

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 897 Construction Liens and Bonds

SPONSOR(S): Civil Justice Subcommittee; Moraitis

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1202

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Caridad	Bond
2) Government Operations Subcommittee	12 Y, 0 N	Williamson	Williamson
3) Judiciary Committee			

SUMMARY ANALYSIS

In Florida, "surety insurance" is defined to include both payment and performance bonds. A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers. A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance to its terms and conditions. Current law requires any person who enters into a formal contract over \$100,000 with the state, a county, a city, a political subdivision, or other public authority for the construction, completion, or repair of a public building, to deliver a payment and performance bond issued by a state-authorized surety insurer to the public owner. The bill:

- Requires the surety's bond number to be listed on the front page of the bond;
- Specifies that any provision in a payment bond which limits or expands the duration of a bond, or which adds conditions precedent to the enforcement of the claim against the bond is unenforceable;
- Replaces mailing by clerk of court with service by the contractor or the contractor's attorney who records a notice of contest of claim against the payment bond;
- Gives claimants additional time to serve required notices when the bond is not recorded before commencement of construction; and
- Creates a new provision which provides that if a contractor furnishes and records a payment and performance bond, the public authority may not condition its payments to the contractor on the production of a waiver from a claimant showing that such claimant does not have an outstanding claim for payments due on the project.

A construction lien is a statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real property. The bill:

- Creates a provision in the construction lien law relating to effective notice where a lessor has an interest in a specific premises on a parcel of land;
- Requires that all lienors including those hired directly by the owner be served with a notice of termination of a notice of commencement;
- Provides additional information (i.e. description of the project) that must be included in a demand for a copy of contract or statements of account;
- Makes changes to mirror proposed changes related to bonds; and
- Makes various grammatical and stylistic changes.

The effective date of the bill is October 1, 2012.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In Florida, "surety insurance" is defined to include both payment and performance bonds.¹ A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers.² A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance to its terms and conditions.³

These types of bonds involve a surety company that is paid a premium by a principal (i.e., general contractor) and agrees to stand in the place of the principal in the event of default to either the performance or payment of the contract.⁴ Unlike customary two-party insurance agreements, which involve the insurer and the insured, a surety agreement is a tripartite agreement that consists of:

- The obligee, the person purchasing the performance in a performance bond.
- The principal (i.e., the contractor).
- The surety, who provides the bond to protect against the principal's default.

Payment Bonds for Public Projects

Section 255.05 F.S., requires any person who enters into a formal contract over \$100,000 with the state, a county, a city, a political subdivision, or other public authority for the construction, completion, or repair of a public building, to deliver a payment and performance bond with a state authorized surety insurer to the public owner.⁵ Pursuant to s. 225.05(1)(a), F.S., the following information must be provided on the first page of a payment or performance bond:

- The name, principal business address, and the phone number of the contractor, surety, and 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.
- A description of the project being improved that is sufficient to identify it (i.e., a legal description or the property's street address) and a general description of the improvement.⁶

Section 225.05(2)(a)2., F.S., requires a claimant who is not in privity with the contractor and who has not received payment for his or her labor, services, or materials to provide written notice to both the contractor and the surety stating that he or she intends to make a claim against the bond for payment. The statute provides a "Notice of Contest of Claim Against Payment Bond" form.

No performance or payment bond is required for state contracts that are \$100,000 or less. In addition, if a state project is between \$100,000 and \$200,000, a state agency can exempt the contractor from the bond requirement pursuant to delegated authority from the Secretary of the Department of Management Services.⁷

The bill:

- Requires the surety's bond number to be listed on the front page of the bond;
- Specifies that any provision in a payment bond which limits or expands the duration of a bond, or which adds a condition precedent to the enforcement of the claim against the bond beyond

¹ Section 624.606(1)(a), F.S.

² See Black's Law Dictionary (9th ed. 2009), bond.

³ See Black's Law Dictionary (9th ed. 2009), performance bond.

⁴ Toomey, Daniel and Tamara McNulty, *Surety Bonds: A Basic User's Guide for Payment Bond Claimants and Obligees*, 22 Construction Lawyer 5 (Winter 2002) (American Bar Association 2002).

⁵ See s. 255.05, F.S.

⁶ Section 255.05(1)(a), F.S.

