

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 Governmental Oversight and Accountability

BILL: CS/SB 622

INTRODUCER: Judiciary Committee and Senator Perry

SUBJECT: Liens and Bonds

DATE: March 16, 2021 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Cibula | Cibula | JU | Fav/CS |
| 2. | Ponder | McVaney | GO | Pre-meeting |
| 3. | | | RC | |

Please see Section IX. for Additional Information:
COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 622 revises several provisions of the Construction Lien Law, which is codified in part I of chapter 713, F.S. The most significant of these changes are summarized below.

The Construction Lien Law provides several statutory forms for use by parties to a construction contract to waive or release their rights to record a lien or make a claim against a payment bond in exchange for payment for their work. The bill provides that provisions included in a waiver or release that are not related to the provisions of the statutory forms are unenforceable.

If a person or subcontractor is not paid for work on a construction project, the construction lien laws allow the person to record a lien against the improved property. If multiple contracts are involved, then multiple liens must be recorded. The bill under these circumstances allows a person or subcontractor to record a single consolidated lien for amounts owed under multiple contracts for the same construction project.

A notice of commencement form is a form prescribed by the construction lien laws. The form identifies those responsible for a construction project. The bill revises the form to identify more clearly the owner or lessee who is responsible for a construction project.

The bill also revises procedures relating to notices of termination, another statutory form used in connection with the Construction Lien Law. The changes will provide more time for a person to serve a notice to owner or a notice to contractor to preserve rights to record a lien or pursue a

claim against a payment bond. Currently, a person who begins work on a construction project in the 15 days before a notice of termination is recorded may have the time reduced for serving the documents without notice.

No fiscal impact is expected on state and local governments.

The bill takes effect July 1, 2021.

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. Contractors and subcontractors, sub-subcontractors, laborers, and materialmen have an interest in receiving payment for their work. Those individuals have a lien or prospective lien on the property improved and are known as lienors. Mechanisms that address these interests of property owners and lienors 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.

These mechanisms ensure payment and are especially important where many lienors who are not in privity with the owner perform work on a construction project. A lienor not in privity with the owner has a contract with the contractor or a subcontractor, but no direct contractual relationship with the owner. As a result, 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. Additionally, compliance with the notice requirements by the various deadlines is a prerequisite to enforcing a lien or pursuing a claim against a payment bond.

A property owner who contracts for the construction of an improvement must carefully follow the requirements of the Construction Lien Law or the owner may become liable for a contractor's failure to pay subcontractors and others.

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 COMMENCEMENT¹

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.²

Notice of Commencement

Construction work generally begins once a “notice of commencement” is posted on the job site and recorded in the court clerk’s office.³ This notice identifies who owns the property to be improved or who is responsible for the construction project. Accordingly, the notice of commencement will list the name and address of the owner of the property, the fee simple titleholder if different from the owner, the contractor, any lessees, the lender, and the surety.⁴ 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.

A notice of commencement generally has a duration of 1 year after it is recorded.⁵ 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.⁶ Additionally, a payment made by the owner after the notice of commencement expires is considered an improper payment.^{7,8}

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.⁹ 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.¹⁰

¹ Section 713.135(1)(a), F.S.

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

³ Section 713.13(1)(a), F.S.

⁴ Section 713.13(1)(a) and (d), F.S.

⁵ Section 713.13(1)(c), F.S.

⁶ Section 713.07(2), F.S.

⁷ Section 713.13(1)(c), F.S.

⁸ In *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.” For reasons unknown, the provision has since been repealed.

⁹ Sections 255.05(2)(a)2., 337.18(1)(c), 713.06(2), and 713.23(1)(c), F.S.

¹⁰ *Id.*

A notice to owner informs the owner of a lienor's identity and work performed.¹¹ 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:

**TO AVOID A LIEN AND PAYING TWICE, YOU MUST OBTAIN A WRITTEN
RELEASE FROM US EVERY TIME YOU PAY YOUR CONTRACTOR.¹²**

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.¹³ 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, however, 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.¹⁴ A notice of nonpayment "must be under oath and served during the 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."¹⁵

Final Furnishing of Labor, Services, and Materials and Lien Law Deadlines

The last date that a lienor furnishes labor, services, or materials is known as the "final furnishing."¹⁶ This date is used to establish the deadline by which a lienor must record a claim of lien or the deadline for the service of a notice to contractor. "[A] claim of lien may be recorded at any time during the progress of the work or thereafter but not later than 90 days after the final furnishing of the labor or services or materials by the lienor."¹⁷

Waiver and Release of Lien/Waiver of Claim Against Payment Bond

The Construction Lien Law requires lienors to use forms that "substantially" follow a statutory form when executing a waiver or release of lien or a waiver of a right to make a claim against a payment bond in exchange for payments.¹⁸ The forms to waive or release a lien are shown below, but forms for payment bonds are essentially identical:

¹¹ Section 713.06(2)(c), F.S.

¹² Section 713.06(2)(c), F.S.

