

STORAGE NAME: h3319.go

DATE: April 1, 1998

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3319

RELATING TO: Liens

SPONSOR(S): Representative Merchant

COMPANION BILL(S): SB 1466(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY & PROBATE 7 YEAS 0 NAYS
 - (2) GOVERNMENTAL OPERATIONS
-

I. SUMMARY:

HB 3319 revises construction lien law as follows:

- Reduces the time period for claimants under a bond of a contractor constructing public buildings to file the required notice of intent to look to the bond for protection;
- Provides an expedited procedure for the enforcement of a claim against a payment bond, and provides certain protection to a contractor and surety when a contractor properly furnishes a payment bond pursuant to s. 255.05, F.S.;
- Provides for a written statement to the contractor with respect to the nature of labor and services performed or to be performed, and the materials furnished or to be furnished;
- Revises provisions with respect to liens of persons not in privity to reduce time frames for the service of required notice and to provide protection to the contractor and surety when a contractor properly furnishes a payment bond;
- Provides that any payment made prior to the recordation of a Notice of Commencement is considered an improper payment;
- Authorizes the contractor to serve a demand for a copy of a contract and statements of account under described circumstances;
- Revises Waiver and Release of Lien forms and provides for waiver of the right to claim against a payment bond; and
- Reduces the time period for a lienor not in privity with the contractor to file notice for protection under the bond.

Comments by the House Committee on Governmental Operations:

This bill provides similar inconsistent "show cause" language in two new sections, ss. 255.05(2)(a)2. and 713.23(1)(f). The remove-everything amendment traveling with the bill does not include these provisions. However, the amendment inconsistently uses various terminology, e.g., retainage/retention, claimant/lienor/person. Affected parties report they are working on a substitute amendment that will correct these inconsistencies as well as otherwise

amend existing lien law. As of the date of this analysis, the substitute amendment has not been filed.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Construction of public buildings

Section 255.05, Florida Statutes, requires all building contractors who contract with the state or a political subdivision for public improvements to provide a performance and payment bond before commencing work on the project. Any person providing materials, labor, or services under the improvement contract who does not receive proper payment has a claim against the bond for the amount due.

This section requires claimants not in privity¹ with the contractor, other than laborers, to give notice to the contractor that he or she intends to look to the bond for protection. The notice must be given within 45 days after beginning to furnish labor, materials, or supplies.

A claimant who is not in privity with the contractor and who has not received payment for his or her labor, materials, or supplies is required to deliver to the contractor and the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. This notice must be given between 45 days after the first furnishing of labor, services, or materials, but not later than 90 days after the final performance of the labor or complete delivery of the materials or supplies; with respect to rental equipment, notice must be given within 90 days after the date that the rental equipment was last on the job site available for use. No action for the labor, materials, or supplies may be instituted against the contractor or the surety unless both notices have been given. In addition, no action can 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.

In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the court. The fee must be taxed as part of the prevailing party costs.

This section provides a form for use when a person is 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 progress payment or final payment.

Construction of private buildings

Section 713.06, Florida Statutes, provides that a materialman or laborer, either of whom is not in privity with the owner, or a subcontractor or sub-subcontractor who complies with

¹ In this context, parties that are in privity with one another are parties who have a contractual relationship with one another. Parties not in privity do not have a contractual relationship with one another.

the provisions of this part, has a lien on the real property improved for any money that is owed to him or her in accordance with his or her contract and the direct contract and for any unpaid finance charges due under the lienor's contract. All lienors under this section, except laborers, who are not in privity must serve a Notice to Owner on the owner as a prerequisite to perfecting a lien. A Notice to Owner served on a lender must be in writing and delivered to the lender by certified mail, return receipt requested.

