

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: CS/SB 1272

INTRODUCER: Banking and Insurance Committee and Senator Bradley

SUBJECT: Liens and Bonds

DATE: February 3, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schrader	Knudson	BI	Fav/CS
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

- SB 1272 revises several provisions of the Construction Lien Law, which is codified in part I of chapter 713, F.S. In general, the bill:
- Deletes a provision allowing alternatives to the posting of a payment bond for contractors working on a public project.
- Clarifies that a lienor giving a required notice of nonpayment to the surety shall do so with a copy of the notice.
- Require that a notice of nonpayment may not be served earlier than 30 days after the first furnishing of labor for a public project or a construction or maintenance project with the Department of Transportation;
- Revises the definition of “final furnishing” as it relates to specially fabricated materials and creates a definition of “specially fabricated materials.”
- Revises the timeframes during which a notice to contractor may be served for public projects.
- Revises the definition of “clerk’s office.”
- Revises the term contractor under the Construction Lien Law to include licensed general contractors or building contractors under certain conditions.
- Creates a definition of finance charge.
- Creates provisions for the computation of time under the Construction Lien Law for recording of documents and filing of actions.

- Revises the submissions a building permit applicant must make in regards to notices of commitment and limits the civil liability of permit issuing authorities.
- Revises provisions relating to notices of termination.
- Revises service of documents requirements.
- Specifies that a lien can be discharged in whole or in part and revises the requirements for discharge due to satisfaction or release of the lien.
- Specifies that a contest of lien must be recorded to be effective.
- Revises provisions relating to attorney fees.
- Allows for certain required forms to be notarized online.
- Modifies the minimum bond amount necessary to transfer a lien to a security from \$1,000 to \$5,000. The amendment also creates a requirement that said bond be recorded with the certificate of such.
- Deletes an obsolete provision.
- Makes technical and conforming changes.
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The bill takes effect July 1, 2022.

II. Present Situation:

In a construction project, the owner of the property to be improved has an interest in ensuring that the contractor performs the construction work in the time and manner described in the construction contract. Large-scale construction projects are usually headed by a general contractor who is responsible for the day-to-day running of the project as a whole. They will generally supervise, coordinate, and engage subcontractors to complete the project.¹ Under that, there may be sub-subcontractors, laborers, and materialmen, which, as with the general contractor and subcontractors, have an interest in receiving payment for their work. Unfortunately, given the complexity of many construction projects, money moving from the owner (or bank financing the construction project), downstream to the general contractor, and then to these other groups, does not always make it to each person that performed work on the project.² To address this issue, Florida's Construction Lien Law allows individuals to have a lien or prospective lien on the property which they have improved. Persons having a lien on a property and are known as lienors. Construction liens are part of a larger subset of security interests encumbering property as a way to recover a debt.³ Mechanisms that address the interests of property owners and lienors relating to construction are set forth in the Construction Lien Law, codified in part I of chapter 713, F.S., for private construction contracts, s. 255.05, F.S., for public construction contracts, and s. 337.18, F.S., for construction or maintenance contracts with the Department of Transportation.

¹ The Law Dictionary, *What is General Contractor*, <https://thelawdictionary.org/general-contractor/> (last visited Jan. 28, 2022).

² Klingen, Leonard, *Florida's Unwieldy by Effective Construction Lien Law*, 93(1) FLORIDA BAR JOURNAL 26 (Jan/Feb 2019), available at <https://www.floridabar.org/the-florida-bar-journal/floridas-unwieldy-but-effective-construction-lien-law/#:~:text=A%20glance%20at%20any%20urban,construction%20is%20still%20big%20business.&text=Construction%20liens%20are%20a%20subset,to%20those%20claiming%20a%20debt.>

³ Klingen, *supra* note 2.

Privity, Notice, and the Construction Lien Law

The concept of “privity” is used throughout ch. 713, F.S.; however, the term is not defined for the chapter. At common law, privity is established when there is a substantive legal relationship between parties.⁴ An important issue in construction law is privity arising from a direct contractual relationship. As stated, it is often the case that many parties working on a construction project are not in a direct contractual relationship with the owner, but instead have a contract with a general contractor or a subcontractor under the general contractor. Such persons, at common law, would not be in privity with the owner, and therefore could not seek payment for their work from the owner. Florida’s lien law revises this concept to ensure payment for all of those that perform work on a construction project, regardless of whether they have direct contractual relationship with the owner. Florida’s courts have described this modification of privity under the lien law thusly:

In order to create privity under the lien statute, there must be, in addition to knowledge of the owner that a certain person is furnishing labor or material for the contractor to be used in the execution of his contract, an express or implied assumption by the owner of a contractual obligation to pay for the labor or materials furnished ... While such privity may be made out by circumstantial, as well as direct and positive evidence, the ultimate conclusion must be made to appear that the owner voluntarily put himself in such situation toward the materialman or laborer as to make him liable on an implied agreement to pay for the labor or material furnished, not as a secondary, but as a primary debtor on the account.⁵

To this end, Florida’s Construction Lien Law requires notice. Otherwise, a lienor’s identity, work, and charges for services might be unknown to the owner or contractor unless the lienor complies with the notice requirements of the Construction Lien Laws.⁶ Further, compliance with the notice requirements by the various deadlines is a prerequisite to enforcing a lien or pursuing a claim against a payment bond.

