form in s. 713.13(1)(d), F.S. to reflect the change of the expiration from 1 year to 90 days.

The bill amends s.713.135(1)(f), F.S., to also require that the local issuing authority provide the book and page number of the official public records on which the Notice of Commencement and payment bond, if any, are recorded to any person upon request.

The bill also creates s. 713.137, F.S., to list the prerequisites for inspection of improvements and to provide exceptions. The bill requires that the local issuing authority have a certified copy of the Notice of Commencement. The bill creates s. 713.137, F.S., to provide prerequisites to the inspection of improvements. The bill requires that:

- The issuing authority have a copy, signed and dated by the homeowner, of the Statement of an Owner's Rights and Responsibilities under Florida's Construction Lien Law.
- The issuing authority have a copy of the contractor's recorded payment bond or a notarized statement of the contractor or owner stating that a payment bond was not required, and;

²¹ s. 713.13(1)(d), F.S.

²² s. 713.135(1)(b), F.S.

²³ s. 713.135(6)(a), F.S.

- The issuing authority assure that the Notice of Commencement is consistent with the building permit application²⁴ and that the Notice of Commencement is complete and legible.

The bill provides the following exceptions to the prerequisites to inspection:

- The installation of temporary electrical service or other temporary utility service, land service or other preliminary site work;
- Repair of or replacement of a heating or air-conditioning system pursuant to a direct contract in the amount of \$7,500 or less, and
- For improvements pursuant to a direct contract in an amount of \$5,000 or less. The current exception is for a direct contract of \$2,500 or less.²⁵

The bill also amends s. 713.18, F.S., to include additional means for serving notice. The new means of delivery include global express guaranteed and by a national or international mail service reasonably calculated to give notice. Currently, the only means of service are registered or certified mail or by overnight or second day delivery.²⁶ The addition of global express allows for a more reliable means of international delivery.

The bill also amends s. 713.29, F.S., to define the term “prevailing party” for the purpose of determining entitlement to attorneys’ fees. The bill defines a lienor as the prevailing party “if the lienor obtains a net judgment in any action brought to enforce a lien or to enforce a claim against a bond after deduction of any setoffs.” The bill defines the defendant as the prevailing party “if the lienor does not obtain a net judgment after the deduction of any setoffs.” The bill also strikes the phrase “as allowed in equitable actions” from s. 713.29, F.S. These changes to s. 713.29, F.S., may reverse the reasoning in *Trytek*²⁷ in favor of strictly applying net judgment to determine the prevailing party. If the new definition of prevailing party were to be applied to the facts in *Trytek* the contractor may have been awarded attorneys’ fees as the prevailing party.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

²⁴ Section 713.135(d), F.S., currently requires that the Notice of Commencement be consistent with the building permit application.

²⁵ Section 713.135(1)(d), F.S.

²⁶ Section 713.18(1)(b), F.S.

²⁷ *Trytek v. Gale Industries, Inc.*, 2009 WL 465808 (Fla. 2008).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill changes the expiration of the Notice of Commencement. Under current statute, the Notice of Commencement expires 1 year after the Notice of Commencement is filed or the specified amount of time on the notice. The bill changes the expiration to 90 days after the day of final furnishing of all labor, services, and materials required by the direct contract, including any change orders or on the effective date of the Notice of Termination. This change could help home owners avoid improper payments because of the expiration of the Notice of Commencement.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on April 1, 2009:

- The committee substitute (CS) amends the definition of “construction services” in ss. 218.72(7) and 255.072(2), F.S., to include “architectural and engineering services.”
- The CS also: Adds the phrase “and verify such payments to the local government” to the end of s. 218.735(6), F.S.
- Changes the original bill requirement that a surety record the payment bond. It requires the contractor to record the payment bond in the renumbered s. 255.05(1)(d), F.S.

- Amends s. 713.015, F.S., to include the General Statement of Owner's Rights and Responsibilities under Florida's Construction Lien Law (statement).
- Adds a requirement in s. 713.015, F.S., which requires the contractor provide the home owner with a copy of the statement.
- Deletes the requirement in s. 713.015, F.S., that a contractor include the mandatory warning provision in any direct contract between the contractor and home owner.
- Adds a warning to the statutory form of the Notice to Owner in s. 713.06(2)(c), F.S.
- Replaces the notice to subcontractor that was added by the original bill in the statutory Notice of Commencement with a warning to owner in s. 713.13(1)(a), F.S.
- Deletes the one-year expiration in s. 713.13(1)(g), F.S., of a Notice of Commencement if the improvement does begin within 90 days of the filing of the notice.
- Amends s. 713.13(6), F.S., to change effectual date of a Notice of Commencement.
- Adds the requirement in s. 713.135(1), F.S., that an applicant for a building permit submits a signed and dated General Statement of Owner's Rights and Responsibilities under Florida's Construction Lien Law.
- Adds the requirement in s. 713.135(1)(c), F.S., that the local issuing authority make available copies of the General Statement of Owner's Rights and Responsibilities under Florida's Construction Lien Law to the applicant or home owner.
- Deletes the requirement in s. 713.135(1)(c), F.S., that the issuing authority provide the owner with a copy of literature about Florida's Construction Lien Law either directly or through mail or electronic means.
- Adds the requirement in the original bill's newly created s. 713.137, F.S., that the local issuing authority have a signed copy of the General Statement of Owner's Rights and Responsibilities under Florida's Construction Lien Law prior to inspection.
- Adds the exception to the prerequisite for inspection in the original bill's newly created s. 713.137, F.S., for the installation of a solar hot water system pursuant to a direct contract of \$7,500 or less.
- Adds a new requirement in s. 713.16, F.S., for the Request for Sworn Statement of Account.
- Adds s. 713.18, F.S., to provide a new means of serving notice.
- Amends s. 713.29, F.S., to define the term "prevailing party" for an award of attorneys' fees.

B. Amendments:

None.

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