

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 283 Liens and Bonds

**SPONSOR(S):** Business & Professions Subcommittee, Toledo and others

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	10 Y, 1 N, As CS	Brackett	Anstead
2) Civil Justice Subcommittee			
3) Commerce Committee			

### SUMMARY ANALYSIS

A construction lien is designed to protect those who provide work or materials to improve property for a property owner that are not in direct contract with the owner, such as subcontractors, laborers, and material suppliers. Any person who provides services, labor, or materials for improving, repairing, or maintaining real property (except public property) may place a construction lien on the property if they are not paid for their services, and they timely notify the property owner.

The bill:

- Provides that a person may not be required to sign a waiver or release of lien that is different from the form provided in statute in exchange for payment;
- Prohibits any provisions in a waiver or release of lien that are not related to the waiver or release unless the person has agreed to those provisions in their initial contract.
- Provides that the statutory requirements for a waiver of a right to claim against a bond for public construction projects also apply to Department of Transportation construction projects.
- Provides that licensed building and general contractors who provide construction management services may record a construction lien.
- Clarifies that construction liens may be filed against a lease for private leaseholds on public property.
- Provides that a person may file one claim of lien for multiple contracts with the same owner.
- Provides that an owner may not record a notice of termination until each person who worked on the property has been paid.
- Provides that an owner must provide a copy of the notice of termination to a person who timely serves a notice to owner after the notice of termination has been recorded.
- Allows a lien to be transferred to a payment bond obtained by a subcontractor if the person who filed the lien is working for the subcontractor.
- Increases the amount needed to obtain a security in order to transfer a lien to the security.
- Provides that a prevailing party is entitled to attorney's fees in actions to enforce liens that have been transferred to securities.
- Clarifies the definition of "final furnishing" related to specially fabricated materials.
- Provides that construction liens have priority over debts that are recorded after the construction lien is recorded, even if such debts relate back to a debt that was recorded before the construction lien attached pursuant to the operation of "any common law doctrine or remedy."
- Removes the requirement that a notice of commencement must include:
  - The owner or lessee's interest in the property; and
  - A statement that an ownership interest is a leasehold interest if a lessee contracted for the work.

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

The bill provides for an effective date of July 1, 2020.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### Background

Florida law ensures that people who work on construction projects can obtain payments for their work. Any person who provides services, labor, or materials for improving, repairing, or maintaining real property (except public property) may place a construction lien on the property, provided the person meets the procedural guidelines set forth in current law.<sup>1</sup>

Under part I of chapter 713, F.S., a person who is not in privity or direct contract with the owner, such as subcontractors and material suppliers, who intends to secure the right to claim a lien against the property must take several steps. The construction lien law requires various notices, demands, and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. Florida law requires that some notices, demands, and requests be in the statutory form provided in statute, while others do not have to be in the statutory form. The following notices are required by the act: Notice of Commencement,<sup>2</sup> Notice to Owner,<sup>3</sup> Claim of Lien,<sup>4</sup> Notice of Termination,<sup>5</sup> Waiver or Release of Lien,<sup>6</sup> Notice of Contest of Lien,<sup>7</sup> Contractor's Final Payment Affidavit,<sup>8</sup> and Demands of Written Statement of Account.<sup>9</sup>

For example, if a payment bond does not apply, the person must serve a notice to owner<sup>10</sup> (in the statutory form provided) that sets 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.<sup>11</sup> The notice informs the owner of who is providing services or materials on their property, and that the person serving the notice is looking to the owner to ensure he or she receives payment for their services or materials.<sup>12</sup> The notice to owner must be served no later than 45 days after the person begins furnishing labor, services, or materials.<sup>13</sup>

Once the owner receives a notice to owner, the owner must obtain a waiver or release of lien (not required to be in the statutory form) from that person before paying the contractor. Otherwise, a payment to the contractor may constitute an improper payment and the owner is liable to the person if he or she is not paid by the contractor.<sup>14</sup>

A payment bond is a type of bond that guarantees that a contractor will pay subcontractors, laborers, and material suppliers for their work.<sup>15</sup> It forms a three-part contract between the owner, the contractor, and the surety, and ensures that liens are not filed on the project. A payment bond for a construction

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<sup>1</sup> Ch. 713, F.S.

<sup>2</sup> S. 713.13, F.S.;

<sup>2</sup> S. 713.06(2), F.S.; *MHB Construction Services, LLC v. RM-NA HB Waterway Shoppes, L.L.C.*, 74 So. 3d 587, 589 (Fla. 4th DCA 2011) ("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.")

<sup>3</sup> S. 713.06(2), F.S.

<sup>4</sup> S. 713.08, F.S.

