

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/CS/HB 897 (CS/SB 1202)	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Judiciary Committee; Civil Justice Subcommittee; Moraitis (Judiciary; Bogdanoff)	114 Y's	0 N's
COMPANION BILLS:	CS/SB 1202	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

CS/CS/HB 897 passed the House on February 23, 2012, and subsequently passed the Senate on March 9, 2012. The bill makes various changes to construction contracting regarding bonds for public projects and construction liens.

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 bond number assigned by the surety 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.
- 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.
- Requires government entities to open sealed bids for public works projects at a public meeting.

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.
- Makes various grammatical and stylistic changes.

The bill was approved by the Governor on May 4, 2012, ch. 2012-211, Laws of Florida. The effective date of the bill is October 1, 2012.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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 to the public owner payment and performance bond with a state authorized surety insurer.⁵ 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

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.*

A person or claimant who is not in privity⁸ 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.⁹ 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.¹⁰

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.¹¹ 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 official records and having the clerk of court mail a copy of the notice to the claimant.¹² The claimant must initiate an action against the bond within 60 days after service of the notice or the claimant’s claim is extinguished.

Opening of Sealed Bids for Public Works Contracts

The bill provides that a state or local government entity must open sealed bids or the portion of any sealed bids that include “the prices submitted” for public works projects at a public meeting. As such, the bill appears to prohibit a governmental entity from opening sealed bids in advance of a public meeting.

The bill also requires governmental entities to announce at the public meeting the name of each bidder and the price submitted and to make the name and price information available upon request. Under s. 119.071(1)(b), F.S., sealed bids are exempt from disclosure requirements under public records laws until “the agency provides notice of an intended decision or until 30 days after opening the bids . . . , whichever is earlier.” As a result of the public records exemption, the components of a sealed bid other than a bidder’s name and price submitted are likely to remain exempt from disclosure until the agency provides notice of an intended decision or for 30 days after the meeting at which the bids are opened, whichever is earlier.

Other Changes

Related to bonds, the bill also:

- Establishes a period of 5 years to initiate an action to enforce a claim against a payment bond which must be governed by ss. 95.11(5)(e) (relating to limitations on actions); 255.05(10) (relating to bonds for public projects); 337.18(1) (relating to surety bonds for construction or maintenance contracts); or 713.23(1)(e), F.S., (relating to construction liens).
- Requires the bond number assigned by the surety to be listed on the front page of the bond.
- Provides that before commencing the work after default or abandonment, the contractor must provide to the public entity a certified copy of the recorded bond. The public entity may not make a payment to the contractor until the contractor complies.
- 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

⁸ 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).

⁹ Section 255.05(2)(a)2., F.S.

¹⁰ *Id.*

¹¹ Section 255.05(10), F.S.

¹² Section 255.05(2)(a)1., F.S.

those provided in statute, is unenforceable.¹³

- 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.
- Provides that if a contractor furnishes and records a payment and performance bond and provides the public authority with a written consent from the surety regarding the project or payment in question, 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. However, the surety may, in a writing served on the public authority, revoke its consent or direct that the public authority withhold a specified amount from a payment, effective upon receipt.

Florida Construction Lien Law

Chapter 713, F.S., governs construction liens. A construction lien¹⁴ is a statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real property.¹⁵

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,¹⁶ Notice to Owner, Claim of Lien,¹⁷ Notice of Termination,¹⁸ Waiver and Release of Lien,¹⁹ Notice of Contest of Lien,²⁰ Contractor's Final Payment Affidavit,²¹ and Demands of Written Statement of Account.²²

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.²³ 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.²⁴

"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

¹³ 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.

¹⁴ 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 s. 726.102(8), F.S.

¹⁵ Black's Law Dictionary (9th ed. 2009), "lien."

¹⁶ 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).

¹⁷ Section 713.08, F.S.

¹⁸ Section 713.132, F.S.

¹⁹ Section 713.20, F.S.

²⁰ Section 713.22(2), F.S.

²¹ Section 713.06, F.S.

²² Section 713.16, F.S.

²³ Section 713.13(1)(a), F.S.

²⁴ Section 713.13(1)(a)1.-7., F.S.

commencement.”²⁵ If a notice of commencement is not filed, liens attach and take priority as of the time the lien is recorded.²⁶ 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.²⁷

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. However, the notice of termination must be served on each lienor who served a notice to owner.²⁸ The notice of termination may take effect as early as 30 days after it is recorded.²⁹

Liens Against Leased Property

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 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; and 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.³⁰ 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

²⁵ *Napolitano v. Security First Federal Savings and Loan Ass'n.*, 553 So.2d 948, 949-50 (Fla. 5th DCA 1988).

²⁶ Section 713.07(2), F.S.

²⁷ *See Napolitano*, at 949-50.

²⁸ Section 713.132(1)(f) and (4), F.S. Paragraph (1)(f) and subsection (4) of s. 713.132, F.S., 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.

²⁹ Section 713.13(4), F.S.

³⁰ Section 713.13(1)(a), F.S.

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. The statute lists information that must be included in the notice. 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.*³¹

The bill provides that all lienors, including those hired directly by the owner or in privity with the owner, must be served with a notice of termination of the 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.³² 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.³³ An owner may serve in writing a demand of any lienor for a written 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.

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.³⁴ 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.³⁵ 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).

³¹ Section 713.132(1)(f), F.S., (emphasis added).

³² Section 713.16(1), F.S.

³³ Section 713.16(4), F.S.

³⁴ See s. 713.18(1)(a)-(c), F.S.

³⁵ Section 713.18(3), F.S.

The bill updates certain service provisions to include methods of delivery by any common carrier and to allow for use of the United States Postal Service's (USPS) 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.³⁶

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 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.³⁷

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.

³⁶ Section 713.22(2), F.S.

³⁷ Section 713.08(3), F.S.

The bill also:

- Extends the application deadline for certification of registered contractors from November 1, 2005 to November 1, 2015.
- 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.³⁸
- Specifies that the limitation period for commencement of an action against a payment bond in s. 95.11, F.S., is not expanded.
- 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.
- Makes grammatical and stylistic changes.

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.

³⁸ Section 713.06, F.S., (relating to liens of persons not in privity with the owner).