According to s. 713.06(2)(a), F.S., a sub-subcontractor or a materialman to a subcontractor must serve a copy of the Notice to Owner on the contractor as a prerequisite to perfecting a lien under ch. 713, F.S., and recording a claim of lien. The Notice to Owner must be served before commencing, or not later than 45 days after commencing, to furnish his or her services or materials, but, in any event, before the date of the owner's disbursement of the final payment after the contractor has furnished the affidavit under s. 713.06(3)(d)1, F.S. The notice must be served regardless of the method of payments by the owner, whether proper or improper, and does not give to the lienor serving the notice any priority over other lienors in the same category; and the failure to serve the notice, or to timely serve it, is a complete defense to enforcement of a lien by any person.

The Notice to Owner must be substantially in the form provided in s. 713.06(2)(c), F.S.

In Craftsman Contractors v. Brown, 695 So. 2d 750 (Fla. 1st DCA 1997), Craftsman Contractors did not include McElhany Electric in the final affidavit. Craftsman argued that McElhany was not a "lienor" since it had failed to file the Notice to Owner as required in s. 713.06(2)(a), F.S. The court held that a subcontractor's failure to file a Notice to Owner did not remove it from the definition of "lienor" for purposes of s. 713.06(3)(d)1., F.S. The court affirmed the lower court's finding that Craftsman's lien was unenforceable because it failed to properly list all lienors who had not been paid in the final affidavit. Judge Benton, dissenting, stated that the construction lien law excludes non-lienors who have no prospect of a lien and relieves the contractor making an affidavit of any duty to identify in the affidavit any person unable to perfect a lien. According to Judge Benton, "lienors" (other than laborers) who have not yet given notice to an owner are by definition limited to subcontractors or materialmen who are still able to give the required Notice to Owner and meet other prerequisites for liens upon real property.

Section 713.13, Florida Statutes, specifies the criteria and form of the Notice of Commencement. Unless otherwise provided in the Notice of Commencement or in a new or amended Notice of Commencement, a Notice of Commencement is effective for 1 year after the date of recording.

Subsection 713.16(2), Florida Statutes, provides the owner may serve in writing a demand of 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 account to date; the amount due; and the amount to become due, if known, as of the date of the statement by the lienor.

The failure or refusal to furnish the properly demanded 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. If the owner serves more than one demand for statement of account on a lienor and none of the information regarding the account has changed since the lienor's last response to a demand, the failure or refusal to furnish the statement does not deprive the lienor of his or her lien. The negligent inclusion

or omission of any information deprives the person of his or her lien to the extent the owner can demonstrate prejudice from such act or omission by the lienor. The failure to furnish a response to a demand for statement of account does not affect the validity of any claim of lien being enforced through a foreclosure case filed prior to the date the demand for statement is received by the lienor.

Section 713.20, Florida Statutes, relates to the waiver or release of liens. In subsection (1) the acceptance by the lienor of an unsecured note for all or any part of the amount of his or her demand shall not constitute a waiver of his or her lien unless expressly so agreed in writing, nor shall it in any way affect the period for filing the notice under s. 713.06(2), F.S., or the claim of lien under s. 713.08, F.S. Subsection (2) provides that a right to claim a lien may not be waived in advance. A lien right may be waived only to the extent of labor, services, or materials furnished. Any waiver of a right to claim a lien that is made in advance is unenforceable. In subsection (3) any person may at any time waive, release, or satisfy any part of his or her lien under this part, either as to the amount due for labor, services, or materials furnished or for labor, services, or materials furnished through a certain date subject to exceptions specified at the time of release, or as to any part or parcel of the real property. Lastly, subsection (4) provides that a lienor is required to execute a waiver or release of lien in exchange for, or to induce payment of, a progress payment. The waiver or release may be substantially in the form outlined in this subsection.

Section 712.23(1)(a), Florida Statutes, provides that the payment bond required to exempt an owner must be furnished by the contractor in at least the amount of the original contract price before commencing the construction of the improvement under the direct contract, and a copy of the bond must be attached to the Notice of Commencement when the Notice of Commencement is recorded. 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 shall promptly make payments for labor, services, and material to all lienors under the contractor's direct contract.

