

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 473 Construction Liens and Bonds

SPONSOR(S): Civil Justice & Property Rights Subcommittee, Toledo and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 622

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	16 Y, 1 N, As CS	Mawn	Jones
2) Regulatory Reform Subcommittee	17 Y, 0 N	Brackett	Anstead
3) Judiciary Committee			

SUMMARY ANALYSIS

A 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 in certain situations as long as they follow certain procedures set forth in ch. 713, F.S., Florida's Construction Lien Law.

CS/HB 473:

- Modifies the notice of commencement and notice of nonpayment forms.
- Prohibits anyone from requiring a person to sign a waiver or release of lien or a waiver of right to claim against a payment bond that is different from the statutory form in exchange for payment unless the person is required to do so under a direct contract he or she signed.
- Provides that any provision in a waiver or release of lien or in a waiver of right to claim against a payment bond that is not related to the waiver is unenforceable unless the party signing the waiver agreed to such terms under a direct contract.
- Authorizes construction liens to be placed on private leasehold interests on public property.
- Allows general or building contractors providing construction or program management services to claim construction liens for such services.
- Authorizes a lienor to record one claim of lien for services or materials provided under multiple direct contracts under specified conditions.
- Requires an owner to serve a notice of termination on anyone not in privity with the owner who timely served a notice to owner after the notice of termination was recorded.
- Changes when a notice of termination must be recorded and served, and when such notice is effective.
- Modifies service requirements for various notices and other documents required or authorized by the construction lien law.
- Authorizes a subcontractor, laborer, or material supplier intending to make a claim against a payment bond to serve the surety with a copy of the notice of nonpayment, instead of an original document.
- Specifies that the methods for discharging a lien may also be used to release a lien, in whole or in part.
- Modifies the requirements for recording a satisfaction of lien with the clerk's office.
- Entitles the prevailing party in an action to enforce a lien transferred to a security to recover reasonable attorney fees and costs.

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

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida law ensures that people working on construction projects are paid 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 lien¹ on the property, provided the person complies with statutory procedures.² These procedures require sending various written notices, demands, and other instruments to the homeowner, contractor, subcontractor, lender, and building officials, including a:

- Notice of Commencement;³
- Notice to Owner;⁴
- Claim of Lien;⁵
- Notice of Termination;⁶
- Waiver or Release of Lien;⁷
- Notice of Contest of Lien;⁸
- Contractor's Final Payment Affidavit;⁹ and
- Demands of Written Statement of Account.¹⁰

Notice of Commencement

Before construction begins, a property owner or the owner's authorized agent must generally file a notice of commencement with the clerk of court in the county where the property is located.¹¹ The notice of commencement must also be posted at the construction site and filed with the building department before the first inspection.¹² 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.¹³

Current law provides a statutory form for the notice of commencement, which notice must be substantially similar to the form and contain information describing:

- The real property on which the improvement will be located;
- The improvement;
- The name and address of the owner and contractor;
- Information relating to a surety bond,¹⁴ if a bond applies;
- Contact information for the project's lender;
- Contact information designated by the owner, upon whom notices may be served;

¹ A lien is a claim against property that evidences a debt, obligation, or duty. Fla. Jur. 2d Liens § 37:1.

² Ch. 713, F.S.

³ S. 713.13, F.S.

⁴ S. 713.06(2), F.S.

⁵ S. 713.08, F.S.

⁶ S. 713.132, F.S.

⁷ S. 713.20, F.S.

⁸ S. 713.22(2), F.S.

⁹ S. 713.06(3), F.S.

¹⁰ S. 713.16, F.S.

¹¹ S. 713.13(1)(a), F.S.

¹² *Id.*; S. 713.135(1)(d), F.S.

¹³ *Stocking Building Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So. 3d 313, 319 (Fla 3d 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 (last visited Mar. 1, 2021); Fred Dudley, William A. Buzzett, & Deborah Kaveney Kearney, *Construction Lien Law Reform: The Equilibrium of Change*, 18 Fla. St. U. L. Rev., 278 (1991).