¹³ Sections 713.23(1)(a), 337.18(1)(c), and 255.05(2)(a)2., F.S.

¹⁴ Sections 713.23(1)(d), 255.05(2)(a), and 337.18(1)(c), F.S.

¹⁵ 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.

¹⁶ Section 713.01(12), F.S.

¹⁷ Section 713.08(5), F.S.

¹⁸ Sections 713.20(4) and (5) and 713.235(1) and (2), F.S.

WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT

The undersigned lienor, in consideration of the sum of \$____, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished through (insert date) to (insert the name of your customer) on the job of (insert the name of the owner) to the following property:

(description of property)

This waiver and release does not cover any retention or labor, services, or materials furnished after the date specified.

DATED on ____, (year). (Lienor)

By: _____

WAIVER AND RELEASE OF LIEN UPON FINAL PAYMENT

The undersigned lienor, in consideration of the 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 following described property:

(description of property)

DATED on ____, (year). (Lienor)

By: _____

Although the Construction Lien Law requires waivers and releases of liens to be executed on forms that substantially follow the statutory forms, the law also provides that noncompliant forms are enforceable. Specifically, the law states that “[a] lien waiver or lien release that is not substantially similar to the forms [above] is enforceable in accordance with the terms of the lien waiver or lien release.”¹⁹

¹⁹ Section 713.20(8), F.S. Section 713.235(5), F.S., relating to waivers of claims against payment bonds, is effectively identical: “A waiver that is not substantially similar to the forms in this section is enforceable in accordance with its terms.”

Priority of Liens

Once a lienor satisfies all the statutory prerequisites and remains unpaid, the lienor may record a lien on the improved property, which is a prerequisite to foreclosing on the property. Normally, the priority of liens, which establishes the order in which claims are paid from the proceeds of a foreclosure sale, is determined by the order in which the liens are recorded.²⁰ Under the Construction Lien Law, however, all construction liens are treated as if they were recorded on the date that the notice of commencement was recorded.²¹

Once recorded, the priority of a construction lien in relation to other types of liens or mortgages is set forth in s. 713.07(3), F.S., which states:

All [construction] liens shall have priority over any conveyance, encumbrance or demand not recorded against the real property prior to the time such lien attached as provided herein, but any conveyance, encumbrance or demand recorded prior to the time such lien attaches and any proceeds thereof, regardless of when disbursed, shall have priority over such liens.²²

As a result, a construction lien will generally take priority over other liens or mortgages recorded after the recording of the notice of commencement, and a construction lien is inferior to other liens or mortgages recorded before the recording of the notice of commencement.

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. With respect to public construction contracts, the law provides that a lienor, as a prerequisite to making a claim against a payment bond, must “serve a written notice of nonpayment on the contractor and on the surety.”²³ Thus, the law appears to require a claimant to serve two original documents when providing a notice of nonpayment.

When instruments including notices are served, the Construction Lien Law allows service to be accomplished through by “actual delivery to the person to be served” and 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.”²⁴ The law further provides that service of an instrument is generally effective on the “date of mailing.”²⁵ Because the law allows an instrument to be shipped or mailed, the law may imply that a different effective date applies if an instrument is delivered by a delivery service other than U.S. mail.

²⁰ The rule “governing priority of lien interests is ‘first in time is first in right.’” *Holly Lake Ass’n v. Fed. Nat’l Mortg. Ass’n*, 660 So. 2d 266, 268 (Fla.1995) (citing *Walter E. Heller & Co. Southeast, Inc. v. Williams*, 450 So. 2d 521, 532 (Fla. 3d DCA 1984), *review denied*, 462 So. 2d 1108 (Fla.1985)).

²¹ Section 713.07(2), F.S. Similar provisions exist with respect to public contracting in s. 255.05(5)(d) and (f), F.S.

²² Section 713.07(3), F.S.

²³ Sections 255.05(2)(a)2., F.S. Section 713.23(1)(d), F.S., with respect to private construction projects, contains almost identical language.

²⁴ Section 713.18(2)(a)(b), F.S.

²⁵ Section 713.13(3)(a), F.S.

Notices of Termination

An owner may terminate the effectiveness of a notice of commencement by recording a notice of termination.²⁶ 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.²⁷

The notice of termination may be effective as early as 30 days after it is recorded.²⁸ 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.²⁹ 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.

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.

Form Waivers and Releases (Sections 1, 9, & 12)

Existing law provides forms for a lienor to use to waive and release a lien or to waive a claim against a payment bond. However, the law also provides that waivers and releases remain enforceable even if they are not substantially similar to the statutory forms.

The bill provides that provisions of waivers and releases are unenforceable unless the claimant has otherwise agreed to those provisions in its direct contract. The statutory forms include a form to acknowledge payment for labor, services, or materials and a form waiver or release of a lien or the waiver of the right to make a claim against the contractor's payment bond. Accordingly, provisions included in a waiver or release that release a party from other liabilities or waive other rights are unenforceable under the bill.

Notice of Commencement Form Changes (Section 6)

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.