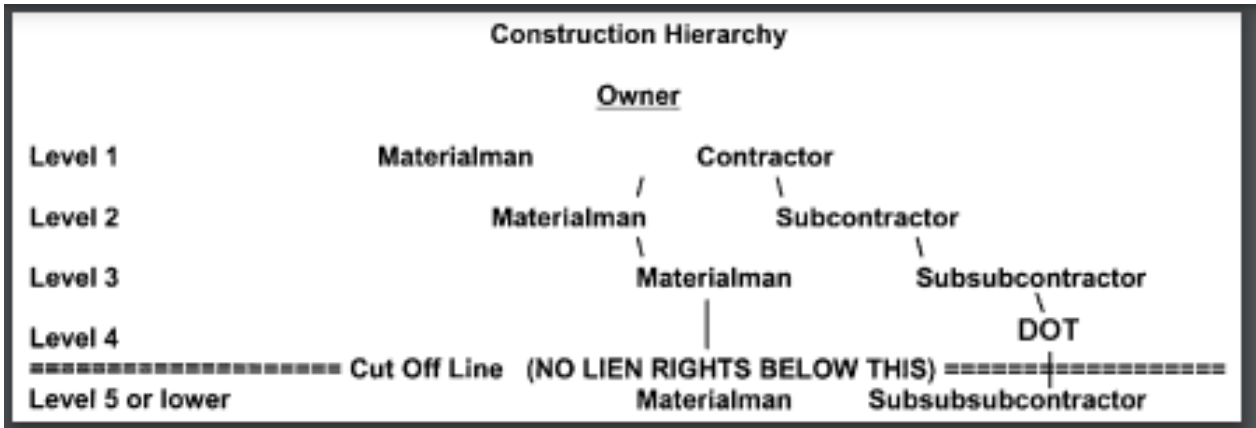
The type of work done, or the class of license held, is immaterial to whether one is a lienor. However, unlicensed persons working on a construction project, where a license is required for such work, are not lienors. In addition, material suppliers supplying to another material supplier and sub-sub-subcontractors are also not lienors. The distinction between contractors, subcontractors, and sub-subcontractors is determined by how far away from the owner these

⁴ Cornell Law School: Legal Information Institute, Privity, available at <https://www.law.cornell.edu/wex/privity#:~:text=When%20two%20or%20more%20parties,result%20of%20privity%20of%20contract> (last visited Jan 29, 2022).

⁵ Section 8:9. Lienors, 8 Fla. Prac., Constr. Law Manual § 8:9 (2021-2022 ed.), citing *Harper Lumber & Mfg. Co. v. Teate*, 98 Fla. 1055, 125 So. 21 (1929); *Pinewood Plumbing Supply, Inc. v. Centennial Const., Inc.*, 489 So. 2d 216 (Fla. 3d DCA 1986); *Tompkins Land Co., Inc. v. Edge*, 341 So. 2d 206 (Fla. 4th DCA 1976); *Warshaw v. Pym*, 266 So. 2d 355 (Fla. 3d DCA 1972); *First Nat. Bank v. Southern Lumber & Supply Co.*, 106 Fla. 821, 145 So. 594 (1932); *Brewer v. Lighting Unlimited of Florida, Inc.*, 603 So. 2d 52 (Fla. 5th DCA 1992); and *Adee v. Great Southeast Carpet Gallery, Inc.*, 562 So. 2d 409 (Fla. 5th DCA 1990).

⁶ See s. 713.06, F.S., which specifies the required notice to the owner regarding liens for persons not in privity with said owner.

persons are in the chain of contract.⁷ The chart below demonstrates, who would, and who would not, lien rights based on this chain of contract:



Source: Section 8:9. Lienors, 8 Fla. Prac., Constr. Law Manual § 8:9 (2021-2022 ed.).

Building Permit Warning to Owner

When a property owner obtains a building permit for an improvement, the permit includes a large, capitalized, boldface warning about the Construction Lien Law and how a person’s failure to comply with the law may result in the person paying twice for the same improvement. The warning states:

WARNING TO OWNER: YOUR FAILURE TO RECORD A NOTICE OF COMMENCEMENT MAY RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE RECORDING YOUR NOTICE OF COMMENCEMENT⁸

A person may pay twice for an improvement if a payment is an “improper payment.” The distinction between a proper and an improper payment may be described as follows:

If an owner fulfills all the duties the [Construction] Lien Law places upon him, his liability for all mechanics’ lien claims cannot exceed the contract price. However, if the owner makes improper payments, then he has failed to comply with the [Construction] Lien Law, and his liability for mechanics’ lien claims may exceed the contract price.⁹

⁷ Fla. Prac., Constr. Law Manual, *Supra* note 5.