¹⁴ A surety bond is a promise to be liable for another's debt, default, or failure. It is a three-party contract by which one party (the surety) guarantees the performance or obligations of a second party (the principal) to a third party (the obligee). National Association of Security Bond Providers, *What are Surety Bonds*, [https://www.nasbp.org/getabond/about-surety#:~:text=A%20surety%20bond%20is%20a,third%20party%20\(the%20obligee\)](https://www.nasbp.org/getabond/about-surety#:~:text=A%20surety%20bond%20is%20a,third%20party%20(the%20obligee)) (last visited Mar. 1, 2021).

- The notice's expiration date; and
- A warning in uppercase type that the notice must be recorded, and that payments made after the notice expires could be improper and lead to the owner paying twice.¹⁵

The notice of commencement must also include:

- 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 titleholder¹⁶ (if different from the owner); and
- Any person designated by the owner to receive a claim of lien.¹⁷

Payment Bond

A payment bond is a type of surety bond that guarantees a contractor will pay all subcontractors, laborers, and material suppliers for their work.¹⁸ It forms a three-part contract between the owner, the contractor, and the surety to ensure that liens are not filed on the property, because the surety guarantees that subcontractors, laborers, and material suppliers will be paid for their work or materials. Current law requires contractors to obtain a payment bond for public projects over \$100,000.¹⁹

Notice to Owner

To secure the right to claim a construction lien, a person working on a construction project who is not in direct contract ("privity") with the owner (such as a subcontractor or a material supplier) must take several additional steps, including serving a notice to owner²⁰ in the statutory form provided. The notice must include the person's name and address and the nature of the services or materials furnished to the owner's property.²¹ The notice informs the owner that someone with whom he or she is not in privity is providing services or materials on the property and that such person expects the owner to ensure he or she is paid.²² The notice to owner must be served no later than 45 days after the person begins furnishing labor, services, or materials.²³

Waiver or Release of Lien

Once the owner receives a notice to owner, he or she must obtain a waiver or release of lien from the person who sent the notice before paying the contractor unless a payment bond applies. Otherwise, a payment to the contractor may constitute an improper payment and the owner will be liable to the person who sent the notice if the contractor does not pay him or her.²⁴ A waiver or release of lien can be a partial waiver or a final waiver for all of the person's services or materials.²⁵ A person may not waive or release his or her right to file a lien before doing work or providing materials, but a person may waive or release the right to file a lien before receiving payment for his or her services or materials.²⁶

Current law provides a statutory form for a waiver or release of lien but does not require that the waiver or release of lien be in such form.²⁷ Current law also prohibits an owner from requiring a person to sign a waiver or release of lien that is substantially different from the form but does not prohibit the inclusion

¹⁵ S. 713.13(1)(a), F.S.

¹⁶ Fee simple title is 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).

¹⁷ S. 713.13(1)(d), F.S.

¹⁸ S. 713.23, F.S.

¹⁹ S. 255.05(1)(d), F.S.

²⁰ A notice to owner is unnecessary when a payment bond applies. S. 713.06(2), F.S.

²¹ S. 713.06(2)(a), F.S.

²² *Stocking Building Supply*, 76 So. 3d at 317.

²³ *Id.*

²⁴ *Id.*; S. 713.06, F.S.

²⁵ S. 713.20, F.S.

²⁶ *Id.*

²⁷ *Id.*

of additional provisions.²⁸ Failure to carefully inspect a waiver or release of lien before signing it may result in inadvertently waiving or releasing all claims, damages, losses, or expenses.²⁹

Right to Claim Against a Payment Bond

Before paying a subcontractor, laborer, or material supplier, a contractor may request that such person provide a waiver of right to claim against the payment bond. A waiver of right to claim against a payment bond serves as a receipt acknowledging payment for services performed or materials provided and waives the ability to seek payment from the surety.³⁰

