

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Regulated Industries Committee

BILL: CS/SB 1016

SPONSOR: Regulated Industries Committee and Senator Argenziano

SUBJECT: Construction Contracting

DATE: March 22, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sumner</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute provides that a bond for a public works project is unenforceable if it restricts the classes or persons protected by a construction bond or restricts the classes of persons protected by a construction bond or restricts the venue of any proceeding on the bond.

The committee substitute increases the administrative fine for violations that the Construction Industry Licensing Board and the Electrical Contractors' Licensing Board may assess a licensee from \$5,000 to \$10,000.

The committee substitute requires that the notice of lien law be in capital letters no less than the 14 point, capitalized, boldfaced type on the front of the contract in the direct contracts between owners and contractors related to improvements to real property consisting of single or multiple family dwellings up to four units. It provides that this section does not affect the lien and bond rights of lienors not in privity with the property owner and that it is not applicable to owners who are contractors or property developers.

The committee substitute provides that if a contract is rendered unenforceable by an unlicensed contractor, subcontractor or sub-subcontractor, such unenforceability shall not affect the rights of any other persons to enforce contract, lien, or bond remedies and shall not affect the obligations of a surety that has provided a bond on behalf of the unlicensed contractor, subcontractor or sub-subcontractor. The committee substitute also provides that it is not a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed.

The committee substitute provides that unless labor and services or materials for subdivision improvement are provided prior to the owner paying any money on account of a direct contract,

the payment will not be considered a proper payment. An owner is required to make final payment on account of a direct contract only after the contractor provides a final payment affidavit. Any such payment not complying with this requirement shall not qualify as proper payment.

The committee substitute provides that claim of liens shall be served on the owner.

The committee substitute provides that a payment bond must be attached at the time the notice of commencement was recorded in order for the bond to be used to transfer any recorded lien of a lienor.

The committee substitute provides that the building department may, in addition to mailing, deliver by electronic mail or other electronic format or facsimile, or personally deliver the statement that the right, title, and interest of the person who has contracted for the improvement to the real property may be subject to attachment under the Construction Lien Law.

The committee substitute amends s. 713.24, F.S., to provide that jurisdiction for actions on issues involving transfers of liens shall be vested in either the county or circuit court. It provides that if a proceeding to enforce a lien is commenced in a court within the specified time and, during the proceeding, the lien is transferred, an action commenced in the same county or circuit court to recover against the security shall be deemed to have been brought, as of the date of filing the action, to enforce the lien, and the court shall have jurisdiction over the action.

The committee substitute provides that for a person to be guilty of a felony of a second degree, the person must have knowingly and intentionally misapplied construction funds of more than \$1,000 and less than \$100,000. It deletes language that provided that the aggregate value of the misapplied funds had to be more than \$20,000 and less than \$100,000, for a person to be guilty of a second degree felony.

The committee substitute provides that if the amount of misapplied construction payments is less than \$1,000 the person is guilty of a third degree felony.

The committee substitute provides that prior to a lender making any loan disbursement on any construction loan secured by residential real property directly to the owner, which, for purposes of the subsection means only a natural person, into the owner's account or accounts, or jointly to the owner and any other party, the lender must mail, deliver by electronic mail or other electronic format or facsimile, or personally deliver written notice to the owner notifying the owner that the lender is making a loan disbursement and alerting the homeowner to require the contractor to provide a lien release. It provides that the subsection does not apply to owners of real property acting as contractors.

This committee substitute substantially amends the following sections of the Florida Statutes: 255.05, 489.129, 489.533, 713.015, 713.02, 713.04, 713.08, 713.13, 713.135, 713.24, 713.345, and 713.3471.

II. Present Situation:

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 before commencing the work or recommencing the work after default or abandonment of the project.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.

Administrative fines for contractors

The regulation of construction contractors is governed by part I of ch. 489, F.S., and is administered by the Construction Industry Licensing Board (CILB) within the Department of Business and Professional Regulation (department). The regulation of electrical contractors is governed by part II of ch. 489, F.S., and is administered by the Electrical Contractors' Licensing Board (ECLB) within the department. Section 489.129, F.S., grants the CILB the authority to fine a construction-contractor licensee up to \$5,000 per violation of part I, ch. 489, F.S., ch. 455, F.S., or any rule or lawful order of the department or the board. Likewise, s. 489.533, F.S., grants the ECLB the authority to fine an electrical-contractor licensee up to \$5,000 per violation of part II, ch. 489, F.S., ch. 455, F.S., or any rule or lawful order of the department or the board.