⁷ *Id.*

those provided in statute, is unenforceable;⁸

- Replaces mailing by clerk of court with service by the contractor or the contractor's attorney who records a notice of contest of claim against the payment bond;
- Gives a claimant additional time to serve required notices when the bond is not recorded before commencement of construction. Specifically, the time period for the claimant to serve any required notices may be calculated from the date specified in s. 255.05, F.S., or from the date the claimant is served a copy of the bond, whichever the claimant chooses;⁹ and
- Creates a new provision which provides that if a contractor furnishes and records a payment and performance bond, the public authority may not condition its payments to the contractor on the production of a document from a claimant showing that such claimant does not have an outstanding claim against the contractor, the surety, the payment bond, or the public authority for payments due on labor, services, or materials furnished on the project.

Florida Construction Lien Law

Chapter 713, F.S., governs construction liens. A construction lien¹⁰ is a statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real property.¹¹

The construction lien law requires various notices, demands, and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands, and requests be in a statutory form. The following notices are required by the act: Notice of Commencement,¹² Notice to Owner, Claim of Lien,¹³ Notice of Termination,¹⁴ Waiver and Release of Lien,¹⁵ Notice of Contest of Lien,¹⁶ Contractor's Final Payment Affidavit,¹⁷ and Demands of Written Statement of Account.¹⁸

Extent of Liens

Section 713.10, F.S., provides that the interest of the lessor is not subject to liens for improvements made by the lessee when:

- The lease or memo of the lease containing the language prohibiting such liability is recorded in the county where the premises are located before the recording of a notice of commencement for improvements to the premises and the terms of the lease expressly prohibit such liability; or
- The terms of the lease expressly prohibit such liability and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the county

⁸ This provision prevents a situation where a bond terminates prior to completion, the project goes upside-down, and claims against the bond cannot be paid due to expiration of the bond.

⁹ This provision is similar to language in s. 713.23(c), F.S., governing liens:

If a notice of commencement is not recorded, or a reference to the bond is not given in the notice of commencement, and in either case if the lienor not in privity with the contractor is not otherwise notified in writing of the existence of the bond, the lienor not in privity with the contractor shall have 45 days from the date the lienor is notified of the existence of the bond within which to serve the notice.

¹⁰ The term "lien" is not defined in ch. 713, F.S., but can be found elsewhere in statute to mean "a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien." See ss. 726.102(8) and 727.103(9), F.S.

¹¹ Black's Law Dictionary (9th ed. 2009), "lien."

¹² Section 713.13, F.S. "Though the Notice of Commencement was originally required to trigger a commencement date from which to measure time limitations under the Mechanic's Lien Law, the information contained in the Notice of Commencement provides all the details necessary to complete a Notice to Owner." *MHB Const. Servs., L.L.C. v. RM-NA HB Waterway Shoppes, L.L.C.*, 74 So.3d 587, 589 (Fla. 4th DCA 2011).

¹³ Section 713.08, F.S.

¹⁴ Section 713.132, F.S.

¹⁵ Section 713.20, F.S.

¹⁶ Section 713.22(2), F.S.

¹⁷ Section 713.06, F.S.

¹⁸ Section 713.16, F.S.

where the parcel of land is located before the recording of a notice of commencement for improvements to the premises. The statute sets out information that must be included in the notice:

- The name of the lessor.
- The legal description of the parcel of land which the notice applies.
- The specific language contained in the various leases prohibiting such liability.
- A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.

The bill expands on the notice requirement in s. 713.10(2)(b)2., F.S. Specifically, it provides that, if the lease for the specific premises as to which a lien could otherwise be claimed against the lessor's interest expressly provides that the interest of the lessor is not subject to liens for improvements made by the lessee, the notice is still effective and the lessor's interest in a premises on the parcel of land is not subject to liens for improvement made by the lessee of such premises regardless of whether:

- The leases for all of the premises on the parcel of land contain language prohibiting such liability; or
- The language prohibiting such liability varies in the various leases or does not match the language in the notice.

Notice of Commencement

An owner must record a notice of commencement before actually commencing to improve any real property.¹⁹ The statute lists information that must be included in the notice (i.e. a general description of the improvement).

Section 713.13(1)(e), F.S., provides that a copy of any payment bond must be attached to the notice of commencement at the time the latter is recorded. However, if the payment bond exists but was not attached, the bond may be used to transfer any recorded lien of a lienor, except that of the contractor, by the recordation and service of notice of bond pursuant to s. 713.23(2), F.S., relating to payment bonds. Under current law, the time limits for serving any required notices must begin running from the dates specified in s. 713.23, F.S., or the date the notice of bond is served on the lienor, whichever is later. The bill provides that the lienor may choose whether the time limits are calculated from the dates specified in s. 713.23, F.S., or the date the notice of bond is served on the lienor.