The bill makes technical changes to the notice of commencement form in a way that the owner and lessee, if any, will be identified on separate lines of the form.

²⁶ Section 713.132(1), F.S.

²⁷ Section 713.132(1)(e), (2), and (4), F.S.

²⁸ Section 713.13(4), F.S.

²⁹ Section 713.06(2)(a), F.S.

Serving Notices (Sections 1, 2, 8, & 11)

Existing statutes governing public contracting and construction or maintenance contracts with the Department of Transportation can be read to require a lienor to serve two original notices to contractor, one on the contractor and one on the surety, as a prerequisite to making a claim against the contractor's payment bond.³⁰ The bill provides that a lienor must serve an original notice to contractor on the contractor and that the surety need only receive a copy.

Existing s. 713.18(2), F.S., provides that service of an instrument under the Construction Lien Law is generally effective on the "date of mailing." As a result, the law may imply that a different effective date applies if a notice or other document is delivered by an authorized shipping service other than U.S. mail. The bill resolves this issue by providing that an instrument shipped by an authorized shipping service is effective on the date of "shipment."

Additionally, the bill provides that same requirements for serving documents under the Construction Lien Law apply to serving documents under s. 255.05, F.S., relating to public contracting and s. 337.18, F.S., relating to construction or maintenance contracts with the Department of Transportation.

Notices of Termination (Section 7)

Under existing law, a notice of termination is effective 30 days after it is recorded. However, existing law also provides a lienor with 45 days to serve a notice to owner after commencing work on a construction project to perfect his or her right to record a lien on the improved property. Similarly, existing law provides a lienor with 45 days to serve a notice to contractor on contracts secured by a bond. As a result of the conflicting time periods, a lienor who begins working on a construction project within the 15 days before a notice of termination is recorded can lose the right to record a lien on the property or make a claim against a bond.

The bill addresses the rights of lienors caught in the 15-day gap by providing that the notice of termination does not cutoff their rights to record a lien or make a claim against a payment bond if they serve a notice to owner within 45 days after commencing their work. The bill further provides that the notice of termination is not effective against these lienors until 30 days after they are served with a notice of termination.

Single Claim of Lien (Section 4)

A large construction project may result in a lienor receiving multiple contracts on the project. The bill provides that in these cases, the lienor can record a single consolidated lien, instead of a lien for each contract, to enforce the lienor's rights to payment.

Mobile Home Parks (Section 5)

The bill corrects a drafting error in existing law to clarify that mobile home parks are not subject to liens for improvements made by lessees, those owning a mobile home but not the lot.

³⁰ Sections 255.05(2)(a)1., and 713.23(1)(d), F.S.

Revised Defined Terms (Section 3)

The bill makes several clarifying changes to the definitions applicable to the Construction Lien Law. The term “clerk’s office” is revised to include “another office serving as the county recorder as provided by law.” The bill revises the definition of “contractor” to include general contractors who perform construction management services.

The definition of “real property” is revised to include expressly a private leasehold interest in government owned property. This change will clarify that a private leasehold interest can be subject to a lien when the real property itself cannot.

Identification of Recorded Documents (Sections 7 & 10)

The Construction Lien Law requires various documents to be recorded in the official records of a county. The book and page number assigned by the clerk is then required to be listed on other documents to facilitate the location of those documents by others. Instead of identifying documents by a book and page number, the bill requires that those documents be identified by the “official records’ reference numbers and recording date affixed by the recording office.”

Transfers of Liens to Security (Sections 13)

The bill recognizes that in some cases, a property owner may wish to transfer a disputed lien to security so that the property may be sold without a cloud on its title. In these cases, the bill provides that any attorney fees permissible under current law remain permissible after a lien is transferred to security.

Online notarization line (Sections 1, 6, & 11)

The construction lien laws require many different forms and notices to be notarized. The bill allows these forms to be notarized through the on-line notarization procedures.

Effective Date (Section 14)

The bill takes effect July 1, 2021.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The bill does not require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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. Additionally, the bill will minimize the ability of those with superior bargaining power to exact waivers or releases at the moment of payment that were not contemplated by the prior agreement of the parties.

Provisions of the bill changing procedures relating to notices of termination and defining as an improper payment a payment made before a notice of commencement is recorded will help lienors receive payment for their work. However, these same provisions may result in delayed final payments to contractors and discourage contractors from seeking advance deposits for construction work.

C. Government Sector Impact:

None.

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, 713.09, 713.10, 713.13, 713.132, 713.18, 713.20, 713.21, 713.23, 713.235, and 713.29.

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 Judiciary on February 15, 2021:

The committee substitute removes a provision from the bill that states that a payment made by a property owner to a contractor before the notice of commencement is recorded is an improper payment.

The committee substitute restores a provision of existing law requiring an owner who contracts for an improvement to describe his or her interest in the property on the notice of commencement form.

The committee substitute also restores a provision of existing law allowing documents relating to construction liens to be served on partnerships, corporations, and limited liability companies by delivering those documents to a partner, officer, director, agent, member, or manager.

- B. **Amendments:**

None.