

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.)

BILL: CS/SB 1206

SPONSOR: Senator Webster

SUBJECT: Construction Liens and Bonds

DATE: March 19, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>CM</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill revises various provisions governing construction liens and public construction bonds. It clarifies that the statutory time periods required for providing notice, recording a claim or bringing an action are not to be measured by the issuance date of a Certificate of Occupancy or of a Certificate of Substantial Completion. It clarifies notice requirements for perfecting a lien for labor, services or materials. It requires certain information to be contained in the Notice of Commencement and requires the issuing authority to verify such information against the building permit application. It provides an exemption from the Notice of Commencement requirement on certain direct contracts for the repair or replacement of heating or air-conditioning systems. It also authorizes the use of overnight delivery or second-day delivery for serving notices and other instruments.

This bill amends the following sections of the Florida Statutes: 255.05, 713.06, 713.08, 713.135, 718.18, and 713.23.

II. Present Situation:

A. Construction Lien Law

Under the construction lien law, a person who improves real property but does not receive payment has a right to a construction lien on the real property. *See* Part I, chapter 713, F.S. (1997 and Supp. 1998). There is a comprehensive statutory framework for the perfection and enforcement of such liens. The property owner can avoid the attachment of these liens in two ways: 1) by making proper payments to the lienors under s. 713.06, F.S.; or 2) by exempting themselves from the provision of the construction lien law through the furnishing of a payment bond by a contractor under s. 713.23, F.S. The bond secures every lien under the direct contract except that of the contractor. *See* §713.23(2), F.S.

A construction lien is extinguished one year after the claim of lien has been recorded. *See* §713.22, F.S. The owner may shorten the time period by filing a Notice of Contest of Lien. If the lienor fails to institute action to enforce the lien within 60 days after such notice, the lien is automatically extinguished. A lien may be discharged by: a) execution of satisfaction of the lien noted in the margin of the record at the clerk's office, b) acknowledgment of satisfaction of the lienor by the lienor, c) failure to begin an action within the statute of limitations period, d) order of the court, or e) recording of a certified judgment on the action. *See* §713.21, F.S.

1. Proper Payments

The property owner has a general obligation in a construction project to pay directly or ensure that payment is made to three classes of persons:

- *General contractor*

The contractor (i.e., the person with whom the owner enters into a written or unwritten express or implied contract for improvement to real property), has a right of lien under s. 713.05, F.S. When the final payment becomes due to the contractor, the contractor must give the owner a Contractor's Affidavit listing all lienors under the direct contract, whether the lienors have been paid in full, or if otherwise, stating the name of each unpaid lienor and the amount due or to be due for labor, services, or materials furnished. *See* § 713.06(3)(d), F.S. Until the Contractor's Affidavit is provided to the owner, the contractor has no lien or right of action against the owner for labor, services, or materials furnished under the direct contract. If the Contractor's Affidavit lists 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. That option is conditioned on whether the balance due on a direct contract at the time the Contractor's Affidavit is given would be sufficient to pay the lienors giving notice. The owner has the right to rely on the Contractor's Affidavit given in making the final payment.

Upon written demand by the owner for a list of all subcontractors and suppliers with whom the contractor has a contract for furnishing materials or performing any service to improve the real property, the contractor must provide the list or otherwise forfeit the right to assert a lien to the extent the owner is prejudiced by the contractor's failure to furnish the list or by any omissions from the list. *See* §713.165, F.S.

- *Lienors not in privity who provide a timely notice to owner*

Lienors not in privity are those who provide services or materials for the improvement without a contract with the owner. *See* §713.06, F.S. Lienors not in privity¹ may be subcontractors, sub-subcontractors, laborers, or materialmen.