Section 712.23(1)(c), Florida Statutes, provides that either before beginning or within 45 days after beginning to furnish labor, materials, or supplies, a lienor who is 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. If a Notice of Commencement is not recorded, or a reference to the bond is not given in the Notice of Commencement, and in either case if the lienor not in privity with the contractor is not otherwise notified in writing of the existence of the bond, the lienor not in privity with the contractor shall have 45 days from the date the lienor is notified of the existence of the bond within which to serve the notice. The notice may be substantially in the form provided in this section.

Section 712.23(1)(d), Florida Statutes, provides that 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. This paragraph provides a form for the notice of nonpayment.

Section 712.23(1)(e), Florida Statutes, provides that 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. Similarly, no action can 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.

Section 712.23(1)(f), Florida Statutes, provides that any lienor has a direct right of action on the bond against the surety. A bond cannot contain any provisions restricting the classes of persons protected thereby or the venue of any proceeding.

Section 713.24(1), Florida Statutes, provides for transfer of liens to security. In Zalay v. Ace Cabinets of Clearwater, Inc., 700 So. 2d 15 (Fla. 2d DCA 1997), the court stated that the critical issue in the case was whether the language of s. 713.06, F.S., permits the attorneys' fees and costs ultimately awarded under s. 713.29, F.S., to become a lien against the property. The court held that the limitation in s. 713.06(3)(h), F.S., is intended to define the extent of the lien for the lienor's materials or services prior to litigation, and is not intended to preclude a lien for costs and attorneys' fees in a lien foreclosure action. The court reasoned that the attorneys' fees awarded under s. 713.29, F.S., are not an element of damages, but are taxed as part of the costs. If a lien is transferred to a security, the deposit or bond must include an amount to cover three years' interest and \$500 to apply to any court costs which may be taxed in a proceeding to enforce the lien. According to the court in Zalay, "[a]lthough the \$500 amount is far less than the costs in this case, the legislature would have made no allowance for costs if it did not intend the costs to create a lien against the property. We note that the \$500 limitation for costs does not preclude the lienor from requesting a higher bond, and costs above the \$500 may be paid from the bond." Id. at 18.

In Mesch v. Berry, 528 So. 2d 1250 (Fla. 1st DCA 1988), the court stated that the subcontractor could obtain an unsecured judgment against the contractor for attorneys' fees if the amount deposited to transfer the lien was insufficient to cover the litigation costs. The court went on to say that if the subcontractor was concerned about the amount of the bond, he could have sought an order pursuant to s. 713.24(3), F.S., to require additional security. In this case, the subcontractor erroneously proceeded against the owners. The court stated the subcontractor had no cause of action against them to enforce his lien, once the transfer bond was posted.

B. EFFECT OF PROPOSED CHANGES

HB 3319 revises provisions of law relating to construction liens. The bill reduces the time period for claimants under a bond of a contractor constructing public buildings to file the required notice of intent to look to the bond for protection. The bill provides an expedited procedure for the enforcement of a claim against a payment bond. The bill provides described protection to a contractor and surety when a contractor properly furnishes a payment bond pursuant to s. 255.05, F.S.

The bill permits a contractor to demand a written statement with respect to the nature of labor and services performed or to be performed, and the materials furnished or to be furnished.

The bill revises provisions with respect to liens of persons not in privity with the contractor to reduce the time frame for service of the required notice, and to provide protection to the contractor and surety when a contractor properly furnishes a payment bond. The bill provides that any payment made prior to the recordation of a Notice of Commencement is considered an improper payment.

The bill authorizes the contractor to serve a demand for a copy of a contract and statements of account under described circumstances. The bill revises the waiver of release of liens forms, and reduces the time period for a lienor not in privity with the contractor to file a notice for protection under the bond.

The bill provides for waivers of the right to claim against a payment bond.

The bill will take effect October 1 of the year in which enacted.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. The bill permits contractors or a contractor's agent or attorney to file a notice of contest of claim against a payment bond and thereby to shorten the time to enforce a claim. This process provides for specified acts by the clerk of court, and provides for an action in circuit court.