⁸ Section 713.135(1)(a), F.S.

⁹ *Tamarac Village, Inc., v. Bates & Daly Co.*, 348 So. 2d 23, 24 (Fla. 4th DCA 1977) (citations omitted).

Notice of Commencement

Before construction begins on a project, a private property owner or the owner's authorized agent must generally file a notice of commencement with the office of the clerk of the circuit court of the county in which the property is located (clerk) and post a certified copy of the notice on the property to be improved.¹⁰ This notice identifies who owns the property,¹¹ the physical location of the property, the name and address of the contractor, a description of the improvement, the name and address of the surety on the payment bond (if such bond exists), name and address of any person making a loan for the improvement, and any person upon whom service to the owner may be made.¹² Lienors use the contact information in the notice of commencement to keep the property owner or lessee informed of their identity, work on the construction project, and need to be paid.

When there is a construction loan on the project, the duty to record the notice is assumed by the lender and the lender must do so prior to disbursing any funds to a contractor. However, the duty to post the certified copy of the notice on the property to be improved remains with the owner in this situation.¹³

A notice of commencement generally has a duration of 1 year after it is recorded.¹⁴ Any construction liens recorded while the notice of commencement is in effect generally attach and take effect on the date that notice of commencement is recorded; in the event that a notice of commencement is not filed, liens attach and take priority as of the time each claim of lien is recorded.¹⁵ Additionally, a payment made by the owner after the notice of commencement expires is considered an improper payment.¹⁶

A building permit applicant must also generally file with the permit issuing authority, before the first inspection, either a certified copy of the recorded notice of commencement or a notarized statement that the notice was filed for recording, along with a copy of said notice. In the absence

¹⁰ Section 713.13, F.S. The notice is not required for certain projects, including:

- An improvement for which the direct contract price is \$2,500 or less.
- Public construction projects since land improved under such projects are not defined as "real property" under s. 713.01, F.S., and public property cannot have a lien placed upon it. However, a recent court decision in the 3rd District Court of Appeal, *James B. Pirtle Constr., Co., Inc. v. Warren Henry Automobiles, Inc.*, 329 So. 3d 205 (Fla. 3d DCA 2021), did clarify that liens on tenant improvements on public property are permissible.
- Direct contracts to repair or replace an existing heating or air-conditioning system in an amount less than \$7,500. Section 713.135(1)(d).

¹¹ Under s. 713.13(1)(a)3., F.S., this would include the name and address of the owner, the owner's interest in the site of the improvement, and the name and address of the fee simple titleholder, if other than such owner. A lessee who contracts for the improvements is an owner as defined under s. 713.01(23) and must be listed as the owner together with a statement that the ownership interest is a leasehold interest. To be an "owner" under the Construction Lien Law, one must own an interest in the property being improved and enter into a contract with a contractor for improving said property. Section 713.01(23), F.S.

¹² Section 713.13, F.S.

¹³ Section 713.13(7), F.S.

¹⁴ Section 713.13(1)(c), F.S.

¹⁵ Section 713.07(2), F.S.

¹⁶ Section 713.13(1)(c), F.S. In addition, *Tamarac Village, Inc., v. Bates & Daly Co.*, 348 So. 2d 23, 24 (Fla. 4th DCA 1977), the appellate court held that a payment made by the property owner to a contractor is an improper payment if the payment is made *before* the notice of commencement is recorded. The decision was based on s. 713.06(3)(a), F.S. (1973), which stated, "The owner shall not pay any money on account of a direct contract prior to recording of the notice provided in §713.13, and any amount so paid shall be held improperly paid." This provision has since been repealed.

of the filing of a certified copy of the recorded notice of commencement, the issuing authority or a private provider performing inspection services may not perform or approve subsequent inspections until the applicant files the appropriate certified copy with the issuing authority.¹⁷

Payment Bonds

One way an owner of a property can reduce their exposure to the Construction Lien Law, is to require their contractor to obtain a payment bond that meets the requirements of s. 713.23, F.S. For a private project, contractors are not obligated to obtain a payment bond; however having such a bond in place, exempts the property owner from other portions of the lien law, excepting construction liens filed by their own contractor.¹⁸ These bonds form a three-part contract between the owner, the contractor, and the surety to ensure that liens are not filed on the property, serving as the security for payment in lieu of the typical right to claim a lien. The payment bond must be furnished in at least the amount of the original contract price before beginning the construction project, and a copy of the bond must be attached to the recorded notice of commencement.¹⁹