Lien law - Mandatory provisions for direct contracts

Any direct contract between an owner and a contractor, related to improvements to real property consisting of single or multiple family dwellings up to and including four units, must contain a provision that notifies the owner that a claim of lien may be filed on their property if the contractor or subcontractor fails to pay the subcontractors, sub-subcontractors, or material suppliers or neglects to make other legally required payments, even if the owner has failed to pay the contractor in full.³

Lien is not defined in ch. 713, F.S. However, s. 713.015, F.S., provides for the following notice:

ACCORDING TO FLORIDA'S CONSTRUCTION LIEN LAW (SECTIONS 713.001-713.37, FLORIDA STATUTES), THOSE WHO WORK ON YOUR PROPERTY OR PROVIDE MATERIALS AND ARE NOT PAID IN FULL

¹ Section 255.05, F.S.

² When the contract amount is for \$100,000 or less, and work is done for the state, no payment and performance bond is required; when the contract amount is for \$200,000 or less, the non-state government entity may use its discretion whether to require a bond; and when the contract amount with the state is between \$100,000 and \$200,000, the Department of Management Services may delegate authority to the relevant state agency whether to require a bond. s. 255.05(1)(a), F.S.

³ Section 713.015, F.S. This provision was added in the 2003 legislative session by ch. 2003-177 L.O.F. and required the notice in 18-point, capitalized bold-faced type.

HAVE A RIGHT TO ENFORCE THEIR CLAIM FOR PAYMENT AGAINST YOUR PROPERTY. THIS CLAIM IS KNOWN AS A CONSTRUCTION LIEN. IF YOUR CONTRACTOR OR A SUBCONTRACTOR FAILS TO PAY SUBCONTRACTORS, SUB-SUBCONTRACTORS, OR MATERIAL SUPPLIERS OR NEGLECTS TO MAKE OTHER LEGALLY REQUIRED PAYMENTS, THE PEOPLE WHO ARE OWED MONEY MAY LOOK TO YOUR PROPERTY FOR PAYMENT, EVEN IF YOU HAVE PAID YOUR CONTRACTOR IN FULL. IF YOU FAIL TO PAY YOUR CONTRACTOR, YOUR CONTRACTOR MAY ALSO HAVE A LIEN ON YOUR PROPERTY. THIS MEANS IF A LIEN IS FILED, YOUR PROPERTY COULD BE SOLD AGAINST YOUR WILL TO PAY FOR LABOR, MATERIALS, OR OTHER SERVICES THAT YOUR CONTRACTOR OR A SUBCONTRACTOR MAY HAVE FAILED TO PAY. FLORIDA'S CONSTRUCTION LIEN LAW IS COMPLEX AND IT IS RECOMMENDED THAT WHENEVER A SPECIFIC PROBLEM ARISES, YOU CONSULT AN ATTORNEY. (Emphasis supplied)

Privity is the term used to indicate a “connection or relationship between two parties, each having a legally recognized interest in the same subject matter”, for example a contract.⁴ “The doctrine of privity means that a person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party.”⁵

Types of lienors and exemptions

Lienors include:

- persons performing services as architect, landscape architect, interior designer, engineer, or surveyor and mapper; any lienor who, regardless of privity, performs services or furnishes material to real property for the purpose of making it suitable⁶ as the site for construction of an improvement;
- persons who are in privity with an owner and who perform labor or services or furnish materials constituting an improvement or part thereof; and
- persons who are not in privity with an owner and who perform labor or services or furnish material constituting a part of an improvement under the direct contract of another person.

Exemptions:

- any improvement for which the direct contract price is \$2500 or less except the provisions for materialman or laborers, either of whom is in privity with the owner, or a contractor;
- in direct contracts where the owner requires the contractor to furnish a payment bond; and

⁴ Black's Law Dictionary (8th ed. 2004)

⁵ *Id.*, citing G.H. Treitel, *The Law of Contract* 538 (8th ed. 1991).

⁶ Making a site suitable as the site of an improvement includes but is not limited to grading, leveling, excavating and filling of land, including the furnishing of fill soil; the grading and paving of streets, curbs, and sidewalks, the construction of ditches and other area drainage facilities, the laying of pipes and conduits for water, gas, electric, sewage, and drainage purposes; and the construction of canals.

