

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 113 CS Construction Contracting
SPONSOR(S): Dean and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1016

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>5 Y, 0 N, w/CS</u>	<u>Billmeier</u>	<u>Billmeier</u>
2) <u>Growth Management Committee</u>	<u>10 Y, 0 N, w/CS</u>	<u>Porter</u>	<u>Grayson</u>
3) <u>Business Regulation Committee</u>	<u>18 Y, 0 N, w/CS</u>	<u>Livingston</u>	<u>Liepshutz</u>
4) <u>Justice Council</u>	<u></u>	<u></u>	<u></u>
5) <u></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. HB 113 amends the 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 if a contract rendered unenforceable because a contractor is found to be unlicensed, the rights of other persons to enforce the contract, lien, or bond remedies shall not be affected and a surety company remains liable.
- Extend the proper payment defense to subdivision improvements and 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 may become 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.
- Elevate the misapplication of construction funds less than \$20,000 to a 2nd degree felony from a 3rd degree felony.
- Reduce the frequency of notice that a lender must furnish regarding the lien law to a borrower to only the first disbursement instead of at every disbursement.

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

This bill will take effect on October 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Limited Government – Reduces statutory requirements.

Safeguard individual liberty –Reduces statutory rights of buyer, increases options for sellers.

Promote personal responsibility –

- Reduces disclosure requirements for those with lien rights.
- The bill increases administrative penalties that may be imposed against certain contractors.
- This bill elevates the current 3rd degree felony for misapplication of funds less than \$20,000 to a 2nd degree felony.

Family Empowerment – Decreases intensity of notice to buyer affecting possible alertness to lien rights.

B. EFFECT OF PROPOSED CHANGES:

Surety Bonds

Background: 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 A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers associated with the project.² A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions.³ Certain contracts may be exempt from the bond requirement, depending on the amount of the contract.⁴

Effect: HB 113 amends s. 255.05(1)(a), F.S., to make unenforceable any provision in a bond furnished for a public works contracts that purports to: a) restrict the classes or persons protected by the bond; or b) relating to the venue of a proceeding relating to that bond. is unenforceable. The bill makes the language of s. 255.05(1)(a), F.S., consistent with ss. 713.23(1)(f), and 47.025, F.S., relating to effected parties and venue.

Regulation of Licensed Construction Contractors

Background: 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 \$5,000.⁵

¹ Section 255.05, F.S.

² See 7 Fla. Jur 2d Bonds § 18.

³ *Id.*

⁴ See e.g. s. 255.05(1)(a), F.S. ("When such work is done for the state and the contract is for \$100,000 or less, no payment and performance bond shall be required. At the discretion of the official or board awarding such contract when such work is done for any county, city, political subdivision, or public authority, any person entering into such a contract which is for \$200,000 or less may be exempted from executing the payment and performance bond.")

⁵ Sections 489.129(1) and 489.533(2)(c), F.S.

Effect: HB 113 increases the limit of administrative fines up to \$10,000 per violation.

A representative of the bill sponsor⁶ stated that the Representative wished to increase the administrative fines because they have not been increased in nearly 20 years.

Construction Liens - Contract Notice Provisions

Background: The Construction Lien Law, ch. 713, F.S., provides contractors,⁷ laborers,⁸ materialmen,⁹ subcontractors,¹⁰ and other persons who improve 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 of the construction lien law.¹¹ The notice must be in bold face capital letters and 18-point type.¹² The bold face and type size of the construction lien law notice were originally intended as a consumer protection measure to make the notice stand out when included in a contract. The size and typeface requirements generally made the notice take up the equivalent of an entire page so that it was isolated from the rest of the document's wording and would be much easier for consumers to notice than if it were contained within the other contents of the contract.

Effect: HB 113 amends s. 713.015, F.S., to change the provision in two ways. First, the bill removes the type size and bold print requirements required to be included in construction contracts. It requires that the notice be capitalized and of a type no smaller than the contract provisions. Second, the bill provides that section 713.015 shall not be construed to adversely affect the lien and bond rights of lienors not in privity¹³ with the owner. Additionally, the bill provides that s. 713.015, F.S., does not apply when the owner is also a licensed contractor or contracting professional in the business of developing property. Florida's lien law is very specific about an owner's responsibilities and the notice was intended to inform owners of these responsibilities in an attempt to prevent actions by an owner that could be problematic due to a lack of knowledge about the lien law. Reducing the type size and bold font could make the wording more difficult to notice within a contract and could prevent proper notice to an owner of their responsibilities under the construction lien law.