<sup>5</sup> S. 713.132, F.S.

<sup>6</sup> S. 713.20, F.S.

<sup>7</sup> S. 713.22(2), F.S.

<sup>8</sup> S. 713.06(3), F.S.

<sup>9</sup> S. 713.16, F.S.

<sup>10</sup> S. 713.06(2), F.S.

<sup>11</sup> S. 713.06(2)(a), F.S.

<sup>12</sup> *Stocking*, 76 So. 3d 313, 319.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; S. 713.06, F.S.

<sup>15</sup> See Bond, Black's Law Dictionary (11<sup>th</sup> ed. 2019).

project exempts the owner from the construction lien law because the surety insurer providing the bond guarantees the subcontractors, laborers, and material suppliers will receive payment for their work or materials. Current law requires contractors to obtain a payment bond for public projects over \$100,000.<sup>16</sup>

### *Waiver or Release of Lien — Current Law*

Prior to making a payment to a contractor, an owner must request that a person who served a notice to owner provide a waiver or release of lien. A waiver or release of lien is essentially a receipt provided by the person who served a notice to owner acknowledging payment for services performed or materials provided and a waiver of their ability to file a lien for those services or materials.<sup>17</sup> A waiver or release of lien can be a partial waiver for some of the person's services or materials or it can be a final waiver for all of the person's services or materials.<sup>18</sup> A person may not waive or release their right to file a lien prior to doing work or providing materials. However, a person may waive or release their right to file a lien prior to receiving payment for their services or materials.<sup>19</sup>

Current law provides a statutory form for a waiver or release of lien. However, current law does not require that the waiver or release of lien be in the statutory form.<sup>20</sup> Thus, a waiver or release of lien may be substantially different from the form and it may include additional provisions that are not included in the form. However, an owner may not require a person to sign a waiver or release of lien that is substantially different from the form.<sup>21</sup>

The form provides that the person who served the notice of owner waives their right to claim a lien for services or materials provided for the job on the owner's property in exchange for a certain sum of money.<sup>22</sup> The form entitled "Waiver and Release of Lien Upon Partial or Final Payment" states:

"The undersigned lienor, in consideration of the (sum of or final payment in the amount of) \$ , hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished to (insert the name of your customer) on the job of (insert the name of the owner) to the described property (insert description of the property)."<sup>23</sup>

Industry blogs and news reports indicate it has become routine in the industry for the form for a waiver or release of lien to include other miscellaneous provisions, and that subcontractors and material suppliers should be warned about signing a waiver or release of lien without understanding the extra provisions. They advise to carefully inspect a waiver or release to ensure someone does not unknowingly sign a waiver or release that includes additional provisions such as a waiver or release of all claims, damages, losses, or expenses.<sup>24</sup>

### *Right to Claim Against a Payment Bond — Current Law*

Similar to a waiver or release of lien, in a situation where there is a payment bond, prior to making a payment to a subcontractor, laborer, or material supplier, a contractor may request the person provide a waiver of right to claim against the payment bond.

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<sup>16</sup> S. 255.05, F.S.

<sup>17</sup> S. 713.20, F.S.; Leonard Klingen, *Florida's unwieldy but effective construction lien law*, Florida Bar Journal (Jan./Feb. 2019) <https://www.floridabar.org/the-florida-bar-journal/floridas-unwieldy-but-effective-construction-lien-law/> (last visited Nov. 12, 2019).

<sup>18</sup> S. 713.20, F.S.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Alex Benarroche, *Florida's "Non-Required" Statutory Lien Waivers Can Lead to Confusion*, Levelset (May 20, 2019) <https://www.levelset.com/blog/florida-statutory-lien-waivers-lead-to-confusion/> (last visited Dec. 6, 2019); Craig Distel, *Understanding waivers and releases for Florida construction contractors*, (Dec. 20, 2018) <https://mcdonaldhopkins.com/Insights/Blog/Industry-Insights/2018/12/20/Understanding-waivers-and-releases-for-Florida-construction-contractors> (last visited Dec. 6, 2019).

