

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1427 Construction Contracting
SPONSOR(S): Dean
TIED BILLS: none **IDEN./SIM. BILLS:** SB 2754 (i)

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>	<u></u>	<u>Bond</u>	<u>Everhart</u>
3) <u>Finance & Tax</u>	<u></u>	<u></u>	<u></u>
4) <u>Commerce & Local Affairs Approp. (Sub)</u>	<u></u>	<u></u>	<u></u>
5) <u>Appropriations</u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Florida's Construction Lien Law provides that a person that improves real property may file a lien against the improved property as a means to enforce payment. The bill amends construction lien law to:

- Prevent surety bond companies from placing certain restrictions in payment and performance bonds.
- Double the administrative fine limit against contractors (from \$5,000 to \$10,000).
- Provide that the failure of a contractor to put the statutory notice regarding the lien law into the contract does not make the contract void.
- Provide that if a contractor cannot impose a lien because that contractor did not have a license, licensed subcontractors and materialmen may still file a lien, and a surety company remains liable.
- Modify the proper payment defense as to subdivision improvements to require that the owner obtain a final contractor's affidavit before making the final payment in order for the owner to be able to utilize the defense.
- Provide that a surety bond obtained after recording the notice of commencement becomes a transfer bond upon recording.
- Provide that the notice required to be provided by a local government by mail to an owner regarding the lien law may be given by electronic means, facsimile, or hand delivery.
- Remove the third degree felony for misapplication of construction funds, making all misapplications either a second or first degree felony.

This bill does not appear to have a fiscal impact on state or local governments.

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

STORAGE NAME: h1427b.sa.doc
DATE: April 7, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input 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 checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input 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:

This bill increases government by limiting surety bond provisions, and by increasing civil fines and criminal penalties.

B. EFFECT OF PROPOSED CHANGES:

Surety Bonds

Any person entering into a 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.¹ Certain contracts may be exempt from the bond requirement, depending on the amount of the contract.² 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. It is reported that some surety bond companies have attempted to place restrictions in bonds that they issue, which restrictions limit who may collect upon the surety bond.

The bill makes it unlawful to restrict the classes or persons protected by a surety bond. This bill also prohibits a surety bond from restricting the venue of any proceeding on the bond.

Regulation of Licensed Construction 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. Both the CILB and the ECLB may take disciplinary action against a contractor licensed through the board, which action may include an administrative fine of up to \$5,000.³

The bill increases the limit of administrative fines up to \$10,000 per violation.

¹ s. 255.05, F.S.

² 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.

³ Sections 489.129 and 489.533, F.S.

Construction Liens - Contract Notice Provisions

The Construction Lien Law, ch. 713, F.S., provides contractors⁴, laborers⁵, materialmen⁶, subcontractors, and other persons improving real property with the right to file a lien against the improved real property in order to enforce payment for the improvements. Included in the prerequisites to filing of a lien is the requirement that a contractor who has a written contract with the owner of the real property must include a notice to the owner regarding the potential effects on the owner of the construction lien law.⁷ The notice must be in bold face capital letters and 18-point type.

The bill removes the type size and typeface requirements, and simply requires that the notice be of the same size type as the contract provisions. The bill also provides that the failure to include this notice does not render the contract unenforceable and the lien and bond rights of lienors not in privity will not be adversely affected.

Construction Liens - Unlicensed Contractors

A construction contract entered into by an unlicensed contractor is void and unenforceable,⁸ and a construction lien filed by an unlicensed contractor is likewise void and unenforceable. It is arguable that when a contract or lien is unenforceable because the general contractor is unlicensed, the contracts and liens of properly licensed subcontractors may also be unenforceable. This can create an inequitable situation where a licensed subcontractor may properly perform construction services, yet be unable to collect for those services because of a failure of the general contractor.

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.

Proper Payment Defense as to Subdivision Improvements

In general, where the owner of real property being improved pays the general contractor according to ch. 713, F.S., according to the contract, and without knowledge of the general contractor failing to apply payments to the proper account, the owner may be found to have made proper payment. Such an owner would then be protected from having to pay subcontractors and suppliers, who were not paid by the general contractor, by application of the proper payment defense. However, the proper payment defense may not apply to the special lien provisions relating to subdivision improvements. *Marks Landscape and Paving Co. v. R.P.B. Industrial Park, Inc.*, 552 So.2d 256 (Fla. 4th DCA 1989).

This bill amends the special lien provisions applicable to subdivision improvements to extend the proper payments defense to subdivision improvements. Also as to subdivision improvements, this bill specifies that an advance payment, that is, a payment made prior to materials or services being furnished, is not a proper payment. Additionally, as to subdivision improvements, the owner must obtain a final contractor's affidavit before making the final payment in order to qualify for the proper payment defense.