⁶ Ryan Tyson – Legislative Assistant to Representative Dean.

⁷ "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 such contract. The term "contractor" includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract authorized by s. 489.103(16). s. 713.01(8), F.S.

⁸ "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.

⁹ "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 or, for specially fabricated materials, off the site of the improvement for the particular improvement, and who performs no labor in the installation thereof. s. 713.01(19), F.S.

¹⁰ "Subcontractor" means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract, including the removal of solid waste from the real property. s. 713.01(27), F.S.

¹¹ Section 713.015, F.S.

¹² *Id.*

¹³ Privity refers to the connection or relationship between two or more contracting parties, such that if you contract with a general contractor to perform renovations to your house, you would not normally have "privity" with the subcontractors (unless they too had signed the contract with you) that your contractor subsequently engages to perform various portions of the renovation.

A representative of National Association of Credit Managers¹⁴ stated that contractors and sub-contractors he represents are asking for this change because the size of the notice required in the contract affects their ability to use a one page carbon copy document. Since the current size of font required for the notice makes the notice take up an entire page, the contractors wish to have it reduced so it will more readily fit on their document. Additionally, he stated those he represents do not feel the current type size aides a consumer in noticing and reading the notice.

A representative of the Florida Home Builders Association¹⁵ stated he felt that reducing the print would prevent consumers from skipping over the notice and would make the notice more readable.

Construction Liens - Unlicensed Contractors

Background: A construction contract entered into by an unlicensed contractor is unenforceable by the contractor,¹⁶ and a construction lien filed by an unlicensed contractor is likewise unenforceable.¹⁷ 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.

Effect: HB 113 amends s. 713.02(7), F.S., to provide 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, as long as, the subcontractor has operated in good faith and is duly licensed. The bill does not alter an owner's defenses under the Florida Lien Law and the owner's ability to enforce the contract with the unlicensed contractor remains.

Proper Payment Defense as to Subdivision Improvements

Background: 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.¹⁸ 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.¹⁹

A notice to owner need not be filed by a lienor who, regardless of privity, performs subdivision improvements.^{20 21} Subdivision improvement lienors are only required to record a claim of lien.²² After receipt of a notice to owner, an owner must make proper payments to the lienor. Proper payment means the owner pays all lienors named in the notice directly.²³ 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.

¹⁴ David Ramba, Esq., Lewis, Longman & Walker, P.A. representing the National Association of Credit Managers – Improved Construction Practices Committee.

¹⁵ Fred Dudley, representing the Florida Home Builders Association.

¹⁶ Section 489.128(1), F.S.

¹⁷ Section 713.02(7), F.S.

¹⁸ Section 713.06(2)(a), F.S.

¹⁹ Section 713.06, F.S.

²⁰ Section 713.04, F.S.

²¹ Subdivision improvements are those improvements that make real property suitable for improvements, such as excavation, paving, laying pipes for water and gas, etc. s. 713.04(1), F.S.

²² Section 713.04(1), F.S.

²³ Section 713.06, F.S.

Effect: HB 113 amends the special lien provisions applicable to subdivision improvements, ss. 713.04(3) and (4), F.S., 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.

A representative of the American Sub-Contractors Association of Florida²⁴ stated that this change is not a substantive change to the statutes and is in line with the way Florida's courts have interpreted the statute pertaining to subdivision improvements. The representative stated that the sub-contractors and materials supply industry groups have reviewed this language and are not apposed to this change.

Claim of Lien

Background: Section 713.08, F.S., details the contents of, and manner for perfecting, a claim of lien²⁵.

Effect: HB 113 amends s. 713.08(4)(c), F.S., to clarify that a claim of lien must be served on the owner.