A waiver of right to claim against a bond is similar to a waiver or release of lien. Like a waiver or release of lien, a waiver of right to claim against the bond is essentially a receipt provided by the person acknowledging payment for services performed or materials provided and a waiver of their ability to seek payment from the surety.<sup>25</sup>

Current law provides a statutory form for a waiver of right to claim against a bond, which is similar to a waiver or release of a lien. Current law provides that a contractor may not require a person to sign a waiver of right to claim against a bond that is substantially different from the form. However, also like a waiver or release of lien, the statutory form for the waiver of right to claim against a bond is not required, and a waiver of right to claim against a bond may be different from the form and it may include additional provisions that are not included in the statutory form.<sup>26</sup>

According to industry experts, any person required to provide a claim against a bond must ensure they carefully inspect a waiver or release to ensure they do not unknowingly sign a waiver or release that includes additional provisions such as a waiver or release of all claims, damages, losses, or expenses.<sup>27</sup>

#### *Waiver or Release of Lien and Right to Claim Against a Payment Bond — Effect of the Bill*

The bill provides that a person may not be required to sign a waiver or release of lien or a right to claim against a payment bond that is different from the statutory forms in order to receive payment, unless the person agreed to sign a different form in his or her contract with the contractor.

The bill provides that any provision in a waiver or release of lien or a right to claim against a bond that is not related to the waiver or release of lien or the right to claim against a bond is not enforceable, unless the person agreed to those provisions in his or her contract with the contractor.

#### *Payment Bonds for Department of Transportation Construction Jobs — Current Law*

Current law requires the successful bidder on a construction or maintenance contract project for the Department of Transportation (DOT) to obtain a payment bond.<sup>28</sup> Subcontractors, laborers, and material suppliers are able to make a claim against the bond if they do not get paid.<sup>29</sup>

These types of bonds work similarly to other construction payment bonds. A person cannot waive their right to make a claim against the bond in advance, but they can waive their right to make a claim against the bond in order to receive payment. However, current law does not require that the statutory form for a waiver of right to claim against a bond be used for waivers related to DOT construction or maintenance projects, so a person may be required to sign a waiver that has additional provisions in it that are not related to the waiver.<sup>30</sup>

#### *Payment Bonds for Department of Transportation Construction Jobs — Effect of the Bill*

The bill requires that the statutory form for waiving a right to claim against a bond be used for DOT construction and maintenance projects.

For DOT construction or maintenance projects, the bill provides:

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<sup>25</sup> Ss. 255.05(2), & 713.235, F.S.

<sup>26</sup> *Id.*

<sup>27</sup> Benarroche, *supra* note 24.

<sup>28</sup> S. 337.18, F.S.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

- A person may not be required to sign a waiver of a right to claim against a payment bond that is different from the statutory form in order to receive payment unless the person signed a contract, which requires the person to sign a different form; and
- Any provision in a waiver of a right to claim against a bond that is not related to the waiver or release of lien or the right to claim against a bond is not enforceable, unless the person agreed to those provisions in his or her contract with the contractor.

### *Licensed General and Building Contractors — Current Law*

Licensed construction contractors are either certified by or registered with the Construction Industry Licensing Board (CILB). The CILB is housed in the Department of Business and Professional Regulation (DBPR) and consists of 18 members who are appointed by the Governor and confirmed by the Senate. The CILB is responsible for licensing, regulating, and disciplining certified construction contractors.<sup>31</sup>

"Certified contractors" are individuals who pass the state competency examination and obtain a certificate of competency issued by DBPR. Certified contractors are permitted to practice in any jurisdiction in the state.<sup>32</sup>

"Registered contractors" are individuals that have taken and passed a local competency examination and can practice contracting only in the local jurisdiction for which the license is issued.<sup>33</sup>

A licensed "general contractor" is a person who may contract for any type of construction service, and may perform any type of construction service unless they are required to subcontract the work to a licensed subcontractor.<sup>34</sup>

A licensed "building contractor" is a person who may contract for construction services for commercial and residential buildings that do not exceed three stories in height, or for construction for any size building if the construction does not affect the structural frame of the building. A licensed building contractor may perform any of the above construction services unless they are required to subcontract the work to a licensed subcontractor.<sup>35</sup>

### *Construction Management Services — Current Law*

Construction managers and construction management entities or companies are responsible for the overall management of a construction project from the predesign phase to the completion of the project.<sup>36</sup> This can include providing preconstruction planning, reviewing designs, estimating costs, determining the value of different building products, project scheduling, contract negotiation, bid procedures, and coordination of trade contractors and safety programs.<sup>37</sup>

Construction managers and construction management businesses are not regulated or licensed by the DBPR.

Generally, construction managers and construction management businesses are not required to be licensed contractors, engineers or architects. However, if the construction manager or construction management business is performing any activity that otherwise requires a license, they must have that specific license or employ someone that holds such license.<sup>38</sup>

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<sup>31</sup> See generally Ch. 489, F.S.

<sup>32</sup> S. 489.105, F.S.

<sup>33</sup> S. 489.103, F.S.

<sup>34</sup> Ss. 489.105(3), & 489.113, F.S.