Once a proper payment bond is in place, if a lienor (other than the main contractor) places a lien upon the project property, the owner or contractor may take the bond to the clerk who records the notice of bond. This has the legal effect of transferring the lien claim from the property to the payment bond.²⁰ There are, however, two different types of payment bonds—unconditional and conditional. An unconditional payment bond requires the surety to pay unpaid subcontractors, laborers, and material suppliers, regardless of whether the owner paid the contractor for said parties' materials and services. In contrast, a conditional bond, which is a creature of statute under s. 713.245, F.S., requires payment from the surety only where the owner has paid the contractor, but the contractor has not paid the subcontractors, laborers, and materials suppliers underneath them.²¹ If the contractor has not been paid for these parties' portion of the project, these parties can still file a lien against the construction project property.²² Therefore, it is critical for owners with conditional payment bonds to keep close tabs on what each payment they make is for and the status of payments to these parties.²³ These types of bonds are not widely used because of the difficult accounting generally required for the owner to keep track of them.²⁴

Generally, Construction Lien Law does not apply to publicly owned property.²⁵ Given this, Florida has enacted legislation requiring payment and performance bonds to be given by contractors for protection of payment to lower-tier subcontractors, suppliers, and laborers.²⁶

¹⁷ Section 713.135, F.S.

¹⁸ Section 8:5. Owner's duties—With s. 713.23, Fla. Stat. payment bond, 8 Fla. Prac., Constr. Law Manual § 8:5 (2021-2022 ed.).

¹⁹ Section 713.23(1)(a), F.S.

²⁰ Fla. Prac., Constr. Law Manual, *supra* note 18.

²¹ Section 713.245, F.S.

²² *Id.* and § 8:7. Owner's duties—With § 713.245, Fla. Stat. conditional payment bond, 8 Fla. Prac., Constr. Law Manual § 8:7 (2021-2022 ed.).

²³ Owner's duties—With § 713.245, Fla. Stat. conditional payment bond, *supra* note 22.

²⁴ Section 8:57. Conditional payment bond and forms, 8 Fla. Prac., Constr. Law Manual § 8:57 (2021-2022 ed.).

²⁵ See *supra*, note 10.

²⁶ Section 10:19. Public statutory payment/performance bonds—Generally, 8 Fla. Prac., Constr. Law Manual § 10:19 (2021-2022 ed.).

Section 255.05, F.S., requires contractors to obtain a payment and performance bond for public projects over \$100,000 to effectuate this protection. However, in lieu of the payment bond, a contractor working on a public project may file with the state, county, city, or other political authority an alternative form of security in the form of cash, a money order, a certified check, a cashier's check, an irrevocable letter of credit, or a security of a type listed in part II of chapter 625, F.S., dealing with investments. The purpose of these alternatives is to provide the same protection to lower-tier subcontractors, suppliers, and laborers as provided by the payment and performance bond.²⁷

Construction Management Services

The traditional concept of a construction manager is that they participate in the design process regarding cost and constructability, but they do not take on the responsibility of paying contractors, subcontractors, and suppliers as with a traditional contractor setup. However, such a person does, in general, manage the construction process. One of the issues with construction management is that there is no uniformity in its application or setup.²⁸ This has given rise to a question in Construction Lien Law as to whether a construction manager may file a lien similar to a contractor or other party permissible under ch. 713, F.S., such as architects and engineers.²⁹

Licensed General and Building Contractors

Section 489.105, F.S., defines a contractor, in part, as the person who is qualified for, and is only responsible for, the project contracted for and means the person who, for compensation, undertakes to, submits a bid to, or does themselves or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure. The section specifies 17 different types of contractors, including general contractors and building contractors (s. 489.105, (a) and (b), F.S., respectively):

- A general contractor is a contractor whose services are unlimited as to the type of work they may do, who may contract for any activity requiring licensure under part I, ch. 489, F.S., and who may perform any work requiring licensure under this part I, ch. 489, F.S.³⁰
- A building contractor is a contractor whose services are limited to:
 - Construction of commercial buildings and single-dwelling or multiple-dwelling residential buildings, which do not exceed three stories in height, and accessory use structures in connection therewith or a contractor whose services are limited to remodeling, repair; or
 - Improvement of any size building if the services do not affect the structural members of the building.

²⁷ Section 255.05(7), F.S.

²⁸ Section 7:7. Construction manager, 8 Fla. Prac., Constr. Law Manual § 7:7 (2021-2022 ed.)

²⁹ See Scott Wolfe, Jr., *Can Construction Managers File Mechanics Liens?*, <https://www.levelset.com/blog/can-construction-managers-filemechanics-liens/> (last visited Jan. 30, 2022).

³⁰ Subject to certain exceptions specified in s. 489.113, F.S.

Notices of Termination

An owner may terminate the effectiveness of a notice of commencement by recording a notice of termination.³¹ In other words, by recording a notice of termination, a property owner can prevent the improved property from being subject to liens from unknown lienors. The property owner may record the notice of termination after all lienors who have served a notice to owner have been served with the notice of termination and after all lienors have been paid in full or paid their pro rata portion of the contractor's direct contract with the owner.³²

The notice of termination may be effective as early as 30 days after it is recorded.³³ However, a lienor has 45 days after commencing to furnish labor, services, or materials to serve a notice to owner, which is a prerequisite to recording a lien on the improved property.³⁴ As a result, lienors who begin work within 15 days before a notice of termination is recorded may have their lien rights cutoff before the time period to serve a notice to owner expires.