Notice of Termination

Under current law, an owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination (NOT). The statute lists information that must be included in the NOT. For instance, the notice must contain:

A statement that the owner has, before recording the notice of termination, served a copy of the notice of termination on the contractor and *on each lienor who has given notice.*²⁰

The bill provides that all lienors, including those hired directly by the owner or in privity with the owner, must be served with a NOT of a notice of commencement.

Demand for Copy of Contract and Statements of Account

A copy of the lienor's or owner's contract and a statement of the amount due must be provided upon written demand of an owner or lienor contracting or employed by the other party, at the expense of the demanding party.²¹ A request for a sworn statement of account must be in accordance with the statutory format prescribed in s. 713.16(3), F.S. Failure to provide such information within 30 days or furnishing a false or fraudulent statement may result in a loss of that person's right to recover under the lien or to recover attorney fees.²² An owner may serve in writing a demand of any lienor for a written

¹⁹ Section 713.13(1)(a), F.S.

²⁰ Section 713.132(1)(f), F.S., (emphasis added).

²¹ Section 713.16(1), F.S.

²² Section 713.16(4), F.S.

statement under oath of his or her account showing the nature of the labor and services performed and to be performed, materials furnished, the amount paid on account to date, and the amount due as of the date of the statement by the lienor. Any such demand to a lienor must be served on the lienor at the address and to the attention of any person who is designated to receive the demand in the notice to owner served by such lienor.

The bill provides that any written demand to a lienor must include a description of the project, including the names of the owner, the contractor, and the lienor's customer — as set forth in the lienor's notice to owner.

In addition, the bill provides that any lienor who is perfecting a claim of lien may serve with the claim of lien or thereafter a written demand on the owner for a written statement under oath.

Service

Section 713.18(1), F.S., provides that a service of a notice, claim of lien, affidavit, assignment, and other instrument must be served by personal service, registered or certified mail, overnight or second-day mail, or, if the other types of service cannot be accomplished, posting on the premises.²³ Service of an instrument is effective on the date of mailing if the instrument is sent to the last known address in the notice of commencement, building application or the last known address of the person to be served; and returned as not delivered or undeliverable through no fault of the person serving the item.²⁴ Under current law, the lienor must use the exact address in the notice of commencement to serve an owner even if the address is clearly incomplete (i.e. does not include a zip code or city).

The bill updates certain service provisions to include methods of delivery by any common carrier and to allow for use of USPS's Global Express Guaranteed service for overseas delivery.

The bill also provides that if the address shown on the notice of commencement or the building permit application is incomplete for purposes of mailing or delivery, the person serving the item may complete the address using information from the property appraiser or another public record or directory without affecting the validity of service under this section. The bill also makes minor grammatical and stylistic changes.

Duration of Lien

Under current law, a lien pursuant to s. 713.22, F.S., must not continue for longer 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, unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction. The continuation of the lien affected by the commencement of an action is not enforceable against creditors or subsequent purchasers for a valuable consideration and without notice, unless a notice of lis pendens is recorded. An owner may shorten the time within which to commence an action to enforce any claim of lien or claim against a bond by recording a notice, as set out in statute, in the clerk's office. The clerk must mail a copy of the notice of contest to the lien claimant and service is deemed complete upon mailing.²⁵

The bill makes changes to mirror proposed changes to s. 255.05, F.S., discussed above. The bill:

- Provides that the clerk of court must serve a copy of the notice of contest to the lien claimant in accordance with s. 713.18, F.S., as opposed to sending it by mail; and
- Deletes language providing that service is deemed complete upon mailing.

The bill also makes grammatical and stylistic changes.

Payment of Bond

Section 713.23, F.S., includes requirements for a payment bond to exempt an owner from the construction lien provision. The statute requires that the contractor provide the owner with a bond for at

²³ See ss. 713.18(1)(a)-(c), F.S.

²⁴ Section 713.18(3), F.S.

²⁵ Section 713.22(2), F.S.

least the amount of the original contract price before beginning the construction of the improvement under the direct contract, and a copy of the bond attached to the recorded notice of commencement. The owner, contractor, or surety must furnish a copy of the bond to any lienor demanding it. A lienor seeking protection from the contractor's bond for his or her work and who is not in privity with the contractor (except a laborer) must serve the contractor with a written notice stating the lienor's intent. Such written notice must be served 45 days before beginning to furnish labor, materials or supplies.