- when a contractor, subcontractor, or sub-subcontractor is unlicensed.⁷

Notice of commencement

The recording of a notice of commencement gives constructive notice that claims of lien may be recorded and may take priority. It does not constitute a lien, cloud, or encumbrance on real property⁸

Liens for professional services and subdivision improvements attach at the time they are recorded and take priority at that time. Liens of materialmen or laborers who are in privity with the owner and who comply with the provisions of ch. 713, F.S., attach and take priority at the time the notice of commencement is recorded. However, in the event a notice of commencement is not filed, the liens attach and take priority at the time the claim of lien is recorded.⁹

A notice of commencement must be recorded in the clerk's office before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. The notice shall provide:

- a description of the real property;
- a general description of the improvement;
- name and address of the owner, the owner's interest in the site of the improvement and the name and address of the fee simple titleholder, if other than the owner;
- the name and address of the contractor;
- the name and address of the surety on the payment bond if any, and the amount of the bond. A copy of the bond must be attached to the notice. However, if the bond is not recorded it may be used as a transfer bond under s.713.24, F.S.¹⁰
- the name and address of any person making a loan for the construction of the improvements;
- the name and address of a designated person upon whom documents may be served if other than the owner.

The owner, at his or her option, may designate a person in addition to himself or herself to receive a copy of the lienor's notice as provided in s. 713.06(2)(b), F.S., and if he or she does so, the name and address of such person must be included in the notice.

The notice must state if the contract between the owner and contractor named in the notice is for construction or improvement that takes in excess of one year. Any payments made by the owner after the expiration of the notice are considered improper payments.

When any person applies for a building permit, the authority issuing the permit is required to:

⁷ Section 713.02, F.S.

⁸ Section 713.13(3), F.S.

⁹ Section 713.07, F.S.

¹⁰ Section 713.13(1)(e), F.S. A transfer bond allows an owner, who has erred and not recorded the bond with the notice of commencement, to transfer liens which are recorded against the owner's property. A lien may be transferred from the real property by depositing the amount required by s. 713.24(3), F.S., with the Clerk of the Court or by filing a surety bond in the amount with the Clerk.

- print on the face of each permit card a statement that the owner's failure to record a notice of commencement may result in the owner paying twice for improvements to the property;
- provide the applicant and the owner of the real property upon which improvements are to be constructed with a printed statement stating that the right, title, and interest of the person who has contracted for the improvement may be subject to attachment under the construction lien law. The authority must also provide the applicant with a statement from the department providing a summary of construction lien law. The authority must mail the statement to the owner;
- inform each applicant who is not the person whose right, title, and interest is subject to attachment, that as a condition to the issuance of a building permit, the applicant must promise in good faith that the statement will be delivered to the person whose property is subject to attachment.¹¹

Notice to Owner - Subdivision improvements and proper payments

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.¹² A notice to owner provides the identity of all persons that have furnished labor or materials to improve the owner's property. The notice to owner protects the owner from double payment and establishes priority of lien.¹³

A notice to owner need not be filed by a lienor who, regardless of privity, performs subdivision improvements.¹⁴ 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.¹⁵

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.¹⁶

After receipt of a lienor notice to owner,¹⁷ an owner must make proper payments to the lienor. Proper payment means the owner pays all lienors named in the notice directly.¹⁸ Similarly, when an owner receives a contractor's final payment affidavit, the owner must make proper payments

¹¹ Section 713.135, F.S.

¹² Section 713.06(2)(a), F.S.

¹³ Section 713.06, F.S.

¹⁴ Section 713.04, F.S.

¹⁵ Section 713.04(1), F.S.

¹⁶ Section 713.06(3)(d), F.S.

¹⁷ 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.

¹⁸ Section 713.06, F.S.

to the contractor. Owners that make these 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.

Claim of lien

Perfecting a lien requires the lienor to record the claim of lien. The claim of lien must be signed and verified by the lienor or his or her agent acquainted with the facts stated therein. It must be in a substantially similar format to that provided in s. 713.08(3), F.S. The omission of any details or errors does not, within the discretion of the trial court, prevent the enforcement of the lien. The claim may be amended any time during the time allowed for its recording.

