

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – This bill provides that any provision in a bond furnished for public works contracts restricting the classes or persons protected by such bond or the venue of any proceeding relating to a bond is unenforceable.

Promote personal responsibility – This bill increases administrative penalties that may be imposed against certain contractors.

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 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

This bill provides that any provision in a bond furnished for public works contracts that purports to restrict the classes or persons protected by the bond is unenforceable. This bill also makes any provision in a bond relating to the venue of a proceeding relating to that bond unenforceable.

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 \$5,000.⁵

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

Construction Liens - Contract Notice Provisions

The Construction Lien Law, ch. 713, F.S., provides contractors,⁶ laborers,⁷ materialmen,⁸ subcontractors,⁹ and other persons who improve real property with the right to file a lien against the

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.

⁶ “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”

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.¹⁰ The notice must be in bold face capital letters and 18-point type.¹¹

This bill removes the type size and typeface requirements. It requires that the notice be of the same size type as the contract provisions. The bill also provides that section 713.015 shall not be construed to adversely affect the lien and bond rights of lienors not in privity with the owner.

Construction Liens - Unlicensed Contractors

A construction contract entered into by an unlicensed contractor is unenforceable by the contractor,¹² and a construction lien filed by an unlicensed contractor is likewise unenforceable.¹³ 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

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.¹⁴ 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.¹⁵

A notice to owner need not be filed by a lienor who, regardless of privity, performs subdivision improvements.^{16 17} Subdivision improvement lienors are only required to record a claim of lien.¹⁸ 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.¹⁹ Similarly, when an owner receives a

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.

⁷ "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.

⁸ "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.

⁹ "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.

¹⁰ Section 713.015, F.S.

¹¹ Id.

¹² Section 489.128(1), F.S.

¹³ Section 713.02(7), F.S.

¹⁴ Section 713.06(2)(a), F.S.

¹⁵ Section 713.06, F.S.

¹⁶ Section 713.04, F.S.

¹⁷ 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.

¹⁸ Section 713.04(1), F.S.

¹⁹ Section 713.06, F.S.

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DATE: 2/17/2005

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.

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.

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.

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 claims of the lienors are transferred from the property to the bond.

This bill provides that if a payment bond under section 713.23, F.S., exists but was not attached at the time the notice of commencement was recorded, 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 section 713.23(2), F.S. The bill also provides that the notice requirements are the same as those in section 713.23, F.S., except that the time limits for serving notices shall run from the later of the time specified in section 713.23, F.S., or the date the notice of the bond is served.

This bill provides 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.

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.²⁰ 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.²¹

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 Section 713.135(1)(b), F.S.

²¹ Section 713.135(1)(d), F.S., contains similar language.

\$20,000 to \$100,000 is a 2nd degree felony, and misapplication of less than \$20,000 is a 3rd degree felony.²²

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

Notice to Owners Regarding the Construction Lien Law

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. Giving the notice multiple times to one owner can become burdensome and appears unnecessary. Additionally, current law requires that the notice be given to all owners, including developers building on their own property who do not need to be notified of the existence of the lien law.

This bill amends the notice requirement to only apply to natural persons, and to only require the notice at the first disbursement.

Effective Date

This bill has an effective date of October 1, 2005.

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.

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.

²² Section 713.345(1)(b), F.S.

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:

None.

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.