The bill also permits contractors to request statements of account.

(3) any entitlement to a government service or benefit?

No

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No

b. Does the bill require or authorize an increase in any fees?

No

c. Does the bill reduce total taxes, both rates and revenues?

No

d. Does the bill reduce total fees, both rates and revenues?

No

e. Does the bill authorize any fee or tax increase by any local government?

No

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill makes changes to the way construction lien law operates. The bill would provide more protection to construction contractors.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

The bill makes changes to the way construction lien law operates. The bill would provide more protection to construction contractors.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

- (1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Amends sections 255.05, 713.06, 713.13, 713.16, 713.20, 713.23, and creates section 713.235, Florida Statutes.

E. SECTION-BY-SECTION RESEARCH:

Section 1.

Section 255.05(2)(a), Florida Statutes, provides time frames for specified claimants who are not in privity with the contractor to provide notice that he or she intends to look to the bond for protection. This section also provides time frames for notice of nonpayment, for a claimant who is not in privity with the contractor. Claimants are precluded from instituting action for payment unless the notice requirements are met.

Section 255.05(2)(a)1., Florida Statutes, is added to provide that a contractor or the contractor's agent or attorney may elect to shorten the time prescribed in paragraph (a) within which an action to enforce any claim against a payment bond may be commenced by serving a Notice of Contest of Claim Against Payment Bond substantially in a prescribed form on the affected claimant. The notice specifies that the contractor is contesting the notice of nonpayment, and provides that the claimant must file suit to enforce the claim within 60 days from the date of service of the notice.

Since the form must be in "substantially" the specified form, it is not clear whether the contractor, contractor's agent or attorney could shorten the time for bringing an action to something less than 60 days.

This section provides that the claim of any claimant, upon whom a Notice of Contest of Claim Against Payment Bond is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of the notice is extinguished automatically. The clerk is required to mail a copy of the Notice of Contest of Claim Against Payment Bond to the claimant at the address shown in the notice of nonpayment and must certify to such service on the face of the notice and record the notice. Service is deemed complete upon mailing.

Section 255.05(2)(a)2., Florida Statutes, is added to provide that a claim against a payment bond provided pursuant to this section may be discharged by an order of the circuit court of the county where the property is located as follows: upon filing a complaint therefor by any interested party, the clerk shall issue a summons to the claimant "to show cause within 20 days why his or her claim against the payment bond should not be

enforced by action or extinguished.”² If the claimant fails to show cause why his or her claim against the payment bond should not be enforced or, if the claimant fails to commence the action before the return date of the summons, the court must issue an order extinguishing the claim.

Currently, a claimant, if he or she has provided the proper notice, has up to one year from the performance of the labor or completion of delivery of the materials or supplies to institute an action. Under this bill, the contractor or his agent or attorney could serve a Notice of Contest of Claim Against Payment Bond which would shorten the time to 60 days. In addition, any “interested party” could file a complaint requiring the claimant to show cause within 20 days as to why his or her claim should not be enforced by action or extinguished, thereby forcing the claimant to either file suit on the claim, or to justify maintaining the claim. It would appear that if the claimant does not immediately file suit, but successfully defends against the extinguishment, he or she would still have the remainder of the 60 days or one year within which to file an action.

“Interested party” for purposes of filing the complaint to show cause is not defined.

Section 255.05, Florida Statutes, is further amended to shorten the time from 45 days to 30 days within which the claimant can furnish the contractor with a notice that he or she intends to look to the bond for protection. Similarly, the time during which the notice of nonpayment can be served is changed from at any time during the progress of the work or thereafter but not before 45 days after the first furnishing of labor, services, or materials, to any time during the progress of the work or thereafter but not before 30 days after the first furnishing of labor, services or materials.

Current law provides for prevailing party attorneys’ fees for any action brought to enforce a claim against a payment bond. It is unclear whether attorneys’ fees would be available to the prevailing party on a complaint to show cause as to why the claim against the payment bond should not be enforced by action or extinguished.

