

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1285 Construction Liens
SPONSOR(S): Altman
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2768

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Courts</u>	<u>6 Y, 0 N</u>	<u>Blalock</u>	<u>Bond</u>
2) <u>Safety & Security Council</u>	<u>15 Y, 0 N, As CS</u>	<u>Blalock</u>	<u>Havlicak</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

A construction lien is a lien created by statute for the purpose of securing priority of payment for the price or value of work performed and materials furnished in construction or repair of improvements to real property, and which attaches to the land as well as the improvements.

This bill makes a number of changes to the Construction Lien Law. Significant changes include:

- Providing a definition for "final furnishing";
- Amending the definition of "furnish materials";
- Emphasizing that statements of accounts be under oath;
- Requiring written notices;
- Providing certain situations where a notice of commencement can be amended;
- Revising the notice of commencement and building permit application forms; and
- Providing conformity with previous changes made in the law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

A construction lien is an equitable device, designed to protect those enhancing an owner's property who are not in direct privity with the owner,¹ such as laborers and suppliers of material, who remain unpaid while the owner pays the contractor directly.² Another purpose of construction liens is to protect owners by requiring subcontractors to provide notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.³

Construction lien statutes set forth a right of action that did not exist at common law,⁴ and thus construction liens are purely statutory.⁵ Florida's Construction Lien Law is found in Chapter 713, F.S.

Under current law, contractors cannot place a lien on public or state owned lands or buildings to secure payments for construction performed on the public buildings or public lands. However, s. 255.05, F.S., provides for payment or performance bonds as an alternative to filing a lien to secure payment for work done by contractors on publicly owned land.

Payment and Performance Bonds

Present Situation

Section 255.05(1), F.S., requires a contractor constructing a public work for state or local government valued in excess of \$200,000 to post a payment and performance bond. Payment and performance bonds protect state and local governments from default by a contractor, and they protect subcontractors who cannot file a mechanic's lien because the project involves public property. "Payment bond" is a bond that guarantees payment of money from the contractor to persons who furnish labor, material equipment and/or supplies for use in the performance of the contract. "Performance bond" is a bond that guarantees that the contractor will perform the contract in accordance with its terms.

It is a common occurrence that a private entity may own a public building or public work in Florida. However, s. 255.05, F.S., does not include construction contracts with private entities in the bonding requirements provided in this section.

Section 255.05(2), F.S., provides procedures for subcontractors and suppliers to make claims against a payment bond. Section 255.05(2)(a)(2), F.S., provides that a claimant who is not in privity with a contractor must, before commencing or not later than 45 days after commencing to furnish "labor, materials, or supplies" for the prosecution of the work, furnish the contractor with a notice that he or she

¹ *Hiers v. Thomas*, 458 So.2d 322 (Fla. 2nd DCA 1984)

² *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995)

³ *Id.*

⁴ *Fleitas v. Julson, Inc.*, 580 So. 2d 636 (Fla. 3rd DCA 1991)

⁵ *Home Elec. of Dade County, Inc. v. Gonas*, 547 So. 2d 109 (Fla. 1989)

intends to make a claim against the bond for payment. Current law does not specifically provide whether the notice must be in writing. The phrase "labor, materials, or supplies" in this section has been revised in several other section of the Construction Lien Law to the phrase "labor, services, or materials".

Proposed Changes

This bill amends s. 255.05(1), F.S., to provide that the performance and payment bond requirements in this section will also apply in situations where a person enters into a construction contract with a private entity for the completion of repairs or other construction on a public building or public works.

This bill amends s. 255.05(2)(a)2., F.S., to specify that a subcontractor or supplier that seeks to make a claim against a payment bond must give the contractor the required notice in writing, and revises the phrase "labor, materials, or supplies" to "labor, services, or materials" in order to conform to other section of the Construction Lien Law that have made this same revision.

Definition of "Final Furnishing" and "Furnish Materials"

Present Situation

Section 713.08(5) provides, in part, that the claim of lien may be recorded at any time during the progress of the work, or thereafter, but not later than 90 days after the final furnishing of the labor or services or materials by the lienor. However, the phrase "final furnishing" is not defined in Chapter 713, F.S., and this has led to some confusion in the implementation of this particular construction lien law.