All lienors not in privity, with the exception of laborers, *must* provide a Notice to Owner to preserve their construction lien rights. *See* §713.06, F.S. A Notice to Owner must be substantially

¹The term "privity" is not defined statutorily but the courts have interpreted it to involve some special type of knowledge or acknowledgment that someone is furnishing labor or materials for the contractor and some assumption of contractual obligation to pay for such materials or services.

in the form provided in statute. See §713.06(1)(c), F.S. (Supp. 1998). The courts have construed this to mean that the Notice to Owner form must be in strict compliance with the form prescribed by the Legislature. See *Allstar Building Materials, L.T.D. v. Kronauer*, 24 Fla. L. Weekly D53 (Fla. 5th DCA, Dec. 23, 1998). The court found the statutory Notice to Owner form important and better for the owner than the one provided by the supplier in the case as the supplier's notice: 1) was not directed specifically to the owner as statutorily required, 2) omitted the expression "IMPORTANT INFORMATION FOR YOUR PROTECTION," 3) reduced dramatically in type size and 4) placed important statutory provisions in footnotes.

There is no obligation on the part of the owner to pay lienors who do not file a Notice to Owner. However, an owner is required to pay directly all lienors not in privity who gave Notice to Owner when any payment, with the exception of the final payment, becomes due to the contractor on the direct contract. See §713.06(3)(c), F.S. Lienors listed in the contractor's affidavit who have given notice, must be paid in full or pro rata from any remaining balance due the contractor. Once the time period for giving notice expires, the lienor can only obtain payment from the person with whom he or she has contracted. See §713.06(3)(c)4.

Upon an owner's demand, in the manner prescribed in statute, a lienor must provide a sworn statement accounting to the nature of the labor or services performed or to be performed, the materials furnished or to be furnished and the amount paid, the amount due or the amount to become due. See §713.16, F.S. A form is provided in statute. A lienor's right to a lien is forfeited if the lienor fails or refuses to furnish the statement, or furnishes a false or fraudulent statement within 30 days after the demand.

The owner can also request a lienor to execute a waiver and release of lien upon progress payment or final payment. See §713.20, F.S. However, the waiver and release can not be executed in advance and can only be waived to the extent of labor, services, or materials furnished. It must also be in substantial compliance with the form and content provided in statute. The waiver and release executed in exchange for a check may be conditioned upon payment of the check.

For purposes of perfecting a lien, a lienor must record a claim of lien in accordance with s. 713.08, F.S. Only one claim of lien may be recorded for labor, services, or materials furnished from more than one improvement under the same direct contract.

- *Laborers*

Laborers are exempt from the notice provisions of the Construction Lien Law. Therefore, regardless of whether they are in privity with the owner, laborers are allowed to recover under the Law. The owner may pay the laborer directly and the amount may be deducted from the amount due the general contractor under the direct contract. See §713.06(3)(b), F.S.

2. Payment Bond

Alternatively, a property owner can require the contractor to furnish a payment bond for purposes of exempting himself or herself from the applicability of the construction lien law. See §713.23, F.S. The bond secures every lien under the direct contract accruing subsequent to its execution

and delivery, except that of the contractor. The payment bond must be equal, at a minimum, to the amount of the original contract price, before commencement of the project. The surety bond must be executed by a surety insurer authorized to do business in this state and must be conditioned upon prompt payment by the contractor to all lienors under the contractor's contract for labor, services, and material. This condition is implied made a part of any form of a payment bond.

Lienors not in privity with the contractor, with the exception of laborers, must serve a written Notice to Contractor that the lienor intends to look to the contractor's bond to recover for labor, services or materials. The Notice to Contractor is very much like the Notice to Owner. In addition, within 90 days after the lienor furnishes labor, services or materials, the lienor must serve as a condition precedent to recovery under the contractor's bond, a written Notice of Nonpayment to the contractor and the surety. The written notice will satisfy the condition precedent necessary for the payment referred in the Notice of Nonpayment and any subsequent payment becoming due to the lienor after the date of the notice.

Any lienor has a direct right of action on the bond against the surety. However, no action for the labor or materials or supplies may be instituted or prosecuted against the contractor or surety unless the Notice to Contractor and the Notice of Nonpayment have been given. The statute of limitations period for bringing an action against the contractor or surety for payment under the bond is 1 year from the date of the performance of the labor or completion of delivery of the materials and supplies. A lienor may not waive in advance his or her right to bring an action under the bond against the surety.