Current law provides a statutory form for a waiver of right to claim against a payment bond and prohibits a contractor from requiring a person to sign a waiver that is substantially different from the form.³¹ However, parties are not required to use the statutory waiver form, and a waiver of right to claim against a payment bond may include additional provisions.³² Failure to carefully inspect the document before signing may result in waiving or releasing all claims, damages, losses, or expenses.³³

Extent of Lien

A construction lien extends to the right, title, and interest of the person who contracts for the improvement to the extent such right, title, and interest exists at the improvement's commencement or is acquired in the real property.³⁴ However, when a lessee makes an improvement under an agreement between the lessee and his or her lessor, the lien also extends to the lessor's interest.³⁵ If a lease expressly provides that the lessor's interest will not be subject to the construction liens relating to improvements made by the lessee, the lessee must notify the contractor making any such improvements of the provision, and the knowing and willful failure of the lessee to provide such notice renders the contract voidable at the contractor's option.³⁶

A lessor's interest is not subject to construction liens for improvements made by a lessee when:

- The lease is recorded in the official records of the county where the property is located before the recording of a notice of commencement for improvements to the property and the lease's terms expressly prohibit such liability;
- The lease's terms expressly prohibit such liability, and a notice advising that leases for the rental of premises on a property prohibit such liability has been recorded in the official records of the county in which the property is located before the recording of a notice of commencement for improvements to the premises and the notice includes specified information; or
- The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park.³⁷

Claim of Lien

To record a construction lien on real property, a person must record a claim of lien with the clerk of court in the county where the property is located and serve the owner with the claim of lien within 15

²⁸ *Id.*

²⁹ Alex Benarroche, *Florida's "Non-Required" Statutory Lien Waivers Can Lead to Confusion*, <https://www.levelset.com/blog/florida-statutory-lien-waivers-lead-to-confusion/> (last visited Mar. 1, 2021); Craig Distel, *Understanding waivers and releases for Florida construction contractors*, <https://mcdonaldhopkins.com/Insights/Blog/Industry-Insights/2018/12/20/Understanding-waivers-and-releases-for-Florida-construction-contractors> (last visited Mar. 1, 2021).

³⁰ Ss. 255.05(2), and 713.235, F.S.

³¹ *Id.*

³² *Id.*

³³ See Benarroche, *supra* note 27.

³⁴ S. 713.10(1), F.S.

³⁵ *Id.*

³⁶ S. 713.10(2)(a), F.S.

³⁷ S. 713.10(2)(b), F.S.

days of recording the lien.³⁸ If a claim of lien is not recorded, the lien is void to the extent that the failure to record the claim prejudices any person entitled to rely on service of the claim of lien.³⁹

A person may file a claim of lien at any time during the progress of the work but may not file a claim of lien later than 90 days after the person's final furnishing of labor or materials.⁴⁰ A person may record a single claim of lien for multiple services or materials provided to different properties as long as such services or materials were provided under the same contract, the person is in privity with the owner, and the properties have the same owner.⁴¹ However, 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.⁴²

Licensed General and Building Contractors

Licensed construction contractors are either certified by or registered with the Construction Industry Licensing Board ("CILB") within the Department of Business and Professional Regulation ("DBPR"). "Certified contractors" are persons who pass the state competency examination and obtain a certificate of competency issued by DBPR.⁴³

Certified contractors can contract in any jurisdiction in the state without fulfilling the competency requirements of the local jurisdiction.⁴⁴ "Registered contractors" are persons who have taken and passed a competency examination administered by a local government and who have then registered with DBPR.⁴⁵ Registered contractors can perform contracting only in the local jurisdiction where their license is issued.⁴⁶

Contractors, whether certified or registered, may be general contractors or building contractors. A licensed "general contractor" is a person who may contract for and perform any type of construction service unless the work must be subcontracted to a licensed subcontractor.⁴⁷ A licensed "building contractor" is a person who may contract for and perform construction services for commercial and residential buildings not exceeding three stories in height, or for any size building if the construction does not affect the building's structural frame, unless such work must be subcontracted to a licensed subcontractor.⁴⁸

Construction and Program Management Services

A construction manager is responsible for the overall management of a construction project.⁴⁹ This includes 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.⁵⁰ A program manager is "responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services."⁵¹ DBPR does not regulate construction or program managers, and such managers are generally not required to be licensed contractors, engineers, or architects if hired by a local government or private entity. However, if a construction or program manager is performing any activity that otherwise requires a professional license, he or she must have that specific license or employ someone with such license.⁵²

³⁸ S. 713.08, F.S.