Serving Notices

The proper functioning of the Construction Lien Law is substantially based on the delivery and receipt of notices among property owners, lienors, contractors, and sureties. Prior to October 1, 1987, service could only be accomplished in the manner provided by law for the service of process; as such, service was generally accomplished having a sheriff or a special process server hand-deliver a document. This situation contributed to Florida's sheriff's offices being overly-burdened in trying to serve summonses, subpoenas, and other writs. Thus, this method for serving of notices under the Construction Lien Law was eliminated as of October, 1987, by s. 10, ch. 87-405, Laws of Florida.

When instruments including notices are served, the Construction Lien Law allows service to be accomplished by:

- Actual delivery to the person to be served;
- 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;" the evidence of such delivery may be in electronic format; or
- If neither of the first two methods can be accomplished, posting on the project site.³⁵

³¹ Section 713.132(1), F.S. The notice of termination must include the following:

- The same information as in the notice of commencement;
- The recording office document book and page reference numbers and date of the notice of commencement;
- A statement of the date as of which the notice of commencement is terminated, which date may not be earlier than 30 days after the notice of termination is recorded;
- A statement specifying that the notice applies to all the real property subject to the notice of commencement or specifying the portion of such real property to which it applies;
- A statement that all lienors have been paid in full; and
- 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 a direct contract with the owner or who has served a notice to owner.

This requirement is excepted for a lienor who has executed a waiver and release of lien upon final payment.

³² Section 713.132(1)(e), (2), and (4), F.S.

³³ Section 713.13(4), F.S.

³⁴ Section 713.06(2)(a), F.S.

³⁵ Section 713.18(2), F.S.

In general, service of a document is effective on the “date of mailing.”³⁶ 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.³⁷

Notice to Owner/Notice to Contractor

After a notice of commencement is posted and recorded, lienors must serve the property owner and the contractor with a notice to owner or notice to contractor.³⁸ Serving these documents within the statutory timeframes is a prerequisite to enforcing a lien on the improved property or a claim against a payment bond.³⁹ For public construction projects, pursuant to s. 255.05(2)(a), F.S., and private projects, pursuant to s. 713.23(1)(c), F.S., the notice must be served no later than 45 days after the first furnishing of services or materials for the project.

A notice to owner informs the owner of a lienor’s identity and work performed.⁴⁰ Upon receipt of the notice, the owner becomes responsible for ensuring that the lienor is paid for its work even if the contractor is paid in full. To protect against a lien by the lienor or having to pay twice for the same work, the notice warns:

UNDER FLORIDA LAW, YOUR FAILURE TO MAKE SURE THAT WE ARE PAID MAY RESULT IN A LIEN AGAINST YOUR PROPERTY AND YOUR PAYING TWICE. TO AVOID A LIEN AND PAYING TWICE, YOU MUST OBTAIN A WRITTEN RELEASE FROM US EVERY TIME YOU PAY YOUR CONTRACTOR.⁴¹

A notice to contractor is similar to a notice to owner, but it is required when the contractor furnishes a payment bond that exempts the owner’s property from liens or when the contract is for a public improvement.⁴² A notice to contractor advises the contractor of the identity of the lienor and the lienor’s work, and informs the contractor that the lienor intends to look to the contractor’s bond if the lienor is not paid.

Notice of Nonpayment

A notice to owner or a notice to contractor makes an owner aware of the lienor’s identity to ensure that the lienor is paid for its work. If a lienor is not paid immediately upon commencing to furnish labor, services, or materials on a construction project, the lienor may serve a notice of nonpayment on the property owner or, for contracts having a payment and performance bond, on the contractor and surety.⁴³ A notice of nonpayment “must be under oath and served during the

³⁶ Section 713.18(3)(a), F.S. This statute only includes a reference to “mailing,” so there is some ambiguity as to how to apply it for methods of delivery other than sending by United States Mail.

³⁷ Section 713.18(4), F.S.

³⁸ Sections 255.05(2)(a)2., 337.18(1)(c), 713.06(2), and 713.23(1)(c), F.S.

³⁹ *Id.*

⁴⁰ Section 713.06(2)(c), F.S.

⁴¹ Section 713.06(2)(c), F.S.

⁴² Sections 713.23(1)(a), 337.18(1)(c), and 255.05(2)(a)2., F.S.