Notice of Commencement and Transfer of Liens to Security

Background: 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. Subcontractors have 45 days from the commencement of work to file a notice to owner in a non-bonded job or a notice to contractor for a bonded job in order to preserve their lien rights. The subcontractor has 90 days from the completion of work to file a claim of lien against the owner in a non-bonded job or a notice of non-payment for a bonded job to preserve their rights to collect a past due payment for completed work. After the filing of the two types of notices the subcontractor may proceed with foreclosure against the owner for a non-bonded job or the payment bond in the case of a bonded job. If a copy of a surety bond (payment bond) is recorded with the notice of commencement, potential lienors may not file a lien but must look to the surety for payment. 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 claims of the lienors are transferred from the property to the bond.

Section 713.23(1)(c), F.S. states that if a notice of commencement is not filed or makes no reference to the bond, the lienor shall have 45 days from the date the lienor is notified of the existence of the bond to serve the notice of notice to contractor. However, s. 713.23(1)(d) does not provide the same extension of time in the filing of the notice of non-payment for services rendered.

Effect: HB 113 amends s. 713.13(1)(e), F.S., to provide that if a payment bond was not attached and recorded in the notice of commencement, the bond may be used as a transfer bond and the time limits for a lienor to protect their lien shall begin on the date the notice of bond is served on the lienor

Specifically, the bill makes the following changes:

- Clarifies that a copy of a "payment" bond must be attached at the time of recordation of the notice of commencement.
- Provides that if a payment bond under s. 713.23, F.S., exists, but was not attached at the time the notice of commencement was recorded, then the bond may be used to transfer any recorded lien, except that of a contractor, by the recordation and service of a notice of bond pursuant to s. 713.23(2), F.S.

²⁴ Debra Lawson, representing the American Sub-Contractors Association of Florida.

²⁵ A lien is a claim, encumbrance, or charge on property for payment of some debt, obligation or duty.

- Provides that the notice requirements are the same as those in s. 713.23, F.S., except that the time limits for serving notices shall run from the later of the time specified in s. 713.23, F.S., or the date the notice of the bond is served.
- Amends s. 713.24(4) to clarify that when a lien is transferred to a transfer bond under the provisions of s. 713.24 or a payment bond under the provisions of s. 713.13(1)(e) and the lien is part of a properly filed action to enforce a lien in court, the action commenced in the same court to recover against the security shall be considered to have been brought on the date of the original filing to enforce the lien and the court shall have jurisdiction of the action.

It is unclear, in relation to the payment bond being used as a transfer bond, as to whom would make the determination about whether a payment bond could be used as a transfer bond. This provision of the bill will not correct the concern expressed by the American Sub-Contractors Association of Florida representative about the use of an un-recorded payment bond to transfer liens for the owners property to the bond. The use of the word “may” leaves this provision up for interpretation by the courts and may not result in the desired clarity in determining the use of these bonds desired by the sub-contractors.

A representative of the American Sub-Contractors Association of Florida²⁶ stated that sub-contractors have been experiencing difficulty in enforcing their lien rights when a contractor has failed to inform them through the notice of commencement or other notice that a payment bond exists for a construction job. When they are not aware of the bond, the sub-contractors protect and pursue their lien rights against the owner of the property and often don't find out there is a payment bond until they are in court attempting to foreclose on the property for payment. The sub-contractors also wish for more clarity determining when an un-recorded payment bond may be used to transfer lien rights.

Building Permits

Background: 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.²⁷

Effect: HB 113 amends s. 713.135, F.S., to provide that, in addition to regular mail, the required notice may be furnished electronically, by facsimile, or hand delivery to the applicant. The 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.²⁸

A representative of the Florida League of Cities²⁹ stated that members of the League asked for this change to reduce the costs of providing the construction lien law notice they are required to provide to those applying for building permits. They are currently only allowed to mail the notices and wanted to be able to email, fax, or hand deliver them when required.

Misapplication of Construction Monies

Background: 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.³⁰

²⁶ Debra Lawson, representing the American Sub-Contractors Association of Florida

²⁷ Section 713.135(1)(b), F.S.

²⁸ Section 713.135(1)(d), F.S., contains similar language.

²⁹ Scott Dudley – Florida League of Cities, Inc.

³⁰ Section 713.345(1)(b), F.S.

Effect: HB 113 elevates the 3rd degree felony level to a 2nd degree felony, basically eliminating the 3rd degree felony level of offense.

A representative of the bill sponsor³¹ stated that the Representative wished to increase the felony degree to give the law more teeth in prosecuting the misapplication of construction monies.