Proposed Changes

This bill amends s. 713.01, F.S., to add the definition of "final furnishing" in the construction lien law. "Final furnishing" is defined to mean:

"The last date that the lienor furnishes labor, services, or materials. Such date may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of final completion, and does not include correction of deficiencies in the lienor's previously performed work or materials supplied. With respect to rental equipment, the term means the date that the rental equipment was last on the job site and available for use."

This bill also amends the definition of "furnish materials" by revising how the "period of actual use" of rental equipment is determined for calculating lien amounts to, and provides that:

"The delivery of rental equipment to the site of the improvement is prima facie evidence of the period of the actual use of the rental equipment from the delivery through the time the equipment is last available for use at the site, or 2 business days after the lessor of the rental equipment receives a written notice from the owner or the lessee of the rental equipment to pick up the equipment, whichever occurs first."

Written Notices, Demands, or Requests in Construction Lien Law

Present Situation

Chapter 713, F.S., allows and sometimes requires various notices, demands and requests to be provided. Chapter 713, F.S., often requires certain notices, demands and requests to be in a statutory form. However, other times the statute is silent as to whether other notices are required to be in writing.

This has led to confusion in many cases as to whether a particular notice, demand, or request has to be in writing.

Proposed Changes

This bill creates s. 713.012, F.S., to provide that notices, demands, or requests that are allowed or required under the Construction Lien Law, except any notice required by s. 713.04, F.S.⁶, must be in writing.

Direct Contracts Between an Owner and a Contractor

Present Situation

A "direct contract" is defined in the Construction Lien Law as a contract between the owner and any other person.⁷

Section 713.015, F.S., provides that 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 specific provision in 14-point font stating who and for what reasons a construction lien can be placed on an owner's property. There has been some confusion regarding this provision in circumstances where there have been oral or implied contractual agreements.

Proposed Changes

This bill amends s. 713.015(1), F.S., to provide that the mandatory provisions required to be in direct contracts only apply when the contract between an owner and a contractor is greater than \$2,500. This bill also provides that the provision required to be in the contract described above only have to be in 12-point font and must specifically state that "THIS CLAIM OF LIEN IS KNOWN AS A CONSTRUCTION LIEN".

This bill creates s. 713.015(2), F.S., to provide that if the contract is written, the notice must be in the contract document; and if the contract is oral or implied, then the notice must be provided in a document referencing the contract. This bill also provides that failure to provide the written notice does not bar the enforcement of a lien against a person who has not been adversely affected.

Lien Exemptions

Present Situation

Section 713.02(6), F.S., provides that an owner can require that a contractor furnish a payment bond so that the owner is exempt from the construction lien law.

Proposed Changes

This bill amends s. 713.02(6), F.S., to provide that the owner and contractor may agree for the contractor to furnish a payment bond for the purpose of exempting the owner from the construction lien law. This bill changes current law by removing a property owner's ability to force a contractor to provide a payment bond. Under this bill, the contractor and the property owner have to agree to the payment bond provision.

⁶ Section 713.04, F.S., provides authority for filing a lien against any real property for any money owned to a person who performs under a contract to making real property suitable as the site of a subdivision improvement. Section 713.04, F.S., also provides that a lienor is not required to give notice to an owner for any liens filed under this section.

⁷ Section 713.01(9), F.S.

Priority of Liens

Present Situation

Chapter 713.07, F.S., provides a mechanism for an owner to terminate a notice of commencement when construction ceases and to record a notice of recommencement if the owner desires to recommence construction. Although it is implied in the statute that construction ceases when the direct contract is terminated, it is not so stated.

Proposed Changes

This bill amends s. 713.07, F.S., to provide that the termination of the direct contract before completion of construction can be a basis to initiate the recommencement process.

Claim of Lien

Present Situation

Section 713.08(2), F.S., provides that the claim of lien must be signed and verified⁸ by the lienor or his or her agent acquainted with the facts. The requirement of taking an "oath or affirmation" is the standard in other legal proceedings and the filing of affidavits. A claim of lien is similar to an affidavit, but has these different legal standards.

Section 713.08(5), F.S., provides the time periods for which a claim of lien can and cannot be recorded with the clerk of court. The definition of "final furnishing" that is provided in this bill requires this section of the Construction Lien Law to also be amended to conform to the new language.

Proposed Changes

This bill amends s. 713.08(2), F.S., to provide that the lienor or the lienor's employee or attorney may prepare a claim of lien. The bill also replaces the term "verified" with "sworn to or affirmed" to create uniformity with other areas of the law, and to make the provision gender silent.