⁴³ Sections 713.23(1)(d), 255.05(2)(a), and 337.18(1)(c), F.S.

progress of the work or thereafter, but may not be served later than 90 days after the final furnishing of labor, services, or materials by the lienor.”⁴⁴

Duration of Liens

Section 713.22, F.S. states that under the Construction Lien Law, an action to enforce a properly recorded construction lien must be brought within one year of recording or one year after the recording of an amended claim of lien showing a later final furnishing date, unless the owner of the subject property chooses to shorten the enforcement period by recording a notice of contest of lien in the clerk’s office. Upon this contest of lien being filed, the clerk must serve notice on the lienor. Upon receipt of such notice, a lienor failing to file suit within 60 days to enforce their lien, shall have such lien extinguished.

Discharge of Liens

Section 713.21, F.S., specifies that liens under the Construction Lien Law may be discharged by:

- Entering satisfaction of the lien upon the margin of the record thereof in the clerk’s office when not otherwise prohibited by law;
- The satisfaction of the lienor, duly acknowledged and recorded in the clerk’s office;
- Failing to begin an action to enforce the lien within the statutorily-prescribed time frame;
- The issuance of an order discharging such by the circuit court of the county where the property is located; and
- Recording with the clerk a court judgment or decree showing the lien action’s final determination.

Transfer of Liens to Security

Section 713.24, F.S., states that any lien under the Construction Lien Law may be transferred from the real property to other security by a person with an interest in the real property or the contract under which the lien is claimed by either depositing money or filing a bond with the clerk’s office. Such deposit or bond must either in an amount equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate for 3 years, plus \$1,000 or 25 percent of the amount demanded in the claim of lien, whichever is greater. Upon the provision of such deposit or bond, the clerk must make and record a certificate showing the transfer of the lien from the real property to the security and shall mail a copy thereof by registered or certified mail to the lienor named in the claim of lien.⁴⁵

Attorney’s Fees and Costs

Section 713.29, F.S., states that in an action to enforce a lien or claim against a bond under the Construction Lien Law, a prevailing party is entitled to recover a reasonable fee for the services of her or his attorney for trial and appeal or for arbitration.

⁴⁴ Section 713.23(1)(d), F.S. With respect to notices of nonpayment for public construction projects and construction maintenance projects, ss. 255.05(2)(a)2. and 337.18(2)(c), F.S., provide the same deadline.

⁴⁵ Section 713.24(1), F.S.

Computation of Time

The Construction Lien Law, though it does provide critical time frames for serving of certain notices and other documents, does not specifically provide a method for the computation of such time. Florida does, however, have a default method for computing time when statute does not already provide for such. Rule 2.514, Florida Rules of Judicial Administration, provides that when the stated period is in days, or a longer period of time:

- Begin counting from the next day that is not a Saturday, Sunday, or legal holiday;
- Count every day, including intermediate Saturdays, Sundays, and legal holidays; and
- Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, or falls within any period of time extended through an order of the chief justice under Florida Rule of Judicial Administration 2.205(a)(2)(B)(iv), the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday and does not fall within any period of time extended through an order of the chief justice.

III. Effect of Proposed Changes:

This bill revises several provisions of the Construction Lien Law, which is codified in part I of chapter 713, F.S., as detailed below.

Payment Bonds

Section 1 of the bill deletes from s. 255.05, F.S., a provision allowing, in lieu of the required payment bond, a contractor working on a public project to file with the state, county, city, or other political authority an alternative form of security in the form of cash, a money order, a certified check, a cashier's check, an irrevocable letter of credit, or a security of a type listed in part II of chapter 625, F.S., dealing with investments.

Notice to Contractor and Notice of Nonpayment

The bill amends several sections of Florida law relating to notices to contractors and notices of nonpayment. Specifically, the bill, under s. 255.05, F.S. (**section 1** of the bill) and s. 713.23, F.S. (**section 12** of the bill):

- Provides that the signatory of a notice of nonpayment may utilize an online notary.
- Clarifies that a lienor giving a required notice of nonpayment to the contractor must also include a copy of the notice provided to the surety.

The bill also revises in s. 713.01, F.S. (**section 3** of the bill) the definition of "final furnishing." The term is expanded to state that with respect to specially fabricated materials, final furnishing means:

- The date that the last portion of the specially fabricated materials is delivered to the site of the improvement; or
- If any portion of the specially fabricated materials is not delivered to the site of the improvement by no fault of the lienor, the term means 90 days after the date the lienor completes the fabrication or 90 days before the expiration of the notice of commencement, whichever is earlier.

In addition, for a construction project on public buildings under s. 255.05, F.S., **section 1** of the bill provides that if a payment bond is not recorded before the commencement of work or before the recommencement of work after a default or abandonment, if applicable the claimant may serve the contractor with a notice to contractor up to 45 days after the date that the claimant is served with a copy of said bond. The bill also reduces the waiting period of 45 days after the first furnishing of labor, services, or materials, to file a notice of nonpayment under s. 255.05, F.S., and s. 337.18, F.S., to 30 days (**Sections 1** and **2** of the bill, respectively).

Additional Definitions Used in the Construction Lien Law

Section 3 amends s. 713.01, F.S., which provides definitions of terms used in the Construction Lien Law.

