

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 9, 1998 Revised: \_\_\_\_\_

Subject: Liens

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Wiehle</u>	<u>Moody</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill:

- Amends s. 255.05, F.S., to provide that on any public works project on which a performance bond is required, suits may be brought at law or in equity by or against the public authority on any contract claim arising from breach of an express or implied provision of a written agreement or a written directive issued by the public authority pursuant to the written agreement. In such a suit, the public authority and the contractor have all of the same rights, obligations, remedies, and defenses as a private person under a like contract, except that no liability may be based on an oral modification of the written contract or written directive.
- Amends s. 713.24, F.S., to provide for attorney’s fees in actions to enforce a lien which has been transferred to other security and require a monetary deposit or bond to secure payment of such fees.
- Amends s. 713.18, F.S., to provide that if a notice to owner is served by mailing to the owner within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is effective as of the date of mailing if the person who served the notice maintains a registered or certified mail log that shows the date the notice was served, the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing.
- Amends both s. 713.23, F.S., and s. 255.05, F.S., to provide that a contractor may shorten the current 1-year time period for instituting an action against the contractor and the surety based on a claim against a payment bond.
- Creates s. 713.235, F.S., to create forms for a waiver of a right to claim against a payment bond both for a progress payment and a final payment, with related provisions such as are contained in the waiver of lien statute.

- Amends s. 713.06, F.S., which provides for the general contractor's affidavit of payment to lienors upon final payment, to provide that the general contractor must state that all lienors who have timely served a notice to owner have been paid, and provides that if a contractor makes a mistake in the affidavit which does not prejudice the owner, it does not constitute a default that operates to defeat an otherwise valid lien.

The bill substantially amends the following sections of the Florida Statutes: 255.05, 713.01, 713.06, 713.132, 713.18, 713.23, and 713.24. The bill also creates section 713.235 of the Florida Statutes.

## II. Present Situation:

### A. Construction Lien Law

The construction lien law, Part I of ch. 713, F.S., provides, in general, that those persons who improve the real property of another and do not receive payment for doing so have a lien on the real property. The property owner can avoid these liens in two ways. First, the owner can make proper payments under s. 713.06(3), F.S. Second, the owner can require the contractor to furnish a payment bond under s. 713.23, F.S., and be exempted from the construction lien law. This bond secures every lien under the direct contract except that of the contractor. s. 713.23(2), F.S.

#### 1. Proper Payments

Generally, the owner has an obligation to ensure payment to three categories of people; the general contractor, lienors not in privity who provide a notice to owner, and laborers. The contractor, the person with whom the owner enters into a contract for the improvement, has a lien under s. 713.05, F.S. Those who provide services or materials for the improvement without a contract with the owner, such as subcontractors, sub-subcontractors, laborers, or materialmen, are lienors not in privity. s. 713.06, F.S. With the exception of laborers, these lienors *must* provide a notice to owner to preserve their lien rights. s. 713.06(2)(a) and (3)(c), F.S.

The owner may pay laborers directly and deduct the amount paid from any amount due the general contractor under the direct contract. s. 713.06(3)(b), F.S. The owner must pay all lienors not in privity who have given a notice to owner and can pay them directly. s. 713.06(3)(c), F.S.

When the final payment under a direct contract becomes due to the contractor, the contractor must give the owner an affidavit stating, if that be the fact, that all lienors under his or her direct contract have been paid in full or, if the fact be otherwise, showing the name of each lienor who has not been paid in full and the amount due or to become due each for labor, services, or materials furnished. s. 713.06(3)(d), F.S. The contractor has no lien or right of action against the owner for labor, services, or materials furnished under the direct contract while in default for not giving the owner the affidavit. *Id.* If the contractor's affidavit recites any outstanding bills for labor, services, or materials, the owner may, after giving the contractor at least 10 days' written notice, pay such bills in full directly to the person or firm to which they are due, if the balance due

on a direct contract at the time the affidavit is given is sufficient to pay them and lienors giving notice, and shall deduct the amounts so paid from the balance due the contractor. *Id.* Lienors listed in the affidavit who did not give notice, but whose time for giving notice has not expired, must be paid from any balance then remaining due the contractor; but no lienor whose notice time has expired is to be paid by the owner or by any other person except the person with whom that lienor has a contract. *Id.*

The owner has the right to rely on the contractor's affidavit given in making the final payment unless there are lienors giving notice who are not listed in the affidavit. *Id.* If there are lienors giving notice who are not so listed, the owner may pay such lienors and any persons listed in the affidavit that are entitled to be paid by the owner and is then discharged of any further responsibility under the direct contract, except for any balance that may be due to the contractor. *Id.*