This bill amends s. 713.08(5), F.S., to conform this section to changes made in other sections of the bill. Specifically, the definition of "final furnishing" makes the rental equipment provisions in this section unnecessary, and therefore, this bill amends s. 713.08(5), F.S., to conform.

Notice of Commencement

Present Situation

Section 713.13, F.S., provides that the recording of a notice of commencement give constructive notice that claims of lien may be recorded and may take priority. It does not constitute a lien, cloud, or encumbrance on real property.

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. Currently, s. 713.13(1)(a), F.S., provides that the notice of commencement should include the legal description of the property and also the street address. The statutory notice of

⁸ Verified means that testimony, evidence, or statement of facts made in a document are formal declarations either made in the presence of an authorized officer, such as a notary public, or made under oath but not in the presence of such an officer, whereby one swears to the truth of the statements in the document. Verification process consists of an oath or affirmation that an authorized officer administers to someone who makes an affidavit or deposition.

commencement form contained at 713.13(1)(d), however, also contains a blank for the tax folio number. This number is not mentioned in the statute text.

There is a reference in the statute regarding the ability of an owner to amend a notice of commencement. However, there is no specific statutory authority allowing an owner to amend a notice of commencement, or specifically how amendments are to be made. The practice in the industry is that owners will record an amended notice of commencement. If an owner were not permitted to amend a notice of commencement, it would be forced to cease construction and record a new notice of recommencement. This can be costly and time consuming.

Proposed Changes

This bill amends s. 713.13(1)(a), F.S., to specifically provide that the property owner should include property's tax folio number in the description of the property for the notice of commencement. This bill also provides that the notice of commencement include a warning to the owner that payments made by the owner after the expiration of the notice of commencement are improper payments, and can result in the owner paying twice for improvements to the property. The warning must also state that a notice of commencement must be recorded and posted in the job site before the first inspection. This bill further amends the notice of commencement by replacing the sworn statement with an acknowledgment statement that must be notarized, the requirement that the form be verified, and a signed declaration that the facts stated in the notice of commencement are true.

This bill amends s. 713.13(5), F.S., to specifically provide a means for amending a notice of commencement to extend the effective period, change erroneous information in the original notice, or add information that was omitted from the original notice. This bill also requires that the amended notice identify the official records book and page where the original notice of commencement is recorded, and a copy of the amended notice must be served by the owner upon the contractor and each lienor who serves notice before or within 30 days after the date the amended notice is recorded.

Building Permit Application

Present Situations

Section 713.135(1), F.S., provides that when any person applies for a building permit, the authority issuing the permit must print on the face of each permit card the following warning in 18-point font:

"WARNING TO OWNER: YOUR FAILURE TO RECORD A NOTICE OF COMMENCEMENT MAY RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE RECORDING YOUR NOTICE OF COMMENCEMENT."

Section 713.135(6), F.S., provides for the specific building permit application form.

Proposed Changes

This bill amends the warning to owners that is required in s. 713.135(1), F.S., by providing that the font only need to be 14-point font, and that the warning further state that "A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION".

This bill amends the building permit application form provided in s. 713.135(6), F.S., by requiring that the warning to owners that is in on the form currently also state that "A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION".

Demand for Copy of Contract and Statement of Account

Present Situation

Section 713.16(2), F.S., provides that the owner may serve in writing a demand of any lienor for a written statement of his or her account showing the nature of the labor or services performed and to be performed, the materials furnished, that materials to be furnished, the amount paid on the account, and the amount due.

Section 713.16(5), F.S., permits a lienor to request from the owner a sworn statement as to the amounts of all direct contracts, presumably even direct contracts that the lienor is not performing work under. The apparent intent of s. 713.16(5), F.S., is for a lienor to have information relevant to the direct contract under which it is performing work or supplying materials.

Proposed Changes

This bill amends s. 713.16(2), F.S., to emphasize that statements of account are to be under oath.

This bill amends s. 713.16(5), F.S., to provide that that the lienor is only entitled to information regarding direct contracts under which it is providing labor, materials or services.

Manner of Serving Process and Other Instruments

Present Situation

Section 713.18, F.S., provides procedural requirements for service of notices, claims of lien, affidavits, assignments, and other instruments permitted or required in the Construction Lien Law. Since the enactment of Chapter 713, F.S., the limited liability type of business entity has become more widely used. However, the Construction Lien Law does not specifically address how one could obtain service of the statutorily permitted or required notices on this relatively new form of business entity.