Revision of the Definition of Clerk's Office

The bill revises the definition of “clerk’s office” under the Construction Lien Law to include another office serving as the county recorder as provided by law.

Revision of the Term Contractor under the Construction Lien Law

The bill revises the definition of the term “contractor” in s. 713.01, F.S. to include a licensed general contractor or building contractor who provides construction management services, which include scheduling and coordinating both preconstruction and construction phases for the successful, timely, and economical completion of the construction project or who provides program management services, which include schedule control, cost control, and coordination in providing or procuring planning, design, and construction. The effect of this change is to clarify that a licensed general contractor and a building contractor, meeting these criteria, may claim construction liens under the Construction Lien Law if they are not paid for their work.

Defining the Term Finance Charge under the Construction Lien Law

The bill defines the term “finance charge” under the Construction Lien Law to mean a contractually specified additional amount to be paid by the obligor on any balance that remains unpaid by the due date set forth in the credit agreement or other contract.

Defining the Term Specially Fabricated Materials

The bill defines the term “specially fabricated materials” under the Construction Lien Law to mean materials designed and fabricated for use in a particular improvement that are not generally suited for or readily adaptable for use in a similar improvement.

Computation of Time

Section 4 of the bill creates s. 713.011, F.S., establishing a method for the computation of time under the Construction Lien Law for recording a document or filing an action. This has the effect of overriding, for this area of law for said circumstances, the default method for computing time provided in rule 2.514, Florida Rules of Judicial Administration. Specifically, the section states that:

- In computing any time period for recording a document or filing an action under the Construction Lien Law, if the last day of the time period is a Saturday, Sunday, legal holiday, or any day observed as a holiday by the clerk's office, the time period is extended to the end of the next business day.
- During a state of emergency declared under ch. 252, F.S., during which the clerk's office is closed, the time periods for recording a document or filing an action under the Construction Lien Law are tolled. Upon the expiration of the declared state of emergency, the number of days that were remaining for any such time period on the first day of the declared state of emergency commences on the first business day after the expiration of the declared state of emergency.

In computing a time period, a federal, state, or local governmental order closing or directing the closure of the clerk's office for any reason constitutes a state of emergency and a clerk's office is considered closed if it is not accepting documents for recording or filing by any means.

Mobile Home Parks

Section 5 of the bill, amending s. 713.10, F.S., regarding the extent of liens, clarifies that mobile home parks are not subject to liens for improvements made by their lessees who are leasing a mobile home lot in said park.

Notices of Commencement

The notice of commencement form for a construction project provides the name and address of the owner of the property to be improved and the names and addresses of others who may be responsible for the project, including the fee simple title holder, lessee, contractor, surety, and lender. **Section 6** of the bill, amending s. 713.13, F.S., revises the notice of commencement form to allow that the signatory of the notice may use an online notary.

Section 8 of the bill also makes technical revisions to, and substantially amends, s. 713.135, F.S., regarding notices of commencement. Specifically, it authorizes a building permit applicant to submit to the clerk official records identifying information for the recorded notice of commencement, including the instrument number, to the issuing authority in lieu of a certified copy of the notice or notarized statement of filing. In addition, the section states that the permit issuing authority is not liable in a civil action for a failure to verify that:

- A notarized statement that the notice of commencement has been filed for recording along with a copy thereof; or
- The clerk's office official records identifying information that includes the instrument number for the notice of commencement or the number and page of book where the notice of commencement is recorded.

Notices of Termination

Section 7 of the bill revises several provisions regarding notices of termination pursuant to s. 713.132, F.S. Specifically, the bill requires that an owner serve a copy of the notice of termination on any lienor who timely serves a notice to owner after the notice of termination is recorded and to affirm in said notice that they will do so. This section also deletes a provision

that allows an owner to record a notice of termination after completion of construction or construction ceases; instead, the notice may only be recorded after all lienors have been paid in full. In addition, the section clarifies that the notice of termination must include the official records reference numbers and recording date affixed to the notice of commencement by the clerk.

In addition, the section requires that a notice of termination be served on each lienor who has a direct contract with the owner and on each lienor who has timely and properly served a notice to owner before the recording of the notice of termination. Said notice must be recorded in the official records of the county in which the improvement is located. 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 who lacks a direct contract with the owner who timely serves a notice to owner after the notice of termination is recorded until 30 days after such person is served with the notice of termination.

Service of Documents

Section 9 of the bill, amending s. 713.18, F.S., makes technical changes and revises certain provisions relating to the service of documents under the Construction Lien Law. Specifically, the section:

- Changes the term “actual” delivery to clarify that it means “hand” delivery.
- Clarifies that service by mail must be made on the person to be served.
- Requires the person serving a notice to owner or a preliminary notice to contractor maintain electronic tracking records generated by the U.S. Postal Service, deleting the requirement that the records be electronic and specifying that they may be either generated or approved by the U.S. Postal Service. The section also deletes the requirements that such tracking records contain the name and address of the person being served.
- Specifies that for the service of a notice to owner or a preliminary notice to contractor to be effective upon mailing, all requirements of 713.18, F.S., must have been met.
- Clarifies that service of notice sent through an approved delivery service is effective on the date of mailing or shipping. Currently, the statute only specifies that the “date of mailing” applied.