The “WAIVER OF RIGHT TO CLAIM AGAINST THE PAYMENT BOND” for both progress payments and final payments is amended to provide a reference to s. 255.05, Florida Statutes, and to provide for identification of the contractor and surety.

A new section 255.05(8), Florida Statutes, is added to provide a contractor and surety who furnishes a payment bond and who follows the proper payment procedure set forth in s. 713.06, F.S., with the same protections afforded to an owner under s. 713.06, F.S.

A new section 255.05(9), Florida Statutes, is added to provide that when a contractor has furnished a payment bond, he or she may, when the governmental entity or other public authority makes any payment to the contractor or to a claimant, serve a written demand on any other claimant for a written statement under oath of his or her account showing: the nature of the labor or services performed and to be performed, the materials furnished, the materials to be furnished, the amount paid on account to date, the amount due, and the amount to become due, as of the date of the statement by the lienor.

² This provision sounds like the lienor should show cause why his or her claim **should not** be effectuated, when in fact the lienor should simply have to show cause why his or her claim should not be extinguished thus showing cause for why his or her claim **should** be enforced.

It is not clear why a "written statement under oath" is necessary. The claimant would have to comply with the requirement for a notice of intent to look to the bond, and a written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. The last part of the sentence refers to the "statement by the lienor". Prior to that phrase, the reference had been to "claimant".

This provision further provides that any such demand to a claimant must be served on the claimant at the address and to the attention of any person who is designated to receive the demand in the notice to contractor served by the claimant. The failure or refusal to furnish the statement does not deprive the claimant of his or her rights under the bond if the demand is not served at the address indicated. The failure to furnish the statement within 30 days after the demand, or the furnishing of a false or fraudulent statement, deprives the person who fails to furnish the statement, or who furnishes the false or fraudulent statement, of his or her rights under the bond.

This creates a second layer of requirements with which the claimant must comply.

Further, if the contractor serves more than one demand for statement of account on a claimant and none of the information regarding the account has changed since the claimant's last response to a demand, the failure or refusal to furnish the statement does not deprive the claimant of his or her rights under the bond.

This provision would appear to permit the contractor to send out demands as often as he or she wishes whether or not there is a change in the claim. This could be problematic for a small claimant in complying with the 30-day response time requirement -- with a penalty of losing the claimant's rights under the bond.

This provision states that the negligent inclusion or omission of any information deprives the person of his or her rights under the bond to the extent that the contractor can demonstrate prejudice from such act or omission by the claimant.

This provision could result in a harsh penalty for a negligent act or omission. It is not clear what kinds of acts or omissions are contemplated in this provision.

The failure to furnish a response to a demand for statement of account does not affect the validity of any claim on the bond being enforced in a lawsuit filed prior to the date the demand for statement of account is received by the claimant.

Section 2.

Section 713.06, Florida Statutes, relates to liens of persons not in privity with the owner, and proper payments. Section 713.06(2)(a), Florida Statutes, is amended to provide that the notice on the owner be served before commencing, or not later than 30 days (current law provides for 45 days) after commencing, to furnish his or her services or materials, but, in no event, before the date of the owner's disbursement of the final payment after the contractor has furnished the affidavit under subparagraph (3)(d)1.

Paragraph (3)(d)1., is amended to provide that when the final payment under a direct contract becomes due the contractor shall give to the owner an affidavit stating, if that be the fact, that all lienors having valid lien rights pursuant to this part under his or her direct contract have been paid in full or, if the fact be otherwise, showing the name of each lienor

STORAGE NAME: h3319.go

DATE: April 1, 1998

PAGE 12

who has not been paid in full and the amount due or to become due each for labor, services or materials furnished. This would appear to give the contractor the discretion of determining whether or not liens are valid. It appears that the contractor would still disclose the lienor "not" having a valid lien right along with any other lienor who has not been paid in full.