³⁹ S. 713.08(4), F.S.

⁴⁰ S. 713.08(5), F.S.

⁴¹ S. 713.09, F.S.

⁴² *Id.*; see also *Lee v. All Florida Construction Co.*, 662 So. 2d 365, 366-67 (Fla. 5th DCA 1995).

⁴³ S. 489.105(8), F.S.

⁴⁴ *Id.*

⁴⁵ S. 489.105(10), F.S.

⁴⁶ S. 489.103, F.S.

⁴⁷ Ss. 489.105(3), and 489.113, F.S.

⁴⁸ *Id.*

⁴⁹ The Florida Bar, *Florida Construction Law Practice*, Chapter 4: Rights and Liabilities of Construction Managers (9th ed. 2018).

⁵⁰ *Id.*

⁵¹ S. 255.103(3), F.S.

⁵² *Id.*

Current law allows local governments to hire construction managers and program management entities for construction projects. 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.”⁵³ The program management entity is “responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.”⁵⁴

Construction managers and program management entities hired by local governments are not required to be a licensed contractor, engineer, or architect. However, if such persons or entities are not licensed, they must hire a licensed professional to perform any job that does require a license.⁵⁵

Current law also 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.”⁵⁶

Though 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,⁵⁷ it is unclear if construction or program managers may do so because they do not necessarily provide labor, services, or materials that improves real property.⁵⁸

Further, the lien law provides that a contractor may file a lien for any money owed to him or her for labor, services, or materials⁵⁹ but defines a “contractor” as any person other than a materialman or laborer who contracts with an owner to improve the owner’s real property.⁶⁰ The definition also includes a licensed architect or engineer who improve real property through a design-build contract⁶¹ but does not include construction or program manager services.⁶² Some courts have determined that construction or program managers may not file construction liens.⁶³

Construction Liens for Private Leasehold Interests in Public Property

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.⁶⁴ However, if a tenant contracts for real property improvements, the contractor is only able to file a lien against the tenant’s leasehold interest. A contractor cannot file a lien against the real property, unless the tenant contracted for an improvement with the owner’s agreement.⁶⁵

Construction liens may not be filed against public property, but construction lien law is silent as to whether such liens may be filed against the private leasehold interests of a tenant on public property.⁶⁶

⁵³ S. 255.103(2), F.S.

⁵⁴ S. 255.103(3), F.S.

⁵⁵ *Id.*

⁵⁶ S. 255.32(1), F.S.

⁵⁷ *See, generally*, ch. 713, F.S.

⁵⁸ Scott Wolfe, Jr., *Can Construction Managers File Mechanics Liens?*, <https://www.levelset.com/blog/can-construction-managers-file-mechanics-liens/> (last visited Mar. 1, 2021).

⁵⁹ S. 713.05, F.S.

⁶⁰ S. 713.01(8), F.S.

⁶¹ S. 713.01(8), F.S.

⁶² *Id.*

⁶³ *See, e.g., 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.”); *see also, e.g., 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 also* The Florida Bar *supra* note 47.

⁶⁴ Adam B. Edgecombe, *How do construction liens impact a commercial landlord in Florida?* <https://www.jimersonfirm.com/blog/2019/05/how-construction-liens-impact-commercial-landlord/> (last visited Mar. 1, 2021).

⁶⁵ S. 713.10, F.S.

⁶⁶ *See generally* ch. 713, F.S.

