

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1427                      Relating to Construction Contracting  
**SPONSOR(S):** Dean  
**TIED BILLS:**                              **IDEN./SIM. BILLS:** SB 2754

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Business Regulation</u>	<u>34 Y, 0 N</u>	<u>Gallen</u>	<u>Liepshutz</u>
2) <u>State Administration</u>	_____	_____	_____
3) <u>Finance &amp; Tax</u>	_____	_____	_____
4) <u>Subcommittee on Commerce &amp; Local Affairs</u> <u>Appropriations</u>	_____	_____	_____
5) <u>Appropriations</u>	_____	_____	_____

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### SUMMARY ANALYSIS

Under Florida's Construction Lien Law, a person that performs construction services as described by statute is given a right to file a lien against improved property in order to enforce payment of a contract. The bill makes several changes to the construction lien law:

- Providing additional requirements when filing a claim of lien and clarification of lien rights.
- Providing that when a contract is deemed unenforceable because it was entered into by an unlicensed contractor, that the unenforceability does not affect the lien rights of others.
- Providing clarification regarding payment of a contract for subdivision improvements and extending the proper payment defense to owners that contract for subdivision improvements.
- Providing clarification for the operation of bonds that are not properly attached to a notice of commencement but later recorded.
- Modifying the penalties for the misapplication of money received for construction services.

The bill provides that a bond is unenforceable if it restricts the classes or persons protected or restricts the venue of any proceeding on the bond.

The bill increases administrative fines that may be imposed on contractors by a contractor's board from \$5,000 to \$10,000.

The bill takes effect October 1, 2004.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h1427a.br.doc  
**DATE:** March 30, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

The bill makes several changes to the Construction Lien Law, as well as amending regulation regarding contractors and contractor bonds.

##### Bonds

Any person entering into a formal contract with state or local government for the construction or repair of a public building or public work, must execute, deliver to the owner, and record a payment and performance bond.<sup>1</sup> Certain contracts may be exempt from the bond requirement, depending on the amount of the contract.<sup>2</sup> A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers associated with the project. A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions.

**Effect of Proposed Changes:** The bill makes it unlawful to restrict the classes or persons protected by a construction bond or restricting the venue of any proceeding on the bond. Any bond that contains these prohibited restrictions is unenforceable.

##### Contractors

The regulation of construction contracting is governed by part I of chapter 489, F.S., and is administered by the Construction Industry Licensing Board (CILB) within the Department of Business and Professional Regulation (DBPR). The regulation of electrical contracting is governed by part II of chapter 489, F.S., and is administered by the Electrical Contractors' Licensing Board (ECLB) within the DBPR.

The CILB may take disciplinary action on any certified or registered contractor that is found guilty of violating any of the acts prescribed by statute.<sup>3</sup> Among the actions that may be taken is the imposition of an administrative fine up to \$ 5,000. Likewise, the ECLB may impose an administrative fine up to \$5,000 upon a finding of guilt for violating any acts prescribed by statute.<sup>4</sup>

**Effect of Proposed Changes:** The bill increases these administrative fines, authorizing the CILB and the ECLB to impose fines up to \$10,000 per violation.

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<sup>1</sup> s. 255.05, F.S.

<sup>2</sup> When the contract amount is for \$100,000 or less, no payment and performance bond is required; when the contract amount is for \$200,000 or less, the government entity may use its discretion whether to require a bond; and when the contract amount is between \$100,000 and \$200,000, the government entity may delegate authority to the relevant state agency whether to require a bond. S. 255.05(1)(a), F.S.

<sup>3</sup> s. 489.129, F.S.

<sup>4</sup> s. 489.533, F.S.

## Construction Liens

Pursuant to Florida's Construction Lien Law [Ch. 713, F.S.], contractors<sup>5</sup>, laborers<sup>6</sup>, materialmen<sup>7</sup>, subcontractors, and other persons performing services described in this chapter, are given the right to file a lien against improved property in order to enforce payment of a contract. The law provides a legal remedy to persons who supply labor, services, or materials during the construction of a home or building in the event they are not paid, and provides procedures for property owners to avoid double payment for labor, services, or materials. Every lienor must record a claim of lien that must contain certain statutory requirements.

Direct contracts between an owner and a contractor must contain a provision putting the owner on notice that if the contractor fails to pay subcontractors or material suppliers, the subcontractors or material suppliers can look to the property for payment, even if the owner has paid the contractor in full.<sup>8</sup> The notice must be in bold face capital letters and 18-point type.

**Effect of Proposed Changes:** The bill requires the notice provision to be placed in the body of the contract, in capital letters, and the same size type as the contract provisions. The bill provides that the failure to include this provision does not render the contract unenforceable and the lien and bond rights of lienors not in privity will not be adversely affected.