The owner can serve a written request on the contractor for a list of all subcontractors and suppliers who have any contract with the contractor to furnish any material or to perform any service for the contractor with respect to the owner's real property or improvement to the real property. s. 713.165, F.S. Upon such a request, the contractor must furnish the list or forfeit the right to assert a lien against the owner's property to the extent the owner is prejudiced by the contractor's failure to furnish the list or by any omissions from the list. *Id.*

The owner can also serve a written demand on any lienor for a written statement under oath of his or her account showing the nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on the account to date, the amount due, and the amount to become due, if known, as of the date of the statement by the lienor. s. 713.16, F.S. The failure or refusal to furnish the statement within 30 days after the demand, or the furnishing of a false or fraudulent statement, deprives the person so failing or refusing to furnish such statement of his or her lien. *Id.*

When making payments, the owner can require the recipient to execute a waiver and release of lien. s. 713.20, F.S. Lien rights cannot be waived in advance and a lien can only be waived to the extent of labor, services, or materials furnished. *Id.* The statute provides a form for a waiver and release, both upon progress payment and upon final payment. *Id.* A person cannot require a lienor to furnish a lien waiver or release of lien that is different from these forms. *Id.* A lien waiver or lien release that is not substantially similar to these forms is enforceable in accordance with its terms. *Id.* A lienor who executes a lien waiver and release in exchange for a check may condition the waiver and release on payment of the check. *Id.*

## **2. Payment Bond**

An owner can also require the contractor to furnish a payment bond and then be exempted from the construction lien law. s. 713.23, F.S. The payment bond must be furnished in at least the amount of the original contract price before commencing the construction of the improvement under the direct contract. *Id.* The bond must be executed as surety by a surety insurer authorized

to do business in this state and must be conditioned that the contractor will promptly make payments for labor, services, and material to all lienors under the contractor's direct contract. *Id.* Any form of bond given by a contractor conditioned to pay for labor, services, and material used to improve real property will be deemed to include this condition. *Id.*

When such a bond is furnished, lienors not in privity with the contractor, except a laborer, must serve the contractor with notice in writing that the lienor will look to the contractor's bond for protection on the work, very much like the notice to owner when a bond is not furnished. *Id.* In addition, a lienor is required, as a condition precedent to recovery under the bond, to serve a written notice of nonpayment to the contractor and the surety not later than 90 days after the final furnishing of labor, services, or materials by the lienor. *Id.* A written notice satisfies this condition precedent with respect to the payment described in the notice of nonpayment and with respect to any other payments which become due to the lienor after the date of the notice of nonpayment. *Id.* No action for the labor or materials or supplies may be instituted or prosecuted against the contractor or surety unless both notices have been given. *Id.* Additionally, no action may be instituted or prosecuted against the contractor or against the surety on the bond under this section after 1 year from the performance of the labor or completion of delivery of the materials and supplies. *Id.* Any lienor has a direct right of action on the bond against the surety. *Id.* A lienor may not waive in advance his or her right to bring an action under the bond against the surety. *Id.*

The bond secures every lien under the direct contract accruing subsequent to its execution and delivery, except that of the contractor. *Id.*

## **B. Public Construction**

Any person who enters into a formal contract with the state or any county, city, or political subdivision of the state, or other public authority, for the construction of a public building, for the completion of a public work, or for repairs upon a public building or public work must, before commencing the work, execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. s. 255.05, F.S. The bond must state the name and principal business address of both the principal and the surety and must contain a description of the project sufficient to identify it. *Id.* The bond must be conditioned that the contractor perform the contract in the time and manner prescribed in the contract, and promptly make payments to all persons defined as lienors in s. 713.01, F.S., whose claims derive directly or indirectly from the prosecution of the work provided for in the contract. *Id.*

Any claimant has a right of action against the contractor and surety for the amount due him or her, including unpaid finance charges due under the claimant's contract. *Id.* The action cannot involve the public authority in any expense. *Id.*

As with the construction lien law, a claimant, except a laborer, who is not in privity with the contractor, must furnish the contractor with a notice that he or she intends to look to the bond for protection. *Id.* A claimant who is not in privity with the contractor and who has not received

payment for his or her labor, materials, or supplies must deliver to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. *Id.* No action for the labor, materials, or supplies may be instituted against the contractor or the surety unless both notices have been given. *Id.* No action may be instituted against the contractor or the surety on the payment bond or the payment provisions of a combined payment and performance bond after 1 year from the performance of the labor or completion of delivery of the materials or supplies. *Id.* A claimant may not waive in advance his or her right to bring an action under the bond against the surety. *Id.*