<sup>35</sup> *Id.*

<sup>36</sup> The Florida Bar, *Florida Construction Law Practice*, Chapter 4: Rights and Liabilities of Construction Managers (9th ed. 2018).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Section 255.103, F.S., allows a local government entity to hire a construction manager for a construction project. The construction manager is “responsible for construction project scheduling and coordination in both preconstruction and construction phases and generally responsible for the successful, timely, and economical completion of the construction project.”<sup>39</sup>

Section 255.103, F.S., also allows a local government to hire a program management entity. The program management entity is “responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.”<sup>40</sup>

Construction managers and program management entities hired by local governments are not required to be a licensed contractor, engineer, or architect. However, if they are not licensed then they must hire a licensed professional to perform any job that does require a license.<sup>41</sup>

Section 255.32, F.S., allows the state to hire construction managers for construction projects. Construction managers hired by the state must be licensed general or building contractors. The construction manager “coordinates and supervises a construction project from the conceptual development stage through final construction, including the scheduling, selection, contracting with, and directing of specialty trade contractors, and the value engineering of a project.”<sup>42</sup>

The construction lien law allows any person who provides services, labor, or materials for improving real property (except public property) to place a construction lien on the property.<sup>43</sup> However, it is unclear if construction managers may place a lien on a property because they do not necessarily provide labor, services, or materials that improves real property.<sup>44</sup> Some courts have determined that construction managers are not permitted to file such a lien.<sup>45</sup>

The lien law also provides that a contractor may file a lien for any money owed to him or her for labor, services, or materials.<sup>46</sup> The construction lien law defines a “contractor” as any person other than materialmen or laborer who contracts with an owner to improve the owner’s real property. The definition also includes a licensed architect and engineer who improve real property through a design-build contract.<sup>47</sup> However, the contractor definition does not include construction manager services.<sup>48</sup>

#### *Licensed General and Building Contractors and Construction Management Services — Effect of the Bill*

The bill amends the construction lien law’s definition of “contractor” to include any licensed general or building contractor who provides construction management or program management services. Thus allowing licensed general and building contractors who provide construction management or program management services the ability to file a lien for their services.

The bill defines construction management services so that it mirrors the definition of a construction management entity in s. 255.103, F.S. Construction management services is defined in the bill as including: “responsibility for scheduling and coordination in both preconstruction and construction phases and for the successful, timely, and economical completion of the construction project.”

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<sup>39</sup> S. 255.103(2), F.S.

<sup>40</sup> S. 255.103(3), F.S.

<sup>41</sup> *Id.*

<sup>42</sup> S. 255.32(1)(a), F.S.

<sup>43</sup> *See generally* Ch. 713, F.S.

<sup>44</sup> Scott Wolfe Jr., *Can Construction Managers File Mechanics Liens?* Levelset, (Jul. 19, 2019) <https://www.levelset.com/blog/can-construction-managers-file-mechanics-liens/> (last visited Dec. 12, 2019).

<sup>45</sup> *O’Kon and Company, Inc. v. Riedel*, 540 So. 2d 836, 839-40 (Fla. 1st DCA 1988) (“Chapter 713 which provides for professionals offering services to file a lien for services, does not include ‘project managers.’”) *Medellin v. MLA Consulting, Inc.*, 69 So. 3d 372 (Fla. 5th DCA 2011) (A person cannot file a construction lien for home construction consulting services because it does not improve real property.); *See* The Florida Bar *supra* note 35.

<sup>46</sup> S. 713.05, F.S.

<sup>47</sup> S. 713.01(8), F.S.

<sup>48</sup> *Id.*

The bill defines program management services so that it mirrors the definition of a program management entity in s. 255.103, F.S. Program management services is defined in the bill as including: “responsibility for scheduling control, cost control, and coordination in providing or procuring planning, design, and construction.

#### *Construction Liens for Private Lease Hold Interests in Public Property — Current Law*

Although construction liens generally apply to the owner of the property improved, construction liens may also apply in situations where the property owner’s tenant has contracted for the improvement.<sup>49</sup>

If a tenant contracts for improvements to real property, then the contractor is only able to file a lien against the tenant’s leasehold interest, instead of against the real property, unless the tenant contracts for an improvement in accordance with an agreement with the landlord.<sup>50</sup>

Construction liens may not be filed against public property. Construction lien law does not currently indicate whether liens may be filed against the private leasehold interests of a tenant on public property.<sup>51</sup> However, according to industry experts, in some cases liens may be filed against private leasehold interests when a tenant is on public property. For example, airlines and car rental agencies that lease property within airports.<sup>52</sup>

#### *Construction Liens for Private Lease Hold Interests in Public Property — Effect of the Bill*

The bill amends the definition of “real property” to include private leaseholds on public property, which allows a person to file a construction lien against a private leasehold interest on public property.