⁴ 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.

⁵ "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.

⁶ "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.

⁷ s. 713.015, F.S.

⁸ s. 713.02(7), F.S.

Claim of Lien

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.⁹

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 subcontractors and suppliers with the information they need in order to provide notices required by the Construction Lien Law. If a copy of a surety bond is recorded with the notice of commencement, potential lienors may not file a lien but must look to the surety. If a construction lien or liens are filed against a property, the owner may clear title to the property by obtaining a transfer bond. In such case, the claim of the lienors is transferred from the property to the bond.

This bill provides that a surety bond that is filed after the notice of commencement shall be treated as a transfer bond. This bill also provides that, should a transfer bond be posted after a foreclosure case is filed on the lien, the lien shall transfer to the bond, the date of filing of the action shall be considered as the date that a claim was made against the bond, and thus the foreclosure case shall become a proceeding against the bond.

Building Permits

A local government issuing a building permit is required to mail a notice regarding the Construction Lien Law to every applicant (who would be the property owner) for a building permit. A local government may charge applicants up to \$5 for furnishing the notice.

This bill provides that, in addition to regular mail, the required notice may be furnished electronically, by facsimile, or hand delivery to the applicant. This bill also repeats the statement that the Construction Lien Law does not require that a notice of commencement be recorded prior to issuance of a building permit.¹⁰

Misapplication of Construction Monies

A contractor must pay all suppliers and subcontractors from monies received from the owner. Likewise, subcontractors must also pay suppliers and sub-subcontractors. A contractor or subcontractor that misapplies monies received from an owner may be guilty of felony misapplication of construction monies. Misapplication of \$100,000 or more is a 1st degree felony, misapplication of \$20,000 to \$100,000 is a 2nd degree felony, and misapplication of less than \$20,000 is a 3rd degree felony.

This bill eliminates the 3rd degree felony level, and provides that a misapplication of less than \$100,000 is a 2nd degree felony.

C. SECTION DIRECTORY:

Section 1 amends s. 255.05, F.S., to prohibit a surety bond from restricting persons protected or restricting the venue of any proceedings on the bond.

Section 2 amends s. 489.129, F.S., to increase the administrative penalty that may be assessed by the CILB.

⁹ s. 713.08(4)(c), F.S.

¹⁰ The statement is within s. 718.135(1)(d), F.S., the bill adds a new paragraph (1)(e) that has the same effect.

Section 3 amends s. 489.533, F.S., to increase the administrative penalty that may be assessed by the ECLB.

Section 4 amends s. 713.015, F.S., to modify the requirements for the notice required in construction contracts; and to provide that failure to include the notice does not invalidate the contract or adversely affect other lienors.

Section 5 amends s. 713.02, F.S., to provide that if a contract is unenforceable because the contractor is unlicensed, suppliers and licensed subcontractors may still enforce a lien.

Section 6 amends s. 713.04, F.S., to provide that the proper payment defense applies to subdivision improvements.

Section 7 amends s. 713.08, F.S., to specify that a claim of lien must be served on an owner.

Section 8 amends s. 713.13, F.S., to provide that a bond recorded after the notice of commencement is recorded is deemed a transfer bond.

Section 9 amends s. 713.135, F.S., to provide additional means for a local government to deliver the required information regarding the lien law.

Section 10 amends s. 713.24, F.S., to provide that a foreclosure on a lien becomes an action against a security upon filing of a transfer bond.

Section 11 amends s. 713.345, F.S., to increase 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 an effective date of October 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate. The DBPR cannot estimate how many, if any, contractors will be assessed fines in excess of the current statutory maximum.¹¹

2. Expenditures:

Indeterminate, see Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None. This bill does not affect a local government revenue source.

2. Expenditures:

Indeterminate, see Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

¹¹ Note that collected fines would be paid into trust funds and not general revenue.

This bill includes the possibility of increased fines being assessed against some licensed contractors, although the amount of such increase is indeterminate.

D. FISCAL COMMENTS:

As to the fiscal impact on local expenditures (notice requirements): Current law requires local governments to mail a notice regarding the construction lien law to every applicant for a building permit. This bill provides that the notice may be furnished by electronic mail, facsimile, or given in person to the applicant. These alternative delivery methods are likely to cost less, and thus this provision is likely to reduce local government expenditures. Local governments have not furnished an estimate of the savings that may result from this change.

As to the fiscal impact on state and local expenditures (increased criminal penalties): This bill increases a criminal penalty for misappropriation of construction monies from a 3rd degree felony to a 2nd degree felony. This may result in an increased need for prison beds at the local and state level. The Criminal Justice Estimating Conference has not examined this bill at this time.

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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.