According to industry experts, construction liens are sometimes filed against private leasehold interests on public property, such as when airlines and car rental agencies lease property within public airports.⁶⁷

Notice of Termination

An owner may terminate a notice of commencement before it expires by recording a notice of termination that includes:

- All the information in the notice of commencement;
- The notice of commencement's reference numbers from the official records of the clerk of court and effective date;
- The date 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 the contractor and every person in privity with the owner who timely served a notice to owner.⁶⁸

An owner may record a notice of termination after:

- Completion of the construction project; or
- Work stops on the project and every person who worked on the property has been paid.⁶⁹

If the owner serves a copy of the notice of termination on every person in privity with the owner and who served a notice to owner before the recording of the notice of termination, a notice of commencement terminates 30 days after the notice of termination is recorded or on the termination date stated in the notice, whichever is later.⁷⁰

Manner of Serving Documents

Documents authorized or required under the construction lien law, and notices to contractors for payment bonds for public construction projects, must be served by:

- Actual delivery to the person being served; if a partnership, to one partner; if a corporation, to an officer, director, managing agent, or business agent; or if a limited liability company, to a member or manager.
- Common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, to the person being served with postage or shipping paid by the sender and with evidence of delivery; or
- Posting on the construction site if service cannot be performed by the other two methods.⁷¹

Service of a document by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the document is mailed, if it is:

- Sent to the last address shown in the notice of commencement or, in the absence of such 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.⁷²

However, for construction projects where there is a payment bond, a notice to contractor is effective on the date of mailing if:

- The notice is mailed by registered, Global Express Guaranteed, or certified mail, with postage prepaid, to the person to be served at the last address shown in the notice of commencement,

⁶⁷ H. Wesley, *Property Interests Subject to Construction Liens in Florida*, <https://www.lorman.com/resources/property-interests-subject-to-construction-liens-in-florida-17322> (last visited Mar. 1, 2021); 8 Fla. Prac., Constr. Law Manual § 8.3 (2019-2020 ed.).

⁶⁸ S. 713.132(1), F.S.

⁶⁹ S. 713.132(3), F.S.

⁷⁰ S. 713.132(4), F.S.

⁷¹ S. 713.18(1), F.S.

⁷² S. 713.18(3), F.S.

the last address shown in the building permit application, or the last known address of the person being served;

- The notice is mailed within 40 days after the date the person first furnishes labor, services, or materials; and
- The person who served the notice maintains a registered or certified mail log that shows:
 - The mail number issued by the United States Postal Service (“USPS”), the name and address of the person served, and the date stamp of the USPS confirming the date of mailing; or
 - Maintains electronic tracking records generated by the USPS containing the tracking number, the name and address of the person served, and verification of the date of receipt by the USPS.⁷³

Current law also provides that service of a construction lien notice on one property owner or on one partner of a partnership that owns a property is deemed to provide notice to all owners or partners.⁷⁴

Notice to Contractor and Notice of Nonpayment

Under a payment bond, if the general contractor fails to pay a subcontractor, laborer, or material supplier, such person may seek payment directly from the surety. In order to receive protection under a payment bond for a public or private project, a subcontractor or material supplier⁷⁵ not in privity with the contractor must, within a certain time period⁷⁶ after commencing the furnishing of labor, services, or materials for a construction project, serve the contractor with a written notice of intent to seek protection under the bond.⁷⁷ A subcontractor, laborer, or material supplier not in privity with the contractor and who has not received payment for furnishing labor, services, or materials must also serve a written notice of nonpayment to the contractor and the surety.⁷⁸

Online Notarization

Many notices established under the construction lien law must be signed in the presence of a notary.⁷⁹ The notary authenticates signatures and administers oaths on documents, thereby preventing fraud, and also determines whether the person signing the document is who he or she claims to be.⁸⁰

In 2019, the Legislature authorized the use of online notaries.⁸¹ An online notary may perform an online notarization, regardless of the physical location of the principal at the time of the notarial act, if the notary:

- Is physically located in Florida; and
- Confirms that the principal desires for the notarial act to be performed by a Florida notary public under Florida law.⁸²

However, the statutorily-created construction lien law notice and waiver forms have not been updated to acknowledge that an online notary may be used by the person signing the notice or waiver.⁸³

Discharge of Liens

A construction lien may be discharged by:

⁷³ S. 713.18(2), F.S.