The section also provides that section 713.18, F.S., applies to service of documents for bonds of contractors constructing public buildings under s. 255.05, F.S., and surety bonds for construction or maintenance contracts with the Department of Transportation, under s. 337.18, F.S. **Sections 1** and **2** of the bill also make conforming changes to implement this provision.

Discharge of Liens

Section 10 of the bill, amending s. 713.21, F.S., specifies that the methods used for discharging a lien may be used to discharge a lien in whole or in part. Additionally, the section provides that for a satisfaction or release of the lienor to be effective to discharge a lien, the satisfaction or release must include the lienor’s notarized signature and set forth the official records’ reference numbers and recording date affixed by the recording office on the subject lien.

Duration of a Lien

Section 11 of bill specifies that, under s. 713.22, F.S., the clerk's office must serve a recorded copy of the notice of contest of lien on the lienor. Thus, said notice would have to be recorded prior to service to constitute effective service.

Transfer of Liens to Security

Section 13 of the bill revises s. 713.24, F.S., to modify the minimum bond amount necessary to transfer a lien to a security from \$1,000 to \$5,000. The bill also creates a requirement that said bond be recorded with the certificate of such.

Attorney Fees

Section 15 of the bill, amending s. 713.29, F.S., provides that for liens that have been transferred to a security, a prevailing party in an action to enforce said lien still may (as with other actions to enforce a lien) recover a reasonable fee for the services of her or his attorney for trial and appeal or for arbitration, in an amount to be determined by the court. The bill also revises s. 255.05, F.S., (**section 1** of the bill) to clarify that an arbitrator can set reasonable attorney fees in an enforcement of claim action for a payment bond of a contractor constructing public buildings.

Technical and Conforming Changes

- **Section 14** of the bill deletes s. 713.25, F.S., which is an outdated provision stating that ch. 65-456, F.S., shall take effect on July 1, 1965, but shall not apply to any act required to be done within a time period which is running on that date nor shall apply to existing projects where its operation would impair vested rights.
- **Section 16** of the bill amends s. 95.11, F.S., conforming cross references.

Effective Date

Section 17 of the bill provides an effective date of the bill of July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill makes a number of changes that may clarify potential ambiguities in the Construction Lien Law, this may reduce confusion and litigation in this area of law. In addition, the bill's provisions may cause more subcontractors, laborers, and material suppliers to receive due compensation for the labor, services, or materials they supply for construction projects.

In addition, the provision of the bill eliminating the option for a contractor working on a public project to provide an alternative form of security in lieu of a payment bond may increase costs for contractors working on such projects.

Finally, the provision of the bill increasing the minimum bond amount necessary to transfer a lien to a security will likely increase the costs on persons having an interest in real property, upon which a lien has been placed, who wish to transfer such lien to a security.

C. Government Sector Impact:

Eliminating the option for a contractor working on a public project to provide an alternative form of security in lieu of a payment bond may reduce the field of contractors willing to bid on such contracts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 255.05, 337.18, 713.01, 713.10, 713.13, 713.132, 713.135, 713.18, 713.21, 713.22, 713.23, 713.24, and 713.29,

This bill creates section 713.011 of the Florida Statutes.

This bill repeals section 713.25 of the Florida Statutes.

This bill conforms cross references in section 95.11 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on February 2, 2022:

The committee substitute amended the bill to:

- Revise the requirements for service for a notice to contractor on a public project if a payment bond is not recorded before commencement or recommencement of work;
- Require that a notice of nonpayment may not be served earlier than 30 days after the first furnishing of labor for a public project or a construction or maintenance project with the Department of Transportation;
- Delete a specification that the provisions for the waiver of a claim or a right to claim against a payment bond provided in s. 713.235, F.S., also apply to surety bonds for construction or maintenance contracts with the Department of Transportation;
- Revise the definitions of final furnishing (with respect to specially fabricated materials) and finance charge;
- Create a definition of specially fabricated materials;
- Narrow the scope of a computing of time provision for the Construction Lien Law to only apply it to recording of a document or filing of an action, and also revising how such time is computed.
- Delete a provision that a lienor may only record one claim of lien covering their entire demand against the real property when the amount demanded is for labor or services or material furnished for more than one improvement under multiple direct contracts.
- Restore to current law the notice of commencement for the Construction Lien Law; however, the authorization for online notarization is retained from the original bill.
- Modify the minimum bond amount necessary to transfer a lien to a security from \$1,000 to \$5,000. The amendment also creates a requirement that said bond be recorded with the certificate of such.
- Delete a repeal of s. 713.245, F.S., relating to conditional payment bonds.
- Make technical and conforming changes.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