B. Public Construction

Construction liens do not attach to public property but person working on such projects are generally protected by the execution of a surety bond by the primary contractor. Any person who enters into a formal contract with a public entity must execute a surety bond in accordance with statute before beginning any construction or repair of a public building or public work. *See* § 255.05, F.S. The person must also deliver a copy to the public entity, and record it in the county's public records. 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. The bond must be conditioned upon the timely performance by the contractor, and upon timely payment to all lienors, as defined in s. 713.01, F.S., whose claims derive directly or indirectly from the work provided for in the contract.

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. An action may be brought at law or in equity by or against the public authority on any claim arising from breach of an express or implied provision of a contract or written directive issued by the public authority pursuant to the contract on any public works project on which a performance bond is required. In such action, 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.

As would occur with a lienor under the Construction Lien Law in chapter 713, F.S., a claimant, who is not in privity with the contractor, with the exception of a laborer, must furnish the contractor with a notice that he or she intends to look to the bond for protection. 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 Notice of Nonpayment. A Notice of Nonpayment must be served no later than 90 days after the final furnishing of the labor, services, or materials. *See* §255.05(2)(a)1., F.S. A claimant can not institute an action for the labor, materials or supplies until both notices have been given.

The statute of limitations period for bringing an action, with the exception an action for exclusive recovery of retainage, against the contractor or surety for payment under the bond is 1 year from the date of the performance of the labor or completion of delivery of the materials or supplies. § 255.05(2)(a)1., F.S. The courts have interpreted this provision to mean that the one-year statute of limitations period for action based on a surety bond for work performed on a public construction actually begins to run from the date the Certificate of Substantial Completion² is issued. *See Federal Insurance Co. V. Exel of Orlando, Inc.*, 685 So.2d 896 (Fla. 5th DCA 1996); *Northwestern, Inc. V. Ward Land Clearing & Drainage, Inc.*, 500 So.2d 615 (Fla. 1st DCA 1986); *District School Bd of DeSoto County v. Safeco Ins. Co.*, 434 So.2d 38 (Fla. 2d DCA 1983).

A person may 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 or final payment. *See* §255.05(2)(b)-(c), F.S. A statutory form for waiver and release of progress and final payments is provided. A waiver that is not substantially similar to the forms in this subsection is enforceable in accordance with its terms. A claimant who executes a waiver in exchange for a check may condition the waiver on payment of the check. A claimant may not waive in advance his or her right to bring an action under the bond against the surety.

C. Building Code Inspectors

Prior to the commencement or recommencement of any construction project, a property owner is required to obtain, record and post a Notice of Commencement, unless the owner is otherwise exempted under chapter 713, F.S. *See* §713.13, F.S. (Supp. 1998) The Notice of Commencement protects the owner from double payments and serves as the essential foundation for proceeding under the Construction Lien Law. The Notice of Commencement must be posted at each project site before a first inspection is performed. *See* §713.135, F.S. (Supp. 1998). In 1996, building code administrators and inspectors, i.e., the local authorities issuing the construction permits, became responsible for enforcing the statutory provision regarding the posting of a Notice of Commencement. Building code administrator or inspectors are not currently subject to statutory disciplinary grounds for failure to enforce this statutory requirement. According to industry claims, compliance remains low.

²The Certificate of Substantial Completion is an industry generated form for use in commercial contracts which is generally issued by the architect to the property owner

III. Effect of Proposed Changes:

Section 1 amends s. 255.05, F.S. (Supp. 1998), relating to contractor bonds for public construction. It provides that the statute of limitations period for serving a Notice of Nonpayment or for bringing an action against a contractor or a surety is not to be measured from the date of issuance of a Certificate of Occupancy or a Certificate of Substantial Completion but rather from the last day of furnishing labor, services, or materials by the claimant. This addresses the statute of limitations period issue raised in *Federal Insurance Co., supra*, in which the court construed the statute of limitations period to begin with the date of the Certificate of Occupancy or Certificate of Substantial Completion rather from the time the subsequent minor work had been completed on the project.