#### *Final Furnishing of Materials & Specially Fabricated Materials— Current Law*

In order to record a construction lien on real property, a person must record a claim of lien with the clerk of court of the county where the property is located and serve the owner with the claim of lien. The person must serve the owner with the claim of lien before recording the lien or within 15 days of recording the lien.<sup>53</sup>

If a claim of lien is not recorded, the lien is void to the extent that the failure or delay is shown to have been prejudicial to any person entitled to rely on service of the claim of lien.<sup>54</sup>

A person may file a claim of lien at any time during the progress of work. However, a person may not file a claim of lien later than 90 days after the final furnishing of labor or materials by the person.<sup>55</sup>

Current law provides that the final furnishing date is the last day the person furnishes labor, services, or materials. The 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 person’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.<sup>56</sup>

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<sup>49</sup> Adam B. Edgecombe, *How do construction liens impact a commercial landlord in Florida?*, JimersonBirr (May 7, 2019) <https://www.jimersonfirm.com/blog/2019/05/how-construction-liens-impact-commercial-landlord/> (last visited Dec. 12, 2019).

<sup>50</sup> S. 713.10, F.S.

<sup>51</sup> See generally Ch. 713, F.S.

<sup>52</sup> H. Wesley, *Property Interests Subject to Construction Liens in Florida*, (Sep. 21, 2018)

<https://www.lorman.com/resources/property-interests-subject-to-construction-liens-in-florida-17322> (last visited Dec. 11, 2019); 8 Fla. Prac., Constr. Law Manual § 8.3 (2019-2020ed.).

<sup>53</sup> S. 713.08, F.S.

<sup>54</sup> S. 713.08(4), F.S.

<sup>55</sup> S. 713.08(5), F.S.

<sup>56</sup> S. 713.01(12), F.S.

Materials must be incorporated in the jobsite in order for the materials to be considered furnished. Current law provides that the delivery of materials to the jobsite is prima facie evidence that the materials have been incorporated into the jobsite.<sup>57</sup>

However, “specially fabricated materials” do not have to be incorporated into a jobsite in order for the materials to be considered furnished. Specially fabricated materials are materials made for a particular project and are not suited or readily adaptable for use in a different project.<sup>58</sup> Since specially fabricated materials cannot be used for another project, Florida courts have determined that specially fabricated materials do not have to be delivered to a jobsite in order for the supplier to file lien on the real property.<sup>59</sup> However, current law does not provide a date to determine the last day specially fabricated materials are furnished.

#### *Final Furnishing of Materials & Specially Fabricated Materials — Effect of the Bill*

The bill provides that the final furnishing date for specially fabricated materials is the date that the last portion of the specially fabricated materials is delivered to the jobsite, or if any portion of the specially fabricated materials is not delivered to the jobsite by no fault of the material supplier, the final furnishing date is the later of:

- One year after the date the material supplier completes the fabrication;
- One year after the date the material supplier receives the last portion of the specially fabricated materials needed to complete the order; or
- The date the notice of commencement expires.

#### *Claim of lien — Current Law*

A person may record a single claim of lien for multiple services or materials that are provided to different lots, parcels, or tracts of land (properties) as long as the multiple services or materials are under the same contract, the contract is directly with the owner, and the properties have the same owner.<sup>60</sup>

A person may not record a single claim of lien for multiple services or materials if there is more than one contract, even if the contracts for services and materials are with the same owner.<sup>61</sup>

#### *Claim of Lien — Effect of the Bill*

The bill provides that a person may record a single claim of lien for multiple services or materials for multiple contracts and multiple properties as long as the contracts are directly with the owner, and the owner is the same owner for all the contracts and properties.

#### *Priority of Construction Liens — Current Law*

Construction liens have priority over any conveyance, encumbrance, or demand (debt) not recorded against the real property prior to the time the lien attaches. Any debt recorded prior to the time the lien attaches and any proceeds thereof, regardless of when disbursed, have priority over construction liens.<sup>62</sup>

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<sup>57</sup> S. 713.01(13), F.S.

<sup>58</sup> *Surf Properties v. Markowitz Bros.*, 75 So. 298, 302 (Fla. 1954).

<sup>59</sup> *Oolite Industries, Inc. v. Millman Construction Company, Inc.*, 501 So. 2d 655, 656 (Fla. 3rd DCA 1987); *Aquatic Plant Management, Inc. v. Paramount Engineering, Inc.*, 977 So. 2d 600, 603, (Fla. 4th DCA 2007).

<sup>60</sup> S. 713.09, F.S.