Notice to Owners Regarding the Construction Lien Law

Background: A lender must provide a notice to the owner of the property at every disbursement giving the borrower notice of the lien law and the possibility that the owner may pay twice for improvements if the owner does not follow the lien law. The current law requires that the notice be given to all owners, which would include developers building on their own property, who do not have the same need to be notified of the existence of the lien law.

Effect: HB 113 amends s. 713.3417, F.S., to provide for some reduction in the notice given by lenders to owners who are borrowing funds. Specifically, the section is amended to limit notice to loans secured by residential real property; and to limit the frequency of notice to the first loan disbursement. Existing law requires: 1) such notice to be made regarding commercial property as well as residential real property; and 2) notice be given any time there is a disbursement to an owner. The reduction of the notice requirement to only at the first disbursement is a noticeable reduction in the consumer protection aspects of the statutes. While the continued notification to owners of their responsibilities under Florida's lien law may seem repetitive to lenders it does provide a continuing level of protection to consumers who do not have a recurring need to be knowledgeable concerning the lien law when not constructing their home.

C. SECTION DIRECTORY:

Section 1. Amends s. 255.05, F.S., to make certain restrictions in bonds issued for public works projects unenforceable.

Section 2. Amends s. 489.129, F.S., to increase the administrative fine that can be imposed for certain violations from \$5,000 to \$10,000.

Section 3. Amends s. 489.533, F.S., to increase the administrative fine that can be imposed for certain violations from \$5,000 to \$10,000.

Section 4. Amends s. 713.015, F.S., to change the font size in certain mandatory contract provisions.

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 the owner.

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

Section 9. Amends s. 713.135, F.S., to provide additional means for local government to deliver the required information on the construction lien law.

Section 10. Amends s. 713.24, F.S., to provide that a foreclosure on a lien becomes an action against a transfer bond.

³¹ Ryan Tyson – Legislative Assistant to Representative Dean.

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. Amends s. 713.3471, F.S., to change the lender notice requirements regarding the lien law.

Section 13. Provides an effective date of October 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Unknown. It is not known how many fines in excess of the current \$5,000 limit would be assessed.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill includes the possibility of increased administrative penalties but it is not known how many contractors would receive the increased penalty.

D. FISCAL COMMENTS:

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.

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.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

None.

Other Comments

A representative of the Florida Bankers Association³² stated that the association does not feel that providing borrowers with a lien law notice at each disbursement of funds provides an increased level of consumer protection and is costly to the lender. The association feels that providing the borrower with the notice at the first disbursement is adequate.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Civil Justice Committee considered the bill on February 9, 2005, and adopted two amendments. The first amendment removed language relating to “proper payment” bonds from the section of the bill relating to the transfer of liens. The second amendment provided that if a proceeding to enforce a lien is commenced and during to the proceeding, the lien is transferred, an action commenced to recover against the lien is deemed to have been brought as of the date of filing the act to enforce the lien. The bill was reported favorably, as amended, as a committee substitute.

On March 15, 2005, the Growth Management Committee adopted five amendments that made changes as summarized below.

Amendment No. 1 – Removed lines 237-239 and inserted language to amend s. 713.015, F.S., to reduce the font size of the construction lien law notice in construction contracts from 18 to 14 and to require it to be on the front of the page.

Amendment No. 2 – Removed lines 406-412 and inserted language to restore the three tier felony for misapplication of construction funds to be a 3rd degree felony if less than \$1000 and 2nd degree felony if between \$1000-\$100,000.

Amendment No. 3 – Removed lines 417-429 and inserted language to amend s. 713.3471(1), F. S., to:

- Restore the requirement that lenders provide a construction lien law notice to an owner any time they make a disbursement on a loan;
- Allow for electronic and hand delivery of construction lien law notices; and
- Restrict distribution of the lien law notice to consumers. (i.e. exempts contractors and developers).

Amendment No 4. – Removed lines 377-379 and inserted language to amend ss. 713.24(3) and (4), F. S., to clarify that nothing in the section shall be construed to remove jurisdiction from the county court over transfer bond claims for nonpayment for any amount within the monetary jurisdiction of the county court.

Amendment No. 5 – Replaces the word “run” with the words “begin running” on line 319 amending s. 713.13(1)(e), F.S.