Failure to serve the claim of lien before recording or within 15 days after recording shall render the claim of lien voidable to the extent that the failure or delay is shown to have been prejudicial to any person entitled to rely on the service.

Service must be made in one of the following methods:

- by personal service or if a partnership, to one of the partners, or if a corporation to an office, director, managing agent, or business agent;
- by registered or certified mail with postage prepaid or by overnight or second day delivery with evidence of delivery; or
- by posting on the premises.¹⁹

Transfers of liens to security

The person may transfer a lien from the real property that they have an interest in by either:

- depositing a sum of money in the clerk's office, or
- filing a bond executed as surety in the clerk's office either in the amount equal to the amount demanded in the claim of lien plus interest at the legal rate for 3 years, plus \$1,000 or 25 percent of the amount demanded in the claim of lien whichever is greater to apply on any attorney's fees and court costs that may be taxed in any proceeding to enforce the lien.

Any excess of the security over the aggregate amount of any judgments shall be repaid to the party filing the bond or his or her successor in interest. Deposit money is considered as paid into court and is subject to the relative provisions of law.²⁰

¹⁹ Section 713.08, F.S.

²⁰ Section 713.24(2), F.S.

Moneys received for real property improvements; penalty for misapplication.

Any person who knowingly and intentionally fails to apply payments for real property improvements to the portion then due and owing for the services and labor which were performed on, or materials which were furnished, for such improvement prior to receipt of the payment is guilty of misapplication of construction funds punishable as follows²¹:

- If the amount of payments misapplied has an aggregate value of \$100,000 or more, the violator is guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
- If the amount of payments misapplied has an aggregate value of \$20,000 or more but less than \$100,000, the violator is guilty of a felony of the second degree, punishable as provided in s.775.082, s. 775.083, or s. 775.084.
- If the amount of payments misapplied has an aggregate value of less than \$20,000, the violator is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Lender responsibilities with construction loans

Prior to a lender making any loan disbursement directly to the owner, or jointly to the owner and any other party, the lender shall give a written notice that the lender is making a loan disbursement.

III. Effect of Proposed Changes:

Section 1. Bond of contractor constructing public buildings; form; action by materialmen.

Section 255.05(1)(a), F.S., is amended to provide that a bond for a public works project is unenforceable if it restricts the classes or persons protected by a construction bond or restricts the venue of any proceeding on the bond.

Section 2. Disciplinary proceedings.

The committee substitute amends s. 489.129, F.S., by increasing the administrative fine that the CILB may assess a licensee for each violation of part I of ch. 489, F.S., ch. 455, F.S., or any rule or lawful order of the department or board from \$5,000 to \$10,000.

Section 3. Disciplinary proceedings.

The committee substitute amends s. 489.533(2)(c) F.S., by increasing the administrative fine that the ECLB may assess a licensee for each violation of part II of ch. 489, F.S., from \$5,000 to \$10,000.

Section 4. Mandatory provisions for direct contracts.

The committee substitute amends parts of the mandatory provisions for direct contracts between owners and contractors in s. 713.015, F.S., related to improvements to real property consisting of single or multiple family dwellings up to four units. The committee substitute requires that the notice of the lien law be in capital letters no less than 14-point capitalized, boldfaced type on the

²¹ Section 713.345, F.S.

front of the contract. It deletes the requirement that the letters be in 18 point, capitalized, and boldfaced.²² Representatives from the industry state that the 18 point type is disruptive to formatting to the contract and does not necessarily guarantee that the consumer will see it.

It also provides that nothing in the section shall be construed to adversely affect the lien and bond rights of lienors who are not in privity with the owner. It provides that the section does not apply when the owner is also a license contractor or a construction professional who is in the business of developing property.

Section 5. Types of lienors and exemptions.

The committee substitute amends s. 713.02(7), F.S., to provide that notwithstanding any other provision of this part,²³ if a contract is rendered unenforceable by an unlicensed contractor, subcontractor or sub-subcontractor, such unenforceability shall not affect the rights of any other persons to enforce contract, lien, or bond remedies and shall not affect the obligations of a surety that has provided a bond on behalf of the unlicensed contractor, subcontractor or sub-subcontractor. This provision protects the lien rights of licensed contractors who have contracted with the unlicensed contractor to perform work on a job.

The committee substitute also provides that it is not a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed as provided in s. 489.128 or s. 489.532, F.S.