⁷⁴ S. 713.18, F.S.

⁷⁵ Laborers are exempt from this requirement. Ss. 255.05(2)(a)2., 337.18(1)(c), and 713.23(1)(c), F.S.

⁷⁶ Persons furnishing labor, services, or material for construction on public property or under service or maintenance contracts with the Florida Department of Transportation have 90 days to furnish the notice to contractor, while all other persons have 45 days. *Id.*

⁷⁷ *Id.*

⁷⁸ Ss. 255.05(2)(a)2. and 713.23(1)(d), F.S.

⁷⁹ Ss. 255.05(2), 713.13(1)(d), and 713.23(d), F.S.

⁸⁰ Florida Notary Association, Inc., *Resources – How to Become a Notary*, <https://www.flnotary.com/requirements/> (last visited Mar. 1, 2021).

⁸¹ Ch. 2019-71, Laws of Fla.

⁸² S. 117.265(3), F.S.

⁸³ *See* ch. 713, F.S.

- Entering satisfaction of the lien on the margin of the lien document recorded with the clerk's office, if allowed by law;
- Filing satisfaction with the clerk's office;
- Failing to begin an action to enforce the lien within the statutorily-prescribed time frame;
- The circuit court of the county where the property is located issuing an order; or
- Recording in the clerk's office a court judgment or decree showing the action's final determination.⁸⁴

Attorney's Fees and Costs

The prevailing party in an action to enforce a lien or a claim against a payment bond is entitled to recover his or her reasonable attorney fees and costs.⁸⁵

Effect of Proposed Changes

Notice of Commencement

CS/HB 473 modifies the statutorily-provided notice of commencement form to require both owner information and lessee information, if applicable, and to reflect that the person signing the notice may use an online notary.

Waiver or Release of Lien and Waiver of Right to Claim Against a Payment Bond

The bill provides that a person may not be required to sign a waiver or release of lien or a waiver of right to claim against a payment bond that is different from the statutory forms in exchange for payment, or to induce payment, unless the person signing the waiver entered into a direct contract requiring him or her to do so.⁸⁶ The bill also provides that any provision in a waiver or release of lien or a waiver of right to claim against a payment bond that is unrelated to the waiver is unenforceable, unless the person signing the waiver agreed to such terms in a direct contract.

Construction Liens for Private Leasehold Interests in Public Property

The bill amends the definition of "real property" to include private leasehold interests on public property, thereby allowing a person to file a construction lien against such an interest.

Licensed General and Building Contractors and Construction Management Services

The bill amends the construction lien law's definition of "contractor" to include any licensed general⁸⁷ or building⁸⁸ contractor who provides construction or program management services. This gives licensed general and building contractors who provide such services the ability to claim construction liens for their services.

The bill provides that construction management services includes responsibility for scheduling and coordination in both preconstruction and construction phases and for the successful, timely, and economical completion of the construction project. The bill also provides that program management services includes responsibility for schedule control, cost control, and coordination in providing or procuring planning, design, and construction.

Claim of Lien

⁸⁴ S. 713.21, F.S.

⁸⁵ S. 713.29, F.S.

⁸⁶ This means that the party agreed to the terms firsthand.

⁸⁷ "Licensed general contractor" under the bill has the same meaning as in s. 489.105(3)(a), F.S.

⁸⁸ "Licensed building contractor" under the bill has the same meaning as in s. 489.105(3)(b), F.S.

The bill authorizes a person to record a single claim of lien for services or materials provided under multiple contracts and for 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.

Notice of Termination

The bill:

- Requires an owner to serve a copy of the notice of termination on any person who timely serves a notice to owner after the notice of termination is recorded and to state in the notice that he or she will do so.
- Deletes a provision allowing an owner to record a notice of termination after construction completion or when construction ceases before completion, requiring instead that such notice be recorded only after all lienors have been paid in full or pro rata as authorized by law.
- Clarifies that the notice of termination must include the date affixed to the notice of commencement by the clerk of court.