Also, as with the construction lien law, a person may be required to execute a waiver of his or her right to make a claim against the payment bond in exchange for, or to induce payment of, a payment, and the statute provides forms for a waiver both for a progress payment and the final payment. *Id.* A person may not require a claimant to furnish a waiver that is different from these forms. *Id.* A waiver that is not substantially similar to the forms in this subsection is enforceable in accordance with its terms. *Id.* A claimant who executes a waiver in exchange for a check may condition the waiver on payment of the check. *Id.*

In a recent Florida Supreme Court case, the Court reviewed the denial of a partial summary judgment which was sought by Brevard County based on the argument that a claim for extra work on a public construction project was barred by sovereign immunity because it was outside the terms of the written construction contract and no written change orders had been issued. *County of Brevard v. Miorelli Engineering, Inc.*, 22 Fla. L. Weekly S665 (Fla. Oct. 23, 1997). The Court overturned the denial of the partial summary judgment. *Id.* In its analysis, the Court reviewed and approved the rationale of two district court of appeal cases. *Id.* In the first of these decisions, the Second District Court of Appeal held that sovereign immunity barred a contractor's claim for payment for additional work where that work was not included in the original contract or any subsequent written instrument. *Southern Roadbuilders, Inc. v. Lee County*, 495 So.2d 189 (Fla. 2d DCA 1986). In the second case, the Fourth District Court of Appeal held that a contractor was not precluded from recovering additional expenses based on a claim of breach of implied covenants or conditions contained within the scope of an express written contract. *Champagne-Webber, Inc. v. City of Fort Lauderdale*, 519 So.2d 696 (Fla. 4th DCA 1988). The Court also refused to hold that the doctrines of waiver and estoppel could be used to defeat the express term of the contract. *Miorelli*.

### III. Effect of Proposed Changes:

The bill amends s. 255.05, F.S., to provide that on any public works project on which a performance bond is required, suits may be brought at law or in equity by or against the public authority on any contract claim arising from breach of an express or implied provision of a written agreement or a written directive issued by the public authority pursuant to the written agreement. In such a suit, the public authority and the contractor have all of the same rights, obligations, remedies, and defenses as a private person under a like contract, except that no liability may be based on an oral modification of the written contract or written directive.

The bill amends s. 713.24, F.S., to provide for attorney's fees in actions to enforce a lien which has been transferred to other security and require a monetary deposit or bond to secure payment of such fees.

The bill amends s. 713.18, F.S., to provide that if a notice to owner is served by mailing to the owner within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is effective as of the date of mailing if the person who served the notice maintains a registered or certified mail log that shows the date the notice was served, the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing.

The bill amends s. 713.01, F.S., to include the collection, removal, or disposal of solid waste from a construction site in the construction lien law as an improvement to the real property.

The bill amends the provisions in s. 713.06, F.S., which provide for the general contractor's affidavit of payment to lienors upon final payment, to provide that the general contractor must state that all lienors who have timely served a notice to owner on the owner and the contractor have been paid. This is consistent with the current provisions in s. 713.06(2)(a) and (3)(c), F.S., that the owner is obligated to pay only laborers and those lienors who have provided a notice to owner. The bill also provides that if a contractor makes a mistake in the affidavit which does not prejudice the owner, this does not constitute a default that operates to defeat an otherwise valid lien.

The bill creates s. 713.235, F.S., to create forms for a waiver of a right to a claim against a payment bond both for a progress payment and a final payment, with related provisions such as are contained in the existing waiver of lien statute, s. 713.20, F.S.

The bill amends s. 713.23, F.S., to provide that a contractor may shorten the current 1-year time period for instituting an action against the contractor and the surety based on a claim against a payment bond. The contractor could shorten the time period by serving on the affected lienor a notice of contest of a claim against the payment bond, a form for which is provided. Service would be by the clerk of the court mailing a copy of the notice to the claimant at the address shown on the claimant's notice of nonpayment. The clerk would certify the service on the face of the notice of contest and record the notice. Service would be complete upon mailing.

The time period would be shortened to 60 days from the date of service of the notice. If an action was not brought in this time, the claim would be extinguished automatically.

The bill amends s. 255.05, F.S., on public construction, to add the same provisions on shortening the time period for enforcing a claim against a bond and for extinguishing a claim. The bill also adds provisions to this section allowing a contractor to demand that a claimant furnish a statement as to the services or materials to be furnished in the improvement.

The bill takes effect October 1, 1998.

**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:

Contractors and sureties should benefit as the bill will allow them to more quickly resolve claims against payment bonds and provide to them the proper payment defense, currently only available to a real property owner. On public construction jobs, the bill also provides them with the greater certainty of accounting of services and materials by claimants and waivers of claims against bonds in return for payments made.

C. Government Sector Impact:

Governmental entities may benefit to the extent that the bill encourages more contractors and sureties to participate in public construction projects, or reduces expenses associated with bonding in such projects.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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