The bill provides that a claim of lien must be served on the owner. Although existing law appears to require a claim of lien to be served on the owner, the bill expressly clarifies this requirement.<sup>9</sup>

**Types of Lienors and Exemptions:** Individuals who are in privity with the owner and who perform labor, services or provide materials have rights to a lien. Those who are not in privity with an owner and who perform labor, services, or provide materials under the direct contract of another also have rights to a lien.<sup>10</sup> Privity means the owner and contractor, or other workers, have a relationship of common interests or common legal rights (e.g. privity of contract).

Additionally, no lien can exist in favor of a contractor, subcontractor, or sub-subcontractor who is unlicensed as provided in Ch. 489, F.S. [Contracting].<sup>11</sup>

**Effect of Proposed Changes:** The bill provides that if a contract is deemed unenforceable because it was entered into by an unlicensed contractor, this unenforceability will not affect the rights of any other persons to enforce contract, lien, or bond remedies, and will not affect the obligations of a surety. Therefore, a subcontractor's lien rights will not be impaired because of an unlicensed contractor. This copies the unlicensed contracting provisions passed during the 2003 Legislative Session.<sup>12</sup>

**Subdivision Improvements and Proper Payment:** As a pre-requisite to perfecting a lien and recording a claim of lien, all lienors who are not in privity with the owner, except laborers, must serve a notice on the owner.<sup>13</sup> A notice to owner provides the identity of all persons that have furnished labor

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<sup>5</sup> Contractor" means a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under the contract. s. 713.01(8), F.S.

<sup>6</sup> "Laborer" means any person other than an architect, landscape architect, engineer, surveyor and mapper, and the like who, under properly authorized contract, personally performs on the site of the improvement labor or services for improving real property and does not furnish materials or labor service of others. s. 713.01(15), F.S.

<sup>7</sup> "Materialman" means any person who furnishes materials under contract to the owner, contractor, subcontractor, or sub-subcontractor on the site of the improvement or for direct delivery to the site of the improvement. s. 713.01(19), F.S.

<sup>8</sup> s. 713.015, F.S.

<sup>9</sup> s. 713.08(4)(c), F.S.

<sup>10</sup> s. 713.02, F.S.

<sup>11</sup> s. 713.02(7), F.S.

<sup>12</sup> s. 489.128, F.S.; see also HB 1277 - 2003 Legislative Session.

<sup>13</sup> S. 713.06(2)(a)

or materials to improve the owner's property. The notice to owner protects the owner from double payment and establishes priority of lien.<sup>14</sup>

A notice to owner need not be filed by a lienor who, regardless of privity, performs subdivision improvements.<sup>15</sup> Subdivision improvements are those improvements that make real property suitable for improvements, such as excavation, paving, laying pipes for water and gas, etc. Subdivision improvement lienors are only required to record a claim of lien.<sup>16</sup>

After receipt of a notice to owner,<sup>17</sup> an owner must make proper payments to the lienor. Proper payment means the owner pays all lienors named in the notice directly.<sup>18</sup> Similarly, when an owner receives a contractor's final payment affidavit, the owner must make proper payments to the contractor. Owners that make payments will have a proper payment defense against any claim of lien.

Owners have a proper payment defense against all lienors except those involved in subdivision improvements. However, a lienor involved in subdivision improvements is *permitted* to file a notice to owner, thereby invoking the proper payment procedures and giving owners a proper payment defense.

With the exception of subdivision improvement contracts, when final payment under a direct contract is due the contractor must provide the owner a final payment affidavit. The contractor's final payment affidavit must state that all lienors under direct contract have been paid in full, or if not paid in full, stating the name of each lienor that has not been paid in full and the amount due. Those lienors that fail to provide a notice to owner may lose their lien rights if the owner makes proper payments.<sup>19</sup>

**Effect of Proposed Changes:** The bill clarifies the requirements for payment on a contract for subdivision improvements, providing that payment for these services is not proper when paid before the actual furnishing of labor, services, or materials for improvement.

The bill provides that a contractor, prior to receiving final payment, must provide the owner a final payment affidavit when final payment is due. A contractor with a direct contract with the owner will not have a right of action for a claim of lien until the contractor submits a final payment affidavit.

This bill, effectively, extends a proper payment defense to owners who contract for subdivision improvements. Under this provision, subcontractors and suppliers who are not in privity with the owner and do not serve a notice to the owner could lose their lien rights if the owner makes proper payments.

**Notice of Commencement and Transfer of Liens to Security:** A Notice of Commencement is a recorded statement executed by the owner prior to the improvement of real property. The purpose of the notice of commencement is to provide the contractor and subcontractors and suppliers with the information they need in order to comply with the Construction Lien Law. The authority issuing a building permit is required to furnish the applicant with copies of a notice of commencement form and a statement summarizing the Construction Lien Law in order to notify applicants that their property is subject to lien.

By recording a notice of commencement, the owner can require the general contractor to supply releases of liens from all persons that have served a notice to owner.

