

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1202

INTRODUCER: Senator Bogdanoff

SUBJECT: Construction Liens and Bonds

DATE: January 30, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	Pre-meeting
2.	_____	_____	BC	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill increases the information that must be shared among parties to a construction project and increases the time periods within which construction liens may be recorded or claims against a payment bond may be made. The bill also revises the methods by which notices and other documents relating to construction liens must be transmitted among parties to a construction project.

This bill substantially amends the following sections of the Florida Statutes: 25.05, 713.132, 713.16, 713.18, 713.22, and 713.23.

II. Present Situation:

The law of this state evinces a longstanding public policy of ensuring that people who work on construction projects are paid for their work.¹ The current mechanisms for enforcing that policy are payment bonds under s. 255.05, F.S., and payment bonds and construction liens under part I of chapter 713, F.S.

Payment Bonds for Public Works Projects

Under s. 255.05, F.S., the contractor for the construction of a public building or public works project generally must guarantee the prompt payment of persons who furnish labor, services, or

¹ This public policy was manifest in article XVI, s. 22 of the Florida Constitution of 1885 which stated, "The Legislature shall provide for giving to mechanics and laborers an adequate lien on the subject matter of their labor."

materials through the use of a payment bond.² A bond for a public works project must state on its first page:

the name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity; the contract number assigned by the contracting public entity; and a description of the project sufficient to identify it, such as a legal description or the street address of the property being improved, and a general description of the improvement.³

The contractor must provide the bond to the public owner of the project and record it in the official records⁴ of the county in which the project is located.⁵ The public owner must provide a certified copy of the contract for the project and the bond upon request to a person who has furnished labor, services, or materials to the project. Such persons have a cause of action against the contractor or the surety⁶ providing the payment bond for the amounts due to the person.

A public entity may request the Department of Management Services to exempt a public works project from the requirements for a payment bond if the cost of the project is more than \$100,000 but does not exceed \$200,000.⁷ Contracts with the state for \$100,000 or less are exempt from requirement for a payment bond.⁸

A person or claimant who is not in privity⁹ with the contractor and who intends to secure a right to make a claim against a payment bond must take several steps. First, the claimant must furnish the contractor with a written notice that he or she intends to look to the bond for protection.¹⁰ This notice is often referred to as a notice to contractor. The notice to contractor must be submitted not later than 45 days after commencing to furnish services or materials. Second, the claimant must deliver a notice of nonpayment to the contractor and the surety not later than 90 days after the final furnishing of services or materials by the claimant.¹¹

Lastly, the claimant must generally initiate an action to recover payment from the contractor or the surety within 1 year after the performance of the labor or completion of delivery of the materials or supplies.¹² A contractor may shorten the time for a claimant to initiate an action against a payment bond by recording a “notice of contest of claim against payment bond” in the

² Alternatives to a bond are authorized by s. 255.05(7), F.S., and may include cash, a money order, a certified check, a cashier’s check, or an irrevocable letter of credit.

³ Section 255.05(1)(a), F.S.

⁴ Section 255.05(1)(a), F.S., uses the term “public records.” That term, however, is usually used to describe government records that are subject to public inspection and copying. *See* chapter 119, F.S. Statutes usually direct a person to file an instrument for recording in the official records.

⁵ Section 255.05(1), F.S.

⁶ A “surety” is a “person who is primarily liable for paying another’s debt or performing another’s obligation.” BLACK’S LAW DICTIONARY (9th ed. 2009).

⁷ *Id.*

⁸ *Id.*

⁹ The concept of “privity of contract” refers to the “relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.” BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁰ Section 255.05(2)(a)2., F.S.

¹¹ *Id.*

¹² Section 255.05(10), F.S.

official records and having the clerk of court mail a copy of the notice to the claimant.¹³ The claimant must initiate an action against the bond within 60 days after service of the notice or the claimant's claim is extinguished.

Construction Liens and Bonds/Private Property

The mechanisms and procedures for a person to secure payment for furnishing labor, services, or materials to a construction project on private property are specified under part I of chapter 713, F.S. The mechanisms include payment bonds and the procedures to compel payment and are similar to the procedures specified for payment bonds on public works projects. However, in the absence of a payment bond, a person who furnishes labor, services, or materials "may place a lien on the property to which the work was furnished" and foreclose on the property if the property owner does not pay the outstanding debts to such person.¹⁴

Notice of Commencement and Notice of Termination

Before construction begins, a property owner or the owner's authorized agent generally must file a notice of commencement for recording by the clerk of court in the official records.¹⁵ The notice of commencement must also be posted on the construction site. The notice of commencement must contain information describing: the real property on which the improvement will be located; a general description of the improvement; the name and address of the owner and contractor; information relating to a surety bond, if a bond applies; the contact information for the lender for the project; contact information designated by the owner upon whom notices may be served.¹⁶

"The notice of commencement gives constructive notice that claims of lien may be recorded and may take priority, in that, the lien shall attach and take priority as of the time of recordation of the notice of commencement."¹⁷ If a notice of commencement is not filed, liens attach and take priority as of the time the lien is recorded.¹⁸ As such, a lender seeking to ensure that its loan takes priority over a construction lien has an incentive to record the loan before construction begins and before the notice of commencement is recorded.¹⁹

Under s. 713.132, F.S., an owner may terminate the effectiveness of a notice of commencement and prevent the attachment of construction liens by recording a notice of termination. The notice of termination must contain the same information that must be contained in a notice of commencement and other statements including a statement that all lienors have been paid in full.