Section 713.08, F.S., provides information that must be included in a claim of lien (i.e. the name of the lienor and the address where notices of process may be served on the lienor) and a corresponding form which a lienor must record to perfect his or her lien. However, the negligent inclusion or omission of any information in the claim of lien which does not prejudice the owner does not constitute a default that would defeat an otherwise valid lien.²⁶

Section 713.24, F.S., provides that a person with an interest in real property upon which a lien is imposed or the contract under which the lien is claimed may transfer a construction lien from such real property to other security by depositing a sum of money in the clerk's office; or filing a bond executed as surety by a surety insurer, in the clerk's office.

The bill:

- Revises the statutory notice to the contractor form to follow the language and format of a claim of lien;
- Makes the section consistent with other provisions in statute extending time to serve notices when the bond is not recorded. Specifically, it provides that if a notice of commencement with the attached bond is not recorded before commencement of construction, the lienor not in privity with the contractor may, in the alternative, elect to serve the notice to contractor up to 45 days from the date the lienor is served with a copy of the bond;
- Provides that the bond must be attached to a notice of bond when it is recorded and served;
- Provides that the notice to contractor form may be combined with a notice to owner;²⁷
- Mirrors proposed changes to s. 255.05, F.S., and provides that if the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a notice of nonpayment may be calculated from the date specified in s. 713.23, F.S., or the date the lienor is served a copy of the bond, whichever the lienor chooses;
- Specifies that the limitation period for commencement of an action against a payment bond in s. 95.11, F.S., is not expanded;
- Replaces mailing by clerk of court with service by the contractor or the contractor's attorney who records a notice of contest of claim against the payment bond;
- Deletes language stating "[s]ervice is complete upon mailing;"
- Mirrors proposed changes to s. 255.05, F.S., and provides that any provision in a payment bond which limits or expands the duration of a bond, or which adds conditions precedent to the enforcement of the claim against the bond beyond those provided in statute, is unenforceable;
- Provides that the provisions of s. 713.24(3), F.S., relating to transfer of a lien to a security, apply to bonds pursuant to s. 713.08, F.S., except where those provisions conflict with the latter section; and
- Makes grammatical and stylistic changes.

B. SECTION DIRECTORY:

Section 1 amends s. 255.05, F.S., relating to bond of contractor constructing public buildings.

Section 2 amends s. 713.10, F.S., relating to extent of liens.

Section 3 amends s. 713.13, F.S., relating to notice of commencement.

Section 4 amends s. 713.132, F.S., relating to notice of termination.

²⁶ Section 713.08(3), F.S.

²⁷ Section 713.06, F.S., (relating to liens of persons not in privity with the owner).

Section 5 amends s. 713.16, F.S., relating to demands for a copy of a contract and statements of account.

Section 6 amends s. 713.18, F.S., relating to manner of serving notices and other instruments.

Section 7 amends s. 713.22, F.S., relating to duration of lien.

Section 8 amends s. 713.23, F.S., relating to payment bond.

Section 9 provides an effective date of October 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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:

The bill does not appear to create a need for rulemaking or require rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides for an effective date of October 1, 2012. It is unclear from the effective date provision whether the bill applies to current or future contracts.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2012, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Specifies that any provision in a payment bond which limits or expands the duration of a bond, or which adds a conditions precedent to the enforcement of the claim against the bond beyond those provided in statute, is unenforceable.
- Creates a new provision in s. 255.05, F.S., which provides that if a contractor furnishes and records a payment and performance bond, the public authority may not condition its payments to the contractor on the production of a document (i.e. waiver) from a claimant showing that such claimant does not have an outstanding claim against the contractor, the surety, the payment bond, or the public authority for payments due on labor, services, or materials furnished on the project.
- Provides that notice recorded pursuant to s. 713.10(2)(b)2., F.S., is effective — and the lessor's interest in a premises on the parcel of land is not subject to liens for improvements made by the lessee of such premises — where the lease for the specific premises expressly provides that the interest of the lessor is not subject to liens for improvements made by the lessee. This is so even if the leases for all of the premises on the parcel of land do not contain language prohibiting such liability or the language prohibiting such liability varies in the various leases or does not match the language in the notice.
- Makes the language in certain provisions consistent throughout the statute (i.e. provisions extending time to serve notices when bond is not recorded).
- Deletes unnecessary language in ss. 713.16(2), F.S., and (4), F.S., respectively.
- Deletes contradictory language in s. 713.16(5), F.S.
- Makes grammatical and stylistic changes.

The analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.