The notice of commencement must contain a description of the property to be improved; a description of the improvement; the name and address of the owner and contractor; the name and address of the

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<sup>14</sup> s. 713.06, F.S.

<sup>15</sup> s. 713.04, F.S.

<sup>16</sup> s. 713.04(1), F.S.

<sup>17</sup> The notice to owner must be served no later than 45 days from commencing services to the property and before the date of the owner's final payment after the contractor has furnished the required final payment affidavit. s. 713.06(2)(a), F.S.

<sup>18</sup> s. 713.06, F.S.

<sup>19</sup> s. 713.06(3)(d), F.S.

surety on the payment bond and the amount of such bond; the name and address of any person making a loan for the construction; and the name and address of any other person upon whom notice should be served.<sup>20</sup> Bonds not recorded at the time of the notice of commencement may be used as a transfer bond.<sup>21</sup>

Any lien that is claimed may be transferred by any person having an interest in the real property from the property to another security (e.g. bond). The transfer may be accomplished by depositing in the clerk's office a sum of money, or filing a bond. The clerk will make and record a certificate showing the transfer of the lien and mail a copy of the certificate to the lienor named in the transferred claim of lien. Any number of liens may be transferred to one security. The transfer bond is used to release the owner's property from the lien, thus removing the cloud of lien from the property and transfer the lien to the bond in order to ensure payment to any contractors, laborers, or materialmen (e.g. lienor).<sup>22</sup>

**Effect of Proposed Changes:** The bill provides that a bond is deemed a transfer bond at the time of recordation of the notice of bond and at the time the clerk mails notice of bond to the lienor. In addition, only the notice requirements that govern the transfer of liens to security will apply.<sup>23</sup> This clarifies the operation of a bond as a transfer bond in the instance that the bond is not properly attached to the notice of commencement and the notice of bond is later recorded.

The bill provides that when a proceeding is brought in court to enforce a lien and the lien is transferred to a security (e.g. bond), the action to recover against the security is deemed to have been brought as of the filing date of the original claim to enforce the lien. This protects a lienor by ensuring the claim was timely filed even though the lien was transferred after the proceeding to enforce the lien was commenced.

The bill allows building departments to utilize email, facsimile and personal delivery in addition to regular mail when serving required lien law information on owners who have applied for a building permit.

The bill provides that a failure to record a notice of commencement does not bar the issuance of a building permit. Currently, s. 713.135, F.S. states that the recording of a notice of commencement is not required prior to the issuance of a building permit, therefore, this provision appears to be clarifying language.

The bill modifies the penalties for misapplication of money received for construction services. Currently, if the amount misapplied has an aggregate value of greater than \$20,000 but less than \$100,000, the violator is guilty of a second degree felony. The bill deletes the minimum requirement of \$20,000, thereby raising the penalty for the misapplication of construction funds of less than \$20,000 from a third degree felony to a second degree felony.

#### C. SECTION DIRECTORY:

Section 1: Amends s. 255.05, F.S., prohibits a bond from restricting persons protected or restricting the venue of any proceedings on the bond.

Section 2: Amends s. 489.129, F.S., increases the penalty that may be assessed by the CILB.

Section 3: Amends s. 489.533, F.S., increases the penalty that may be assessed by the ECLB.

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<sup>20</sup> s. 713.135, F.S.

<sup>21</sup> s. 713.13, F.S.; such bonds must be used pursuant to 713.24, F.S.

<sup>22</sup> s. 713.24, F.S.

<sup>23</sup> id.

- Section 4: Amends s. 713.015, F.S., modifies the requirements regarding style and size of mandatory provisions that must be contained in direct contracts; provides that failure to include mandatory provisions in the contract does not invalidate the contract or adversely affect other lienors.
- Section 5: Amends s. 713.02, F.S., provides that contracts deemed unenforceable due to an unlicensed contractor does not affect the lien rights of other persons.
- Section 6: Amends s. 713.04, F.S., provides additional requirements for payment of a contract for subdivision improvements
- Section 7: Amends s. 713.08, F.S., specifies that a claim of lien must be served on an owner.
- Section 8: Amends s. 713.13, F.S., provides that a bond is a transfer bond when the bond is not properly attached to the notice of commencement and later recorded.
- Section 9: Amends s. 713.135, F.S., expands the delivery options when serving lien law information on owners that have applied for a building permit; provides that notices of commencement do not have to be recorded prior to issuance of a building permit.
- Section 10: Amends s. 713.24, F.S., providing that an action commenced to recover against a security is deemed to have been brought as of the date of filing the action to enforce the lien.
- Section 11: Amends s. 713.345, F.S., raising the penalty for misapplication of construction funds of less than \$20,000 from a third degree felony to a second degree felony.
- Section 12: Provides the effective date of October 1, 2004.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact on the private sector is undetermined at the present time.

### D. FISCAL COMMENTS:

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not require the counties or cities to spend funds or take an action requiring the expenditure of funds.

2. Other:

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**