Paragraph (3)(d)1., is further amended to provide that a mistake or error in the contractor's affidavit which has not prejudiced the owner will not constitute a default that operates to defeat an otherwise valid lien.

Paragraph (3)(d) 2., is amended to remove the reference to the 45 day notice period, since the notice is shortened to 30 days in paragraph (2)(a).

Section 713.06(5), Florida Statutes, is added to provide that when a contractor furnishes a payment bond pursuant to s. 731.23 or s. 713.245, Florida Statutes and follows the proper payment procedure set forth in this section, the contractor and surety are entitled to the same protections as are afforded an owner under this section.

Section 3.

Section 713.13, Florida Statutes, relates to the Notice of Commencement and provides that any payments made by the owner after the expiration of the Notice of Commencement are improper payments for purposes of s. 713.06, F.S. (s. 713.06, F.S., relates to liens of persons not in privity with the owner). The bill amends s. 713.13(1)(c), F.S., to provide that any payments made by the owner prior to the recordation of the Notice of Commencement are also improper payments for purposes of s. 713.06, F.S.

Section 4.

Section 713.16(2), Florida Statutes, is amended to permit a contractor to demand a written statement under oath of his or her account showing the nature of the labor or services performed or to be performed, the materials furnished, the materials to be furnished, the amount paid on account to date, the amount due, and the amount to become due, if known. Currently, only the owner can make this demand.

Section 713.16(2), Florida Statutes, provides that the demand to a lienor must be served on the lienor to the attention of the person designated to receive the demand in the Notice to Owner. Subsection (2) is amended to allow service as designated in the notice to contractor. Section 713.16(2), Florida Statutes, also currently provides that the failure or refusal to furnish the statement within 30 days after the demand, or furnishing a false or fraudulent statement, deprives the person of his or her lien. Subsection (2) is amended to add that such behavior also deprives that person of his or her rights under a payment bond.

Section 5.

Section 713.20, Florida Statutes, is amended to include in the Waiver and Release of Lien Upon Progress Payment and the Waiver and Release of Lien Upon Final Payment, a statement that the waiver and release extends to any claim or right to claim against any payment bond pursuant to ss. 713.23 or 712.245, F.S., and adds lines on the form to identify the released parties, i.e., the owner, the contractor, and the surety.

Section 6.

Section 713.23, Florida Statutes, is amended to shorten the time frame from 45 days to 30 days within which a person supplying labor, materials, or supplies must serve the contractor with notice of his or her intent to look to the contractor's bond for protection.

The bill further provides that a contractor or the contractor's agent or attorney may elect to shorten the prescribed time within which an action to enforce any claim against a payment bond may be commenced by serving on the affected lienor a notice in a prescribed form, i.e., Notice of Contest of Claim Against Payment Bond.

The bill further provides that the claim of any lienor upon whom a notice of contest is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice shall be extinguished automatically. The clerk of court is required to mail a copy of the notice of contest to the claimant at the address shown in the notice of nonpayment and shall certify to such service on the face of the notice of contest, and record the notice. Service is deemed complete upon mailing.

A claim against a payment bond may be discharged by an order of the circuit court by filing a complaint by any interested party. The bill provides that "the clerk shall issue a summons to the lienor to show cause within 20 days why his or her claim against the payment bond should not be enforced by action or extinguished."³ If the lienor fails "to show cause why his or her claim against the payment bond should not be enforced [sic ?, "should be enforced"]", or upon the lienor's failure to commence such action before the return date of the summons, the court shall issue an order extinguishing the claim."

Section 7.

Section 713.235, Florida Statutes, is created, and sets forth forms for Waiver of Right to Claim Against the Payment Bond for progress payments and for final payment.

Section 8.

This act shall take effect October 1 of the year in which enacted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

³ This provision sounds like the lienor should show cause why his or her claim **should not** be effectuated, when in fact the lienor should simply have to show cause why his or her claim should not be extinguished thus showing cause for why his or her claim **should** be enforced.