<sup>61</sup> *Lee v. All Florida Construction Co.*, 662 SO. 2d 365, 366-67 (Fla. 5th DCA 1995).

<sup>62</sup> S. 713.07(3), F.S.



However, under the common law doctrine of subrogation, any debt that is recorded after the time a lien attaches will take priority over the lien if the debt was obtained to satisfy a previous debt that was recorded prior to the time the construction lien attaches.<sup>63</sup>

The doctrine of subrogation is the substitution of one party for another, where one party pays the debt of another party, entitling the paying party to rights, remedies, or securities (including priority) that would otherwise belong to the original debtor.<sup>64</sup> There are two types of subrogation: conventional and equitable.<sup>65</sup>

Conventional subrogation occurs when parties who have recorded debts against real property agree that a person who pays the debt of one of the parties will have the rights, remedies, and securities of that party.<sup>66</sup>

Equitable subrogation does not depend on a contract. It arises by operation of law to provide a remedy and prevent unjust enrichment.<sup>67</sup> Equitable subrogation applies when the person paying the debt or lien with higher priority: made the payment to protect his or her own interest; did not act as a volunteer; is not primarily liable for the debt he or she is paying; paid off the entire debt; and subrogating the person for the original debtor does not injustice the rights of another debt holder.<sup>68</sup> If a person meets the requirements of equitable subrogation then he or she will have the rights, remedies, and securities of the debt or lien he or she paid regardless if any other person with a debt or lien against the property agrees to it.<sup>69</sup>

#### *Priority of Construction Liens— Effect of the Bill*

The bill provides that construction liens have priority over any debt not recorded against the real property prior to the time the lien attaches, *including* any debt that relates back to a debt recorded before the construction lien is recorded “pursuant to the operation of any common law doctrine or remedy.”

#### *Notice of Commencement— Current Law*

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. The notice of commencement must also be posted on the construction site, and filed with the building department before the first inspection.<sup>70</sup> The notice of commencement determines the priority of construction liens, provides details needed to fill out a notice to owner, establishes the date on which the statute of limitations begins to run, and protects owners from double payments.<sup>71</sup>

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<sup>63</sup> *Federal Land Bank of Columbia v. Godwin*, 107 Fla. 537, 549-551 (Fla. 1933); *Bankers Lending Company, LLC v. Angela Jackson*, 253 So. 3d 1174, 1177 (Fla. 5th DCA 2018).

<sup>64</sup> Black’s Law Dictionary (11th ed. 2019).

<sup>65</sup> *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999).

<sup>66</sup> *Id.*

<sup>67</sup> *Federal Land Bank of Columbia v. Godwin*, 107 Fla. 537, 549-551 (Fla. 1933).

<sup>68</sup> *Bankers Lending Company, LLC v. Angela Jackson*, 253 So. 3d 1174, 1177 (Fla. 5th DCA 2018).

<sup>69</sup> *Id.*

<sup>70</sup> Ss. 713.13(1)(a), & 713.135(1)(d), F.S.

<sup>71</sup> *Stocking Building Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So. 3d 313, 317 (Fla 3rd DCA 2011); The Florida Senate Committee on Regulated Industries, *Review of the Florida Construction Lien Law*, November 2007 [http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim\\_reports/pdf/2008-149ri.pdf](http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-149ri.pdf) (last visited Nov. 11, 2019); Fred Dudley, William A. Buzzett, & Deborah Kaveney Kearney, *Construction Lien Law Reform: The Equilibrium of Change*, 18 Fla. St. U. L. Rev., 278 (1991).

Current law provides a statutory form for the notice of commencement, and the notice must be substantially similar to the form. 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; the notice's expiration date; a warning in all caps stating that the notice must be recorded and payments after the notice expires could be improper and lead to the owner paying twice.<sup>72</sup>

The owner's information required in the notice of commencement must include:<sup>73</sup>

- The name and address of the owner or lessee if the lessee contracted for the work;
- The owner or lessee's interest in the property;
- A statement that the ownership interest is a leasehold interest if a lessee contracted for the work;
- The name and address of the fee simple titleholder<sup>74</sup> (if different from the owner); and
- Any person designated by the owner to receive a claim of lien.

#### *Notice of Commencement — Effect of the Bill*

The bill repeals the requirement that the notice must include:

- The owner or lessee's interest in the property; and
- A statement that the ownership interest is a leasehold interest if a lessee contracted for the work.