Finally, the bill requires that a notice of termination be served before recording on each lienor in privity with the owner and on each person who timely served a notice to owner before the recording of the notice of termination. The notice must be recorded in the official records of the county in which the improvement is located and, if properly served, the notice terminates the notice of commencement 30 days after the notice of termination is recorded. However, a notice of commencement is not terminated as to any lienor not in privity with the owner who timely services a notice to owner after the notice of termination is recorded until 30 days after such person is served with the notice of termination.

Manner of Serving Documents

The bill:

- Clarifies that “actual delivery” of a notice means “hand delivery.”
- Clarifies that service of a notice sent through the mail is effective upon mailing or shipping.

Further, the bill deletes provisions allowing service to be made to an address contained in the building permit application under specified conditions and modifies the remaining service provisions so that service must, unless otherwise specifically provided by law, be made to the:

- Address contained in the notice of commencement or any amendment thereto; or
- In the absence of a properly indexed notice of commencement that contains the information specified in s. 713.13(1)(b), F.S., to the last known address of the person to be served.

Notice of Nonpayment

The bill provides that a subcontractor, laborer, or material supplier must still provide a notice of nonpayment to the general contractor to receive protection under a payment bond but requires such person to only provide a copy of the notice to the surety. The bill also modifies the statutory notice of nonpayment form to reflect that the person signing the notice may use an online notary.

Discharge of Lien

The bill provides that the methods specified for discharging a lien may also be used to release a lien, in whole or in part, and makes conforming changes. The bill also specifies that, if a satisfaction or release is filed with the clerk’s office, the satisfaction or release must include the lienor’s notarized signature and set forth the official reference numbers and recording date associated with the subject lien.

Attorney Fees and Costs

The bill provides that a prevailing party in an action to enforce a lien transferred to a security may recover his or her reasonable attorney fees and costs.

The bill provides an effective date of July 1, 2021.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 255.05, F.S., relating to bond of contractor constructing public buildings; form; action by claimants.
- Section 2:** Amends s. 337.18, F.S., relating to surety bonds for construction or maintenance contracts; requirement with respect to contract award; bond requirements; defaults; damage assessments.
- Section 3:** Amends s. 713.01, F.S., relating to definitions.
- Section 4:** Amends s. 713.09, F.S., relating to single claim of lien.
- Section 5:** Amends s. 713.10, F.S. relating to extent of lien.
- Section 6:** Amends s. 713.13, F.S., relating to notice of commencement.
- Section 7:** Amends s. 713.132, F.S., relating to notice of termination.
- Section 8:** Amends s. 713.18, F.S., relating to manner of serving notices and other instruments.
- Section 9:** Amends s. 713.20, F.S., relating to waiver or release of lien.
- Section 10:** Amends s. 713.21, F.S., relating to discharge of lien.
- Section 11:** Amends s. 713.23, F.S., relating to payment bond.
- Section 12:** Amends s. 713.235, F.S., relating to waivers of right to claim against payment bond; forms.
- Section 13:** Amends s. 713.29, F.S., relating to attorney's fees.
- Section 14:** Provides an effective date of July 1, 2021.

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:

The bill may cause more subcontractors, laborers, and materialmen to receive compensation for their work, which may have a positive indeterminate impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2021, the Civil Justice and Property Rights Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Restored to current law the provision:
 - Specifying when an owner's payment under a construction contract constitutes an improper payment, so that such payments are only improper if made after the notice of commencement expires.
 - Requiring service to be on a partner if a partnership; on an officer, director, managing agent, or business agent if a corporation; or on a member or manager if a limited liability company.
- Removed the option to serve documents required under the construction lien law to either the last address shown in the notice of commencement or to the last known address of the person to be served, providing that documents may only be served to the last known address in the absence of a properly indexed notice of commencement.

This analysis is drafted to the committee substitute as passed by the Civil Justice and Property Rights Subcommittee.