Section 2 amends s. 713.06, F.S. (Supp. 1998), relating to payment made to lienors, to provide that the Notice to Owner may, rather than must, be substantially in the form provided in statute. This amendment seeks to override part of the court's decision in *Allstar, supra*, in which the court strictly construed the statute to require the form of the Notice to Owner to be in substantial compliance, if not exactly the same format and content as the form provided in statute. The form, however, must contain, at a minimum, the information and warning provided in statute. In addition, the Notice to Owner may be combined with the Notice to Contractor and may be entitled Notice to Owner/Notice to Contractor.

Section 3 amends subsection (5) of s. 713.08, F.S. (Supp. 1998), relating to the claim of lien. Specifically, it provides that the statute of limitations period for recording a claim of lien is not to be measured from the date of issuance of a Certificate of Occupancy or a Certificate of Substantial Completion but rather from the last day of furnishing labor, services, or materials by the lienor. Therefore, it is clarified that the statute of limitations period runs no later than 90 days after the final furnishing of labor, services, or materials by the lienor.

Section 4 amends subsection (1) of s. 713.135, F.S. (Supp. 1998), relating to Notice of Commencement of project. Subsection (d) of subsection (1) is amended to require certain information to be included in the Notice of Commencement and to require a building code administrator or a building official to verify such information against the building permit application. Upon request of any person, the building code administrator or official shall provide the recorded information. It also provides an exemption from the Notice of Commencement requirement on direct contracts for the repair or replacement of heating or air-conditioning systems for less than \$5,000.

Section 5 amends s. 713.18, F.S. (Supp. 1998), relating to the manner of serving notices and other instruments. It adds that mailing provisions regarding service of notice to an owner also apply to preliminary notices on bonded projects. Therefore, preliminary notices under s. 713.23, F.S., or preliminary notices under s. 255.05, F.S., may also be served by mailing the same, postage prepaid, by registered or certified mail and will constitute effective notice as of the date of mailing if the person who served the notice maintains a register or certified mail log. In addition, it permits services of notices, claims of lien, affidavits and other instruments to be made by overnight or second-day delivery, providing it is through a delivery service that maintains records of such delivery.

Section 6 amends paragraphs (d) and (e) of subsection (1) of section 713.23, F.S. (Supp. 1993), relating to forms for waiver of right to claim against payment bonds. Subsection (d) is amended to provide that the time period for serving a written Notice of Nonpayment is not to be measured from the date of issuance of a Certificate of Occupancy or a Certificate of Substantial Completion but rather from the last day of furnishing labor, services, or materials by the lienor. . Therefore, it is clarified that the statute of limitations period runs no later than 90 days after the final furnishing of labor, services, or materials by the lienor. Subsection (e) is also amended to provide identical language as it relates to bringing an action based on the bond against the contractor or surety. Therefore, it is clarified that the statute of limitations period runs from the performance of the labor or completion of delivery of the materials and supplies.

Section 7 provides the act takes effect October 1, 1999.

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 should benefit as the bill clarifies that the format of the Notice to Owner and the Notice to Contractor need not be exactly as the form provided in statute as long as certain statutory information is contained therein. In addition, it clarifies that the statutory time periods for serving certain notices or otherwise bringing an action to recover against contractors or sureties will not be measured from the date of issuance of a Certificate of Occupancy or the issuance of a Certificates of Substantial Completion, but according to the last day in which labor, services, and materials were furnished.

The bill may encourage better enforcement by issuing authorities regarding Notice of Commencement requirements to ensure proper compliance necessary to exercise the right to a construction lien.

The bill should benefit consumers and contractors under direct contract for repair or replacement to heating and air-conditioning systems for less than \$5,000, by removing any delay occasioned by the requirement to file a Notice of Commencement.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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