#### *Notice of Termination — Current Law*

Current law allows an owner to terminate a notice of commencement before the notice of commencement expires. In order to terminate a notice of commencement, an owner must record a notice of termination that includes the following:<sup>75</sup>

- All the information included in the notice of commencement, including the notice of commencement's reference numbers in the official records of the clerk of court;
- The date which the notice of commencement is terminated, which may not be earlier than 30 days after the notice of termination is recorded;
- A statement that all persons who worked on the property have been paid in full; and
- A statement that the owner has served a copy of the notice of termination to every person with a direct contract with the owner and every person who served the owner with a notice to owner.

An owner may record a notice of termination after:<sup>76</sup>

- The construction project has been completed; **or**
- Work has stopped on the project and every person who worked on the property has been paid in full.

If the owner has served a copy of the notice of termination to every person with a direct contract with the owner and every person who served a notice to owner, a notice of commencement will terminate 30 days after the notice of termination is recorded or on the date of termination stated in the notice, whichever is later.<sup>77</sup>

#### *Notice of Termination — Effect of the Bill*

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<sup>72</sup> S. 713.13(1)(a), F.S.

<sup>73</sup> S. 713.13(1)(d), F.S.

<sup>74</sup> The construction lien law does not define fee simple titleholder; however, Black's Law Dictionary defines fee simple title as an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs. Black's Law Dictionary (11th ed. 2019).

<sup>75</sup> S. 713.132(1), F.S.

<sup>76</sup> S. 713.132(3), F.S.

<sup>77</sup> S. 713.132(4), F.S.

The bill provides that an owner must serve a copy of the notice of termination on any person who timely serves a notice to the owner after the owner has recorded the notice of termination. The bill also provides that a notice of termination will take effect against such person 30 days after he or she receives the copy of the notice of termination.

The bill provides that the notice of termination must include a statement that the owner will serve a copy of the notice on any person who timely serves a notice to owner after the notice of termination has been recorded.

The bill provides that an owner may only record a notice of termination after all persons who have worked on the property have been paid in full. The bill removes the option for the owner to file a notice of termination after a construction project has been completed. The bill also removes the requirement that a person may not record a notice of termination until work has stopped on the project, when choosing to record after every person has been paid in full.

#### *Manner of Serving Documents — Current Law*

Notices, claims, and waivers must be served by one of the following methods:<sup>78</sup>

- By actual delivery to the person being served;
- By common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery; or
- By posting on the construction site if service cannot be performed by the other two methods.

Service by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the notice, claim, or waiver is **mailed**, if it is:<sup>79</sup>

- Sent to the last address shown in the notice of commencement or, in the absence of a notice, to the last address shown in the building permit application, or to the last known address of the person to be served; and
- Returned as being “refused,” “moved, not forwardable,” or “unclaimed,” or is otherwise not delivered or deliverable through no fault of the person serving the item.

#### *Manner of Serving Documents — Effect of the Bill*

The bill provides that service by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the notice, claim, or waiver is mailed **or shipped**.

#### *Notice of Nonpayment for a Payment Bond— Current Law*

Since a payment bond exempts the owner from having construction liens placed on their real property, the surety is the one who guarantees a subcontractor, laborer, or material supplies that they will receive payment from the general contractor. If the general contractor fails to do so then the subcontractor, laborer, or material supplier will seek payment from the surety.

In order to receive protection under a payment bond for a public or private project, a subcontractor, laborer, or material supplier who does not have a direct contract with the contractor must provide a written notice of nonpayment to the contractor and the surety.<sup>80</sup>

#### *Notice of Nonpayment for a Payment Bond — Effect of the Bill*

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<sup>78</sup> S. 713.18(1), F.S.

<sup>79</sup> 713.18(3), F.S.

<sup>80</sup> Ss. 255.05(2), & 713.23(1)(d), F.S. F.S.

The bill provides that a subcontractor, laborer, or material supplier must provide a notice of nonpayment to the general contractor and **a copy** of the notice of nonpayment to the surety.

#### *Transfer of Liens to a Security — Current Law*

If a lien is recorded against a piece of property, any person who has an interest in the property may have the lien transferred off the property and on to a security by depositing money with the clerk of court or filing a bond executed by a licensed surety insurer with the clerk of court.<sup>81</sup>

The amount of money deposited or the bond must be in an amount that includes:<sup>82</sup>

- The amount of the lien;
- Interest for at least 3 years; and
- \$1,000 or **25%** of the amount of the lien, whichever is greater.

Any person who has an interest in the security or the property that was liened may file an action in the civil court where the security is deposited to enforce a lien or to recover against the security. An action to enforce a transferred lien must be commenced within one year of filing the lien. If a person has filed an action to enforce a lien and the lien is transferred to a security than the person must file an action to recover against the lien within one year of the transfer.<sup>83</sup>

Contractors can transfer liens filed by one of their subcontractors, laborers, or material suppliers to a security to appease an owner who is worried about their property. Thus allowing a project to keep moving forward, while still providing a remedy.<sup>84</sup>

#### *Transfer of Liens to a Security — Effect of the Bill*

The bill increases the amount needed in order to transfer a lien by providing that the amount deposited or the amount of the bond must include \$1,000 or **35%** of the amount of the lien, whichever is greater.