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Section 255.05(2)(a)1., Florida Statutes, is added to provide that a contractor or the contractor's agent or attorney may elect to shorten the time prescribed in paragraph (a) within which an action to enforce any claim against a payment bond may be commenced by serving a notice substantially in a prescribed form on the affected claimant. The notice specifies that the contractor is contesting the notice of nonpayment, and provides that the claimant must file suit to enforce the claim within 60 days from the date of service of the notice.

Since the form must be in "substantially" the specified form, it is not clear whether the contractor, contractor's agent or attorney could shorten the time for bringing an action to something less than 60 days.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Real Property & Probate adopted a strike-everything amendment which is traveling with the bill. The strike everything differs from the bill as follows:

The amendment adds subsection (1) of section 255.05, F.S., which is not in the bill. The amendment revises s. 255.05(1)(a), F.S., to require certain information be provided on the front page of the bond.

The amendment amends s. 255.05(2)(a)2., F.S., to provide for recovery of retainage. The amendment does not provide for expedited review of a claim against a payment bond, as does the bill.

The amendment amends s. 713.06(1), F.S., to specify what is included in monies owed under a lien, e.g., unpaid finance charges. The bill does not amend subsection (1).

The amendment revises language in the original bill affecting ss. 713.06(2) and (3), F.S. The bill creates a rolling Notice to Owner. The bill revises s. 713.06(2)(a), F.S., to eliminate the 45-day time period for serving Notice to Owner. The amendment provides that the notice may

STORAGE NAME: h3319.go

DATE: April 1, 1998

PAGE 16

be served at any time before or after commencing to furnish labor, services or materials, but must be served: (a) prior to completion of the lienor's labor, services, or materials; and (b) prior to final payment to the contractor. Any Notice to Owner served more than 30 days after the lienor first furnishes labor, services, or materials must be accompanied by a sworn statement of account and proof of the designation of account as required by s. 713.14, F.S.

Language in the amendment differs from the bill in that it revises s. 713.06(3), F.S., to clarify that the contractor need only list in the affidavit those lienors who have timely served a Notice to Owner. The amendment also revises language regarding errors in the affidavit, by specifying negligent inclusion or omission of any information in the affidavit which has not prejudiced the owner will not operate to defeat an otherwise valid lien. The amendment deletes language in current law providing for pro rata payment to lienors listed in the affidavit who failed to give notice, but whose notice time has not expired.

The bill amends s. 713.13(1)(c), F.S., to provide that owner payments made prior to the recordation of the Notice of Commencement are improper; the amendment does not.

The amendment amends s. 713.132(1)(f), F.S., to clarify that service of a notice of termination is not required on lienors that have executed a Waiver and Release of Lien Upon Final Payment. The bill does not amend (1)(f).

The amendment amends s. 713.18(1), F.S., to allow service of the Notice to Owner by certified or registered mail with proof of service maintained by the sender in a certified or registered mail log. If a Notice to Owner is mailed within 40 days of the date the lienor first furnishes labor, services or materials, service of notice is effective as of the date of mailing when this section is followed. The bill does not amend subsection (1).

The amendment revises s. 713.24, F.S., which is not in the original bill, to raise the amount of funds deposited for security of liens to cover lienor's attorney's fees and court costs, and provides specific authority for the court to increase the amount of the security. The amendment clarifies that if there is no allegation of privity between the owner and the lienor, the owner may not be held personally liable for any judgement once the requisite security has been deposited with the court.

Subsections 713.13, 713.16, and 713.20, F.S., are not included in the strike everything amendment. This removes the following from the bill as amended: order to show cause on bonded construction projects, time period for Notice to Owner, certain provisions relating to statements of account, certain provisions relating to Notice of Commencement, and technical changes to the form for the Waiver of Lien.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Legislative Research Director:

P.K. Jameson

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STORAGE NAME: h3319.go

DATE: April 1, 1998

PAGE 17

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

Legislative Research Director:

J. Marleen Ahearn, Ph.D., J.D.

Jimmy O. Helms