Section 6. Subdivision improvements.

The committee substitute amends s. 713.04, F.S., to provide that labor and services or materials for subdivision improvements are provided prior to the owner paying any money on account of a direct contract and any payment not complying with this requirement shall not qualify as proper payment under ch. 713, F.S.

The committee substitute adds subsection (4) that provides that the owner shall make final payment on account of a direct contract only after the contractor provides a final payment affidavit as required in s. 713.06(3)(d), F.S. Any such payment not complying with this requirement shall not qualify as proper payment.

Proper payment is the homeowner's defense that payments have been made against lienors who have not given proper notice. If they did not get the notice they would be liable to the lienors.

Section 7. Claim of lien.

The committee substitute amends s. 713.08(4), F.S., to provide that claim of liens shall be served on the owner.

Section 8. Notice of commencement.

The committee substitute amends s. 713.13(1)(e), F.S., to provide that if a payment bond was not attached at the time the notice of commencement was recorded, the bond may be used to transfer any recorded lien of a lienor except that of the contractor by the recordation of a notice of bond

²² This was part of a 2003 legislative change. Chapter 2003-257, L.O.F.

²³ Part I, ch. 713, F.S.

pursuant to s. 713.23(2), F.S. This provision is helpful to lienors who are not aware of a proper payment bond and believe they have a right to attach a lien to the real property.

It provides that the notice requirements of s. 713.23, F.S. apply to any claim against the bond; however, the time limits for serving any required notices shall begin running from the later of the time specified in s. 713.23 or the date the notice of bond is served on the lienor.

Section 9. Notice of commencement and applicability of lien.

The committee substitute amends s. 713.135, F.S., to provide that the building department may, in addition to mailing, deliver by electronic mail or other electronic format or facsimile, or personally deliver to the owner, or in the case in which the owner is required to personally appear to obtain the permit, provide a statement summarizing and explaining the provisions of the construction lien law.

The committee substitute amends s. 713.135(1)(e), F.S., to provide that the recording of a notice of commencement is not a condition to the issuance of a building permit.

The committee substitute amends s. 713.135(4), F.S., to provide that county commissioners, municipal councils or other similar bodies may establish reasonable copying fees for supplying the required statements. It provides that no forms or statements need to be furnished, mailed, or otherwise provided to permit applicants when the owner of the real property is engaged in the business of construction of buildings for sale with the intent to make improvements and resell.

Section 10. Transfer of liens to security.

The committee substitute amends s. 713.24(3), F.S., to provide that jurisdiction for actions on issues involving transfers of liens shall be vested in either the county or circuit court. It amends s. 713.24(4) to provide that if a proceeding to enforce a lien is commenced in a court within the specified time and, during such proceeding, the lien is transferred, an action commenced in the same county or circuit court to recover against the security shall be deemed to have been brought as of the date of filing the action to enforce the lien, and the court shall have jurisdiction over the action. It is unclear when this section applies.

Section 11. Moneys received for real property improvements; penalty for misapplication.

The committee substitute amends s. 713.345, F.S., to provide that for a person to be guilty of a felony of a second degree, the person must have knowingly and intentionally misapplied construction funds of more than \$1,000 and less than \$100,000. It deletes language that provided that aggregate value of the misapplied funds had to be more than \$20,000 and less than \$100,000. This would increase the criminal penalty to a felony of the second degree.

The committee substitute decreases the amount of misapplied construction payments for a person to be found guilty of a third degree felony from \$20,000 to \$1,000.

Section 12. Lender responsibilities with construction loans.

The committee substitute amends s. 713.3471, F.S., to provide that prior to a lender making any loan disbursement on any construction loan secured by residential real property directly to the owner into the owner's account or jointly to the owner and any other party, the lender must mail, deliver by electronic mail or other electronic format or facsimile, or personally deliver notice to

the owner notifying the owner that the lender is making a loan disbursement and alerting the homeowner to require the contractor to provide a lien release. It provides that owner means only a natural person and that the subsection does not apply to owners of real property acting as contractors.

Section 13.

The act shall take effect October 1, 2005.

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:

None.

C. Government Sector Impact:

The department states that an increase in revenue to the department will result in the increase of administrative penalties for contractors licensed under part I of ch. 489, F.S. and electrical contractors licensed under part II of ch. 489, F.S. from \$5,000 to \$10,000.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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