The bill provides that a lien may also be transferred to a payment bond obtained by a subcontractor as long as:

- The lien is filed by a person working under the subcontractor;
- The lien is not filed by the subcontractor or the contractor; and
- The subcontractor obtained the payment bond at the time of beginning work.

Any provision in the subcontractor's payment bond is unenforceable if it restricts:

- The classes of persons who may file a claim against the bond,
- The venue of any proceeding involving the bond,
- Limits or expands the duration of the bond; or
- Includes any additional condition required to enforce a claim for a payment against the bond that is not required by the construction lien law.

#### *Attorney's Fees — Current Law*

The prevailing party in an action to enforce a lien or a claim against a bond is entitled to reasonable attorney's fees.

#### *Attorney's Fees — Effect of the Bill*

The bill provides that a prevailing party in an action to enforce a lien that has been transferred to a security is also entitled to attorney's fees.

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<sup>81</sup> S. 713.24(1), F.S.

<sup>82</sup> *Id.*

<sup>83</sup> S. 713.24, F.S.

<sup>84</sup> Levelset, *Primer on Mechanics Lien Bonds and Bonding a Mechanics Lien*, (Aug. 29, 2019) <https://www.levelset.com/blog/primer-on-mechanic-lien-bonds-and-bonding-off-a-mechanics-lien/> (last visited Dec. 11, 2019).

**B. SECTION DIRECTORY:**

- Section 1. Amends s. 255.05, F.S., relating to the notice of nonpayment and the waiver or release of claim against a payment bond for public projects.
- Section 2. Amends s. 337.18, F.S., relating to the waiver or release of claim against a payment bond for DOT construction projects.
- Section 3. Amends s. 713.01, F.S., relating to contractors, liens against leasehold interests, and final furnishing of specially fabricated materials.
- Section 4. Amends s. 713.07, F.S., relating to the priority of construction liens.
- Section 5. Amends s. 713.09, F.S., relating to a single claim of lien.
- Section 6. Amends s. 713.13, F.S., relating to the notice of commencement.
- Section 7. Amends s. 713.132, F.S., relating to the notice of termination.
- Section 8. Amends s. 713.18, F.S., relating to the service of instruments.
- Section 9. Amends s. 713.20, F.S., relating to the waiver or release of construction liens.
- Section 10. Amends s. 713.23, F.S., relating to the notice of nonpayments.
- Section 11. Amends s. 713.235, F.S., relating to the waiver or release of claim against a payment bonds for private projects.
- Section 12. Amends s. 713.24, F.S., relating to the transfer of liens to security.
- Section 13. Amends s. 713.29, F.S., relating to attorney's fees.
- Section 14. Providing an effective date of July 1, 2020.

**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:**

Unknown.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that construction liens have priority over any debt not recorded against the real property prior to the time the lien attaches, including any debt that relates back to a debt recorded before the construction lien is recorded pursuant to the operation of "any common law doctrine or remedy." It is not clear exactly what "pursuant to the operation of any common law doctrine or remedy" means or how many common law doctrines or remedies exist. Thus, the effect of this provision is unknown.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 11, 2019, the Business & Professions Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Provides that a subcontractor may not be required to sign a waiver or release of lien that is different from the form provided in statute in exchange for payment;
- Prohibits any provisions in a waiver or release of lien that are not related to the waiver or release unless the subcontractor has agreed to those provisions in their initial contract.
- Provides that the statutory requirements for waivers of right to claim against a bond for public construction projects also apply to DOT construction projects.
- Provides that licensed building and general contractors who provide construction management services may record a construction lien.
- Provides that construction liens may be filed against a lease when a construction project is for a private entity leasing public property.
- Provides that a person may file one claim of lien for multiple contracts with the same owner.
- Removes the use of the term "owner of record" from the notice of commencement thereby maintaining current law.
- Provides that an owner may not record a notice of termination until each person who worked on the property has been paid.
- Provides that an owner must provide a copy of the notice of termination to a person who timely serves a notice to owner after the notice of termination has been recorded.
- Allows a lien to be transferred to a payment bond obtained by a subcontractor if the person who filed the lien is working for the subcontractor.
- Increases the amount needed to obtain a bond in order to transfer a lien to the bond.
- Provides that a prevailing party is entitled to attorney's fees in actions to enforce liens that have been transferred to bonds.