Section 713.18, F.S., also provides that if an instrument that is served as provided in this section is returned as being "refuses", "moved, not forwardable", or "unclaimed", or is otherwise undeliverable through no fault of the person serving the item, then service is effective on the date the notice was sent.

Proposed Changes

This bill amends s. 713.18(1)(a), F.S., to provide for serving process through actual delivery to a limited liability company (LLC), or a member or manager or the LLC. The bill also provides that if it cannot be served through actual delivery then by posting on the premises.

This bill also amends s. 713.18, F.S., to provide that if an instrument that is served as provided in this section is returned as being "refuses", "moved, not forwardable", or "unclaimed", or is otherwise undeliverable through no fault of the person serving the item, then service is effective on the date the instrument was sent.

Duration of Lien

Present Situation

Section 713.22, F.S., provides that a construction lien cannot continue for longer than one year after the claim of lien has been recorded.

Proposed Changes

This bill amends s. 713.22, F.S., to provide that a lien cannot continue for more than one year after the claim of lien has been recorded, or one year after the recording of an amended claim of lien that shows a later date of final furnishing of labor, services, or materials.

Remedies for Fraud

Present Situation

Section 713.31(2)(c), F.S., provides that an owner has a right of action against a lienor for a fraudulent lien. This right of action can be in the form of:

- An independent action;
- In connection with a summons to show cause under s. 713.21, F.S.; or
- A counterclaim or cross-claim to any action to enforce or to determine the validity of the lien.

Unlike section 713.29, F.S., which provides that the prevailing party is entitled to attorney's fees, s. 713.31(2)(c), F.S., provides that the owner is entitled to attorney's fees if it is successful in demonstrating that the lien was fraudulent.

Proposed Changes

This bill amends s. 713.31(2)(c), F.S., to incorporate the prevailing party standard in the fraudulent lien context.

C. SECTION DIRECTORY:

Section 1 amends s. 255.05, F.S., relating to bonds for construction on public buildings.

Section 2 amends s. 713.01, F.S., providing a definition for "final furnishing".

Section 3 creates s. 713.012, F.S., relating to written notice, demands, or requests.

Section 4 amends s. 713.015, F.S., relating to mandatory provisions for direct contracts.

Section 5 amends s. 713.02, F.S., relating to lien exemptions.

Section 6 amends s. 713.07, F.S., relating to priority of liens.

Section 7 amends s. 713.08, F.S., relating to claim of liens.

Section 8 amends s. 713.13, F.S., relating to notice of commencement.

Section 9 amends s. 713.135, F.S., relating to the application for a building permit.

Section 10 amends s. 713.16, F.S., relating to demands for copy of contracts and statements of accounts.

Section 11 amends s. 713.18, F.S., relating to the manner of serving notices and other instruments.

Section 12 amends s. 713.22, relating to duration of liens.

Section 13 amends s. 713.31, relating to remedies for fraud.

Section 14 repeals s. 713.36, F.S., relating to obsolete effective dates.

Section 15 provides an effective date of July 1, 2007.

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:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor 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.

D. STATEMENT OF THE SPONSOR

No statement submitted.

The chair of the Safety & Security Council chose not to submit any statement regarding the council substitute.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 21, 2007, the Committee on Courts adopted two amendments to this bill. The amendments made the following revisions:

- Corrected a cross reference in the bill; and
- Emphasized that statements of account are to be under oath.

The bill was then reported favorably with amendments.

On April 18, 2007, the Safety & Security Council adopted one amendment to this bill. The amendment made the following revisions:

- Amended the definition of "furnish materials" to provide for situations where rental equipment is used;
- Provided that certain mandatory provisions in direct contracts are only required where the direct contract is greater than \$2,500;
- Provided that the notice required to be in a direct contract can be 12-point font instead of 14-point font, and can be provided on a separate page, signed by the owner, and dated;
- Provided that a claim of lien can be prepared by the lienor or the lienor's employee or attorney;
- Added a specific warning that must be included on a notice of commencement related to making payments after expiration of a notice of commencement;
- Provided that a notice of commencement form be notarized, verified, and acknowledged; and
- Amended the building permit application form.

This bill was then reported favorably with a council substitute. This analysis is drafted to the council substitute.