¹³ Section 255.05(2)(a)1., F.S.

¹⁴ Heather Howdeshell, *Didn't My General Contractor Pay You? Subcontractor Construction Liens in Residential Construction Projects*, 61 FLA. L. REV. 151, 151 (Jan. 2009).

¹⁵ Section 713.13(1)(a), F.S.

¹⁶ Section 713.13(1)(a)1.-7., F.S.

¹⁷ *Napolitano v. Security First Federal Savings and Loan Ass'n.*, 553 So. 2d 948, 949-50 (Fla. 5th DCA 1988).

¹⁸ Section 713.07(2), F.S.

¹⁹ See *Napolitano*, at 949-50.

However, the notice of termination must be served on each lienor who served a notice to owner.²⁰ The notice of termination may take effect as early as 30 days after it is recorded.²¹

Construction Liens

Under part I of chapter 713, F.S., a person who is not in privity with the owner (subcontractor) and intends to secure the right to claim a lien against the property must take several steps. First, if a payment bond does not apply, the subcontractor must serve a notice to owner setting forth the person's name and address and the nature of the services or materials furnished or to be furnished to the owner's property.²² The notice to owner must be served no later than 45 days after the subcontractor begins furnishing labor, services, or materials.²³

Once the owner receives a notice to owner, the owner must receive a release of lien from that subcontractor before paying the contractor.²⁴ Otherwise, a payment to the contractor may constitute an improper payment and the owner is liable to the subcontractor if the subcontractor is not paid by the contractor.²⁵

After a subcontractor provides a notice to owner, the subcontractor may record a claim of lien against the owner's property "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 subcontractor.²⁶

Payment Bonds for Construction Projects on Private Property

A property owner's property is exempt from construction liens if the contractor provides a payment bond to guarantee the payment of subcontractors.²⁷ The procedures under s. 255.05, F.S., for a subcontractor who does not have a direct contract with the contractor and intends to secure the right to payment under a payment bond are similar to the steps required under part I of chapter 713, F.S.

First, the subcontractor must provide a notice to contractor within 45 days after beginning to furnish labor, materials, or supplies.²⁸ However, that time period is extended to 45 days after the subcontractor is notified in writing of the existence of the payment bond if the notice of commencement is not recorded or if the notice of commencement does not contain a reference to the bond.²⁹ Second, the subcontractor must serve a notice of nonpayment on the contractor and

²⁰ Section 713.132(1)(f) and (4), F.S. Paragraph (1)(f) and subsection (4) of s. 713.132 are inconsistent. Paragraph (1)(f) suggests that the owner need only serve a notice of termination on each lienor who served a notice to owner. Subsection (4) suggests that the notice of termination must also be served on the contractor.

²¹ Section 713.13(4), F.S.

²² Section 713.06(2)(a), F.S.

²³ *Id.*

²⁴ Section 713.13(2)(c), F.S.

²⁵ *See id.*

²⁶ Section 713.08 (5), F.S.

²⁷ Section 713.23, F.S.

²⁸ Section 713.23(1)(c), F.S.

²⁹ *Id.*

the surety not later than 90 days after the final furnishing of labor, services, or materials.³⁰ Lastly, an action against the contractor or surety must generally be commenced within 1 year after the completion of the delivery of the materials and supplies.³¹ However, the contractor may shorten the time within which a claim against the payment bond must be made by serving the lienor with a notice contesting the claim against the payment bond.³² The lienor must initiate an action against the bond within 60 days after service of the notice or the lienor's claim is extinguished.

Demands for an Accounting

Section 713.16, F.S., specifies procedures that allow owners, contractors, and subcontractors to demand an accounting of each other.³³ Owners and contractors who have provided a payment bond may serve a demand on a lienor for a written statement of account under oath showing the nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known, as of the date of the statement by the lienor.³⁴ Similarly, a lienor may demand that an owner provide a written statement under oath showing the amount of the direct contract, the dates and amounts paid or to be paid under the contract, the estimated cost to complete the direct contract, and the actual cost to complete the contract, if known.³⁵

Manner of Serving Notices

Section 255.05, F.S., and part I of chapter 713, F.S., use inconsistent terminology to describe how a notice must be transmitted from one person to another. For example, in describing how a notice of nonpayment must be provided under s. 255.05(2)(a)1., F.S., the statute provides in one sentence that a claimant shall "deliver" the notice to the contractor. However, the next sentence provides that the notice must "be served."

Section 713.18, F.S., describes methods by which notices, claims of liens, affidavits, assignments, and other instruments may be served. Under that statute, notice may be accomplished by such methods as actual delivery, certified mail with evidence of delivery, and posting the document on the job site. The permissible method of notice may be dictated by the circumstances.

III. Effect of Proposed Changes:

The bill increases the information that must be shared among parties involved in a construction project and increases the time periods within which construction liens may be recorded or claims against a payment bond may be made. The bill also revises the methods by which notices and other documents relating to construction liens must be served.

³⁰ Section 713.23(1)(d), F.S.

³¹ Section 713.23(1)(e), F.S.

³² *Id.*

³³ Similar procedures are available for public works projects under s. 255.05(8), F.S.

³⁴ Section 713.16(2) and (4), F.S.

³⁵ Section 713.16(5)(a), F.S.

Payment Bonds for Public Works Projects (Section 1)

The bill requires a payment and performance bond for a public works project to state the bond number assigned by the surety on its first page.

The bill also extends the time periods within which a claimant must serve a notice to contractor, a notice of nonpayment, or initiate an action against a contractor or surety. Under the bill, the time periods for serving a notice to contractor or a notice of nonpayment or initiating an action against the contractor or surety do not begin to run until the claimant is notified in writing of the existence of the bond.

The structure of the extension of the time periods is inconsistent with s. 713.23(1)(c), F.S., which relates to the deadline for serving a notice to contractor as a prerequisite to making a claim against a payment bond for a construction project on private property. Section 713.23(1)(c), F.S., provides that written notice of the existence of the bond is necessary to start the 45-day time period to serve a notice to contractor only if the notice of commencement is not recorded or if the notice of commencement does not contain a reference to the bond.

The bill also requires a notice of nonpayment which includes sums for retainage³⁶ to specify the amount claimed for retainage.

Information/Parties to a Construction Project on Private Property (Sections 2 and 3)

The bill amends section 713.132(1)(f), F.S., to require a property owner to serve a notice of termination on each lienor who has a direct contract with the owner as a prerequisite to the effectiveness of the notice of termination. This may be a technical change to conform to existing s. 713.132(4), F.S., which provides that the notice of termination must be served on “the contractor.”

The bill amends section 713.16, F.S., to revise the information that must be provided when an owner or contractor makes a demand for a written statement of account to a lienor or when a lienor requests an accounting from an owner. Specifically, such demands served on the contractor or a lienor must include a description of the project and the names of the owner, the contractor, and the lienor’s customer, sufficient for the account to be properly identified. Similarly, a demand served on the owner must include a description of the project and the names of the contractor and the lienor’s customer, sufficient for the owner to identify the project in question.

Methods of Serving Notices and other Documents

The bill amends s. 713.18, F.S., to revise the methods by which notices and other documents relating to construction liens and claims against payment bonds may be served. The bill adds to the list of acceptable methods of serving notices which provide evidence of delivery to include global express guaranteed³⁷ and common carrier delivery services.

³⁶ The term “retainage” means a “percentage of what a landowner pays a contractor, withheld until the construction has been satisfactorily completed and all mechanics’ liens are released or have expired.” BLACK’S LAW DICTIONARY (9th ed. 2009).

³⁷ See United States Postal Service, *Global Express Guaranteed*, <https://www.usps.com/ship/gxg.htm>.

Section 713.18(2), F.S., is also amended to specify additional requirements for the manner in which a notice or other document must be served for the notice or other document to be effective upon mailing. Specifically, in order for a notice to be effective on mailing, the notice must be mailed by registered, global express guaranteed, or certified mail with postage or shipping prepaid. Additionally, the sender may reformat an address to conform to postal standards. The sender may also complete an incomplete address shown on a notice of commencement based upon the address of the recipient shown in public records or another directory.

The bill also makes the requirements for serving notices consistent throughout the bill. For example, requirements to “deliver” or “mail” a notice are changed to “serve” in accordance with s. 713.18, F.S.

Service by Contractor Instead of Clerk of Court

Existing ss. 255.05(2)(a)1. and 713.22(2), F.S., require a clerk of court to serve notices contesting claims against payment bonds. Similarly, s. 713.23(2), F.S., requires the clerk of court to serve notices of bonds on lienors. The bill requires the contractor to serve these notices instead of the clerk of court.

Organizational and Technical Changes

The bill makes numerous organizational and technical clarifying changes to existing law. According to the Florida Supreme Court, “The mere change of language does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law.”³⁸

Effective Date

The bill provides and effective date of October 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

³⁸ *State ex rel. Szabo Food Services, Inc., of North Carolina v. Dickinson*, 286 So. 2d 529, 531 (Fla. 1973).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may facilitate the imposition of construction liens and claims against payment bonds.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

On line 60, the word “materialmen” in the catchline to s. 255.05, F.S., should be changed to “lienors” to better reflect the content of that section.

The cross reference to “paragraph (g)” on line 167 should be changed to “this section.”

The reference to the “description of the project” on lines 392, 451, and 500 should be changed to “property description” to conform to the statutory form for demanding